STATE OF IDAHO)
County of KOOTENAI)ss

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ARMSTRONG PARK HOMEOWNERS ASSOCIATION, an Idaho non-profit corporation, *Plaintiff*, vs. **DAVID L. WHITE, and MICHELLE WHITE, husband and wife; ELK HILLS, LLC, an Idaho limited liability company; and JAMES S. DUNCAN, Trustee of the M. Jean Duncan Decedents Trust Family Trust et al., and POLYCOMP TRUST COMPANY,** *Defendants.*	Case No. **CV 2013 9069** **MEMORANDUM DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on cross-motions for summary judgment.

Since May 10, 2004, the defendants David and Michelle White (Whites) held title to property located in Armstrong Park Development, in Kootenai County, State of Idaho (the property). Declaration of Sandra Haight, p. 3. ¶ 7, Exh. D. Defendant Elk Hills, LLC, is an Idaho Limited Liability Company that currently owns the property. Complaint, p. 2, ¶ 3. Elk Hills, LLC, is owned by the Whites. Answer, Counter-Claim, and Jury Demand, p. 11 ¶ 20. In 2010, the Whites formed Elk Hills, LLC, and Elk Hills, LLC, purchased the property from the investors that acquired the property during the trustee's sale. Affidavit of David White, p. 3 ¶ 7. Collectively, the Whites and Elk Hills, LLC, are referred to as "defendants". James S. Duncan, as Trustee of the M. Jean Duncan Decedents Trust Family Trust, and Polycomp Trust Company are named

defendants because Elk Hills, LLC, granted them an interest in the property. Complaint, p. 2, ¶ 4. Apparently, Elk Hills, LLC, does not know if that allegation is true or not. Answer, p. 2, ¶ 4, First Amended Answer, Counter-Claim, and Jury Demand, p. 2, ¶ 4. Neither cross-motion for summary judgment concerns Duncan or Polycomp.

The property is burdened by a "Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements for Armstrong Park a Planned Unit Development" (CC&Rs). Complaint, pp. 2–3, ¶ 3; Declaration of Sandra Haight, Exh. A. The plaintiff Armstrong Park Homeowners Association, Inc. (Association) "is charged with oversight, enforcement, and administration of" the CC&Rs. Complaint, p. 2, ¶ 1. "The duties and powers of the Association are those set forth in this Declaration, the Articles and Bylaws . . . ." Declaration of Sandra Haight, Exh. A, p. 6.

Article 8.5 of the CC&Rs governs completion of construction of dwellings located within Armstrong Park Development. *Id.*, Exh. A, p. 23. It provides:

> 8.5 Completion of Construction.
>
> Any Dwelling erected or placed on any Lot shall be completed as to external appearance, including finished painting, within nine (9) months from the date of commencement of construction.

Id. (underline in original).

On December 1, 2005, the Whites began construction of a residence on the property. Declaration of Sandra Haight, pp. 3–4, ¶ 11. Pursuant to Article 8.5 of the CC&Rs quoted above, the external appearance of the home was to be completed by September 1, 2006. *Id.,* Exh. A, p. 23. The defendants "admit[ ] that Defendants White undertook to construct a residence on the subject property and did not complete construction within the time provided by the CC&R's..." Answer, Counter-claim, and Jury Demand, p. 4, ¶ XV.

In 2008, David White claims it was impossible for the Whites to perform under Article 8.5 of the CC&Rs because Washington Mutual, the initial lender for the Whites' construction loan, filed for bankruptcy and "JPMorgan Chase Bank[, the entity that] took over the assets of Washington Mutual[,] . . . refused to honor the construction lending obligations of Washington Mutual" construction financing. Affidavit of David White, p. 2, ¶ 7 - p. 3, ¶ 6. According to David White, "for a period of several years, no bank was capable of making a construction loan on unfinished property. Therefore, it was impossible for the Whites to complete construction on their home." Answer, Counter-claim, and Jury Demand, p. 11, ¶ 18. David White further contends extreme weather rendered performance under the CC&Rs impossible. Affidavit of David White, p. 2, ¶ 4; p. 3, ¶ 6; Answer, Counter-claim, and Jury Demand, p. 11, ¶ 17. "In the period during which financing was not available, the successor in interest to the White's [sic] bank foreclosed on the construction loan that was still outstanding and could not be paid off, due to the White's [sic] inability to obtain other financing and finish the home." *Id.*, p. 11, ¶ 19.

When a member is not in compliance with Articles in the CC&Rs, Article 6.5 permits the Board to levy Special Assessments. Specifically, Article 6.5 provides:

> . . . the Board may levy Special Assessments (without limitation as to amount or frequency and without requiring a vote of Owners) against an individual Unit and its Owner to reimburse the Association for costs incurred in bringing that Owner and his Unit into compliance with the provisions of this Declaration and the Bylaws, including actual attorneys' fees and costs. . . .

Declaration of Sandra Haight, Exh. A, p. 16. The Board may also "impose reasonable monetary penalties including actual attorney's fees and costs...against a Unit Owner who is in default in payment of any Assessment..." *Id.*, p. 18. Similarly, the "Bylaws of Armstrong Park Homeowners Association, Inc." (hereinafter "Bylaws") authorize the

Board to impose "monetary penalties…or other appropriate discipline for failure to comply with the Declaration, Articles, these Bylaws or duly-enacted rules..." *Id.,* Exh. C, p. 8.

On June 30, 2011, a notice was sent to the Whites, via certified mail, from the Association's Board members, that the Association would impose penalties by Special Assessment beginning October 1, 2011, if Article 8.5 of the CC&Rs was not complied with. *Id.*, pp. 6–7, ¶ 29. Receiving no response, on December 20, 2011, the Association sent a notice, via certified mail, that a lien would be recorded against the property if the Whites did not respond to the Board. *Id*., p. 7, ¶ 32. On April 10, 2012, Elk Hills, LLC, obtained a loan in the amount of $180,000.00, which was secured by a Deed of Trust recorded against the disputed property. *Id*, p. 7, ¶ 33, Exh. R. On April 17, 2012, the Whites responded, requesting a hearing in front of the Board to present reasons why Special Assessments should not be imposed against them for violations of Article 8.5 of the CC&Rs. *Id.,* pp. 7–8, ¶ 35. The hearing occurred on June 11, 2012. *Id.*, p. 8, ¶ 38. The Association's Board members and the Whites were in attendance. *Id.* On April 30, 2012, approximately 40 days prior to that hearing, notice of the hearing was sent to Elk Hills, LLC, via certified mail. *Id.*, p. 8, ¶ 36. Following the hearing, the three members of the Association's Board unanimously decided to impose Special Assessments. *Id.*, Exh. W. On June 19, 2012, this decision was memorialized in a detailed, four-page written decision. *Id.* A copy of the written decision was sent to the Whites. *Id.*

According to David White, "…the Association placed a lien on the Property and continued renewing the lien, which made it impossible, when the banks began to lend again, to get a loan to finish the Property. The Association has refused to remove the

lien, which continues to prevent us from finishing the Property." Affidavit of David White, p. 3, ¶ 8. The first lien was placed on the property on July 18, 2012, after Elk Hills, LLC, obtained a $180,000.00 loan secured by a Deed of Trust recorded against the disputed property. Declaration of Sandra Haight, p. 7, ¶ 33, pp. 8–9, ¶ 41, Exh. R.

Moreover, neither Elk Hills, LLC, nor the Whites had an active building permit for the property between May 21, 2009, and March 31, 2011, or between December 8, 2012, and January 22, 2015. Clemans Declaration, pp. 2-3, ¶ 3-7. The defendants "admit[ ] that the home has not yet been completed, but work is progressing on the home." Answer, Counter-claim, and Jury Demand, p. 4 ¶ XV, p. 6 ¶ XXV.

On May 27, 2015, the Association moved for partial summary judgment against Elk Hills, LLC. In support of this motion the Association filed a "Memorandum in Support of Motion for Partial Summary Judgment", "Declaration of John F. Magnuson Re: Declaration of Keith Clemans", "Declaration of Sandra Haight", and the "Declaration of Keith Clemans". In response, on June 9, 2015, the defendants filed a "Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment", and the "Affidavit of David White". On June 18, 2015, the Association filed a "Reply Memorandum in Support of Motion for Partial Summary Judgment".

Hearing on the Association's Motion for Partial Summary Judgment was held on June 24, 2015. For the reasons set forth below, the Court grants in part the Association's Motion for Partial Summary Judgment and denies such in part.

On June 23, 2015, the defendants moved for partial summary judgment. In support of their motion, they filed a "Memorandum in Support to Defendants' Motion for Partial Summary Judgment". On July 7, 2015, the Association responded with a "Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment" and the "Declaration of Jeff Anderson in Opposition to Defendants' Motion for Partial

Summary Judgment". On July 14, 2015, the defendants filed a "Reply Memorandum in Support of Defendants' Motion for Summary Judgment".

Hearing on the defendants' motion for partial summary judgment was held on July 21, 2015. For the reasons set forth below, the Court grants in part defendants' Motion for Partial Summary Judgment and denies such in part.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). "The court may permit affidavits to be supplemented . . . by depositions, answers to interrogatories, or further affidavits. I.R.C.P. 56(e). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

"Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v.*

Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." Porter v. Bassett, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008)(citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *See Id.* "Questions of law are subject to free review." *Halvorson v. North Latah County Highway Dist.,* 151 Idaho 196, 201, 254 P.3d 497, 502 (2011).

III. ANALYSIS.

A. The Association's Claim Two, Breach of Contract.

In the Association's Motion for Partial Summary Judgment, it requests an entry of judgment on Claim Two of its Verified Compliant. Claim Two alleges breach of contract against Elk Hills, LLC, in the principal amount of $61,529.32, with prejudgment

interest from May 23, 2015, until a judgment is entered. Memorandum in Support of Motion for Partial Summary Judgment, p 19. The Association argues that Elk Hills, LLC, breached the terms of the "Declaration of Covenants, Conditions, and Restrictions and Reservations of Easements for Armstrong Park, a Planned Unit Development," ("the CC&Rs") by failing to comply with Article 8.5. Plaintiff's Motion for Partial Summary Judgment, p. 3.

The defendants also seek an entry of judgment dismissing all claims against the Whites in their personal capacity; dismissing Claims One and Two of the Verified Complaint for breach of contract; and precluding any fines or penalties against defendants imposed as special assessments. Memorandum in Support to Defendants' Motion for Partial Summary Judgment, p. 1.

1. Article 8.5 of the CC&Rs is not Ambiguous; Therefore, no Genuine Issue of Material Fact Exists that Defendants Breached the CC&Rs.

The Association contends that since Article 8.5 of the CC&Rs is unambiguous, it must be applied as a matter of law. Memorandum in Support of Motion for Partial Summary Judgment, p. 15. It maintains that "[u]nder the terms of Article 8.5 of the CC&Rs, the home constructed on the subject property was to 'be completed as to external appearance, including finished painting within nine (9) months from the date of commencement of construction.'" *Id.*, p. 5, ¶ 12 (citing Declaration of Sandra Haight, Exh. A, p. 23, Art. 8.5). The Association argues there is no disputed issue of material fact that the defendants David and Michelle White failed to comply with this provision, since construction commenced on December 1, 2005, and the external appearance was not completed by September 1, 2006. *Id.*, pp. 5, 19. Moreover, the Association alleges that as of May 27, 2015, the subject property failed to meet the construction requirements set forth by Article 8.5 of the CC&Rs, some five years after Elk Hills, LLC,

gained title to the subject property from the Whites. *Id.*, p. 10, ¶ 43 (citing Declaration of Sandra Haight at ¶ 45).

In response, the defendants do not address whether Article 8.5 is ambiguous. They do, however, "admit[ ] that Defendant White undertook to construct a residence on the subject property and did not complete construction within the time provided by the CC&R's . . . . [and] admit[ ] that the home has not yet been completed, but work is progressing on the home." Answer, Counter-claim, and Jury Demand, p. 4, ¶ XV; p. 6, ¶ XXV. While the defendants do not argue Article 8.5 of the CC&Rs is ambiguous, they do contend that a genuine issue of material fact precludes summary judgment on the breach of contract claim because of their alleged affirmative defenses, "preventing performance" and "impossibility", which will be discussed in turn below. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, pp. 2–4.

"When interpreting CC&R's, this Court generally applies the rules of contract construction." *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (citing *Pinehaven Planning Bd. v. Brooks,* 138 Idaho 826, 829, 70 P.3d 664, 667 (2003)). The Court must first determine whether or not the covenants are ambiguous. *Pinehaven Planning Board,* 138 Idaho at 829, 70 P.3d at 667 (citing *Brown v. Perkins,* 129 Idaho 189, 193, 923 P.2d 434, 438 (1996) (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). The determination of whether a covenant is ambiguous is a question of law. *Id.* (citing *Brown v. Perkins,* 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). To determine whether a covenant is ambiguous, the court must view the agreement as a whole. *Id.* (citing *Brown,* 129 Idaho at 193, 923 P.2d at 438). A covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Id.*

(citing *Post v. Murphy,* 125 Idaho 473, 475, 873 P.2d 118, 120 (1994)). "Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used." *Id.* (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). "Where there is no ambiguity, there is no room for construction; the plain meaning governs." *Id.* (quoting Post, 125 Idaho at 475, 873 P.2d at 120). If the court determines that a covenant is unambiguous, then it must apply it as a matter of law. *Id.* (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). "Interpretation and legal effect of an unambiguous contract are questions of law over which [a reviewing court] exercises free review." *Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014) (quoting *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000).

However, if a covenant is ambiguous, its interpretation is a question of fact. *Id.* When interpreting an ambiguous covenant, the Court must determine the intent of the parties at the time the agreement was drafted. *Id.* (citing *Brown,* 129 Idaho at 193, 923 P.2d at 438). To determine the intent of the drafters, the Court looks to "the language of the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties." *Id.* (quoting citing *Brown,* 129 Idaho at 193, 923 P.2d at 438). If a covenant is ambiguous, summary judgment is improper. *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

In this case, Article 8.5 reads as follows:

> 8.5 Completion of Construction.
>
> Any Dwelling erected or placed on any Lot shall be completed as to external appearance, including finished painting, within nine (9) months from the date of commencement of construction.

Declaration of Sandra Haight, Exh. A, p. 23, Art. 8.5 (underline in original). The Court finds this article is unambiguous. That article is not capable of more than one interpretation. It clearly sets forth the nine-month time frame for completion of the external appearance of the dwelling.

Construction on the dwelling in this case began on December 1, 2005. Under the unambiguous terms set forth in Article 8.5 of the CC&Rs, the external appearance of the dwelling needed to be completed within nine months of that date, by September 1, 2006. There is no dispute of fact that the dwelling's external appearance was not completed by September 1, 2006. Moreover, Elk Hills, LLC, acquired title to the property on March 12, 2010. It obtained a building permit from the City of Coeur d'Alene on March 31, 2011. As of August 18, 2014, Elk Hills, LLC, "admits that the home has not yet been completed, but work is progressing on the home." Answer, Counter-claim, and Jury Demand, p. 6 ¶ XXV. There is no genuine issue of material fact that defendants have failed to comply with the unambiguous provisions of Article 8.5 of the CC&Rs.

2. Defendants' Affirmative Defense of "Impossibility" is Unavailable as a Matter of Law.

David White claims it was impossible for the defendants to perform under Article 8.5 of the CC&Rs because Washington Mutual, the initial lender for Whites' construction loan, filed for bankruptcy and "JPMorgan Chase Bank[, the entity that] took over the assets of Washington Mutual[,] . . . refused to honor the construction lending obligations of Washington Mutual" construction financing. First Amended Answer, Counter-Claim, and Jury Demand, p. 9, ¶ 7; Affidavit of David White, p. 2, ¶ 7; p. 3, ¶¶ 4–6; Memorandum in Opposition of Motion for Partial Summary Judgment, pp. 2–3. Moreover, the defendants contend that extreme weather and the nationwide banking

crisis rendered performance under the CC&Rs impossible. Memorandum in Opposition of Motion for Partial Summary Judgment, pp. 3-4; Affidavit of David White, p. 2, ¶ 4; p. 3, ¶ 6. Thus, defendants have placed their affirmative defense of "impossibility" at issue as part of the defense of the Association's motion for partial summary judgment.

In response, the Association argues the difficulties faced by Elk Hills, LLC, amount to mere impracticability or difficulty, as opposed to impossibility to perform. Reply Memorandum In Support of Motion for Partial Summary Judgment, p. 10. In support of this, the Association contends that after the subject property was foreclosed upon, Elk Hills, LLC, was still able to re-purchase the property and obtain a third party loan secured by the same property. *Id.* The Association further posits that Elk Hills, LLC, not David White, "has the burden of establishing a genuine issue of material fact with respect to the defense[] of impossibility…" *Id.*

For the defendants "[t]o avoid liability once the plaintiff meets its burden, the defendant must prove that its performance was legally excused." *Melaleuca, Inc. v. Foeller*, 155 Idaho at 924, 318 P.3d at 914 (citing *Idaho Power v. Cogeneration, Inc.,* 134 Idaho, 738, 747, 9 P.3d, 1204, 1213 (2014). One way performance can be legally excused is under the doctrine of impossibility. *Haessly v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). "The doctrine of impossibility operates to excuse performance when the bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen, supervening act of a third party." *Id.* For a defendant to prove impossibility: "(1) a contingency must occur; (2) performance must be impossible, *not just more difficult or more expensive*; and, (3) the nonoccurrence of the contingency must be a basic assumption of the agreement." *Id.* (emphasis added).

Moreover, "[i]mpossibility that is only temporary will not act to discharge a contractual obligation if the contract can yet be performed after the impossibility ceases." *Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995) (citing *Culp v. Tri–County Tractor, Inc.,* 112 Idaho 894, 900, 736 P.2d 1348, 1354 (Ct. App.1987).

This Court recognizes that a temporary impossibility may have occurred due to the bankruptcy filing by the Whites' initial lender Washington Mutual, and JPMorgan Chase Bank refusing to honor the construction loan between the Whites and Washington Mutual. However, in 2010, Defendant Elk Hills, LLC, was formed and Elk Hills, LLC, purchased the property from the investors that acquired the property during the trustee's sale. Affidavit of David White, p. 3 ¶ 7. On April 10, 2012, Elk Hills, LLC, obtained a loan in the amount of $180,000.00, which was secured by a Deed of Trust recorded against the disputed property. Declaration of Sandra Haight, p. 7, ¶ 33, Exh. R. When utilizing the Idaho Supreme Court's test for impossibility, it is clear that "performance must be impossible, *not just more difficult or more expensive*[.]" *Haessly*, 121 Idaho at 465, 825 P.2d at 1121 (emphasis added). Although the defendants may have been temporarily restrained from performance, and likely their performance has become more difficult and expensive, this is not enough to establish a defense of impossibility. As the evidence shows, the defendants were able to procure a loan with the use of the property. As such, this Court finds the affirmative defense of impossibility is not viable or available to the defendants as a matter of law.

3. Defendants Fail to Raise a Genuine Issue of Material Fact That an Affirmative Defense of Plaintiff's Actions "Preventing Performance" Exists.

In the alternative, the defendants allege they "… are excused from performance under the CC&Rs because the Association's own actions are the cause of the breach

(to the extent a breach exists)…" Answer, p. 10, ¶ 9. Specifically, the defendants contend the liens placed on the subject property by the Association made it impossible to receive a loan in order to finish construction on the subject property in the time frame required by Article 8.5 of the CC&Rs. Memorandum in Opposition of Motion for Partial Summary Judgment, p. 3. According to David White, "…the Association placed a lien on the property and continued renewing the lien, which made it impossible, when the banks began to lend again, to get a loan to finish the property. The Association has refused to remove the lien, which continues to prevent us from finishing the Property." Affidavit of David White, p. 3 ¶ 8. Moreover, the defendants assert "Elk Hills is constrained by the fact that the lien Plaintiff has placed on the Property has prevented Elk Hills from obtaining financing to speedily finish construction." *Id.*, p. 3 ¶ 9. Similar to the "impossibility" of performance affirmative defense, the defendants, in responding to the Association's motion for partial summary judgment, have placed at issue the defendants' affirmative defense that the Association's actions "prevented performance" by the defendants.

In response to the preventing performance defense, the Association contends it did not act "wrongfully" or "in excess of their legal rights," which the defendants must prove in order to establish the defense. Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 8 (citing *Sullivan v. Bullock*, 124 Idaho 738, 864 P.2d (Ct. App. 1993). It continues, "that the Association simply observed and followed the approval process contained in Article 4 of the CC&Rs." *Id.* Moreover, the Association argues again that it is Elk Hills, LLC, and not David White, which must demonstrate its performance was prevented by the Assocation Plaintiff. *Id.* at pp. 8–9. In furthering this argument, it points out it was Elk Hills, LLC, which failed to "obtain a building permit

until March 31, 2011, over a year after reacquiring title," thus, the Association has not engaged in any preventative conduct. *Id.* at p. 9.

A plaintiff "…who had refused to allow the defendant to perform… or who had imposed conditions which made performance by the defendant impractical, [can]not recover damages." *Sullivan v. Bullock*, 124 Idaho 738, 742, 864 P.2d 184, 188 (Ct. App. 1993) (citing *McOmber v. Nuckols,* 82 Idaho 280, 353 P.2d 398 (1960)). A party's nonperformance will be excused when party preventing performance acts wrongfully and "in excess of their legal rights." *Id.* (citing 17A C.J.S. *Contracts* § 468). Moreover, "the conduct of the party preventing performance must be outside what was permitted in the contract and 'unjustified,' or outside the reasonable contemplation of the parties when the contract was executed." *Id.* (citing *Godburn v. Meserve,* 130 Conn. 723, 37 A.2d 235 (1944); *Morton Buildings, Inc. v. Dept. of Human Resources,* 10 Kan.App.2d 197, 695 P.2d 450 (1985); *Kooleraire Service and Installation Corp., v. Board of Education of the City of New York,* 28 N.Y.2d 101, 320 N.Y.S.2d 46, 268 N.E.2d 782 (1971)); *see also Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.2d 651, 655 (1934).

In this case, defendants' reliance on the theory of preventing performance is misguided. As discussed above, in 2010, Elk Hills, LLC, was formed and it purchased the Property from the investors that acquired the property during the trustee's sale. Affidavit of David White, p. 3 ¶ 7. On April 10, 2012, Elk Hills, LLC, obtained a loan in the amount of $180,000.00, which was secured by a Deed of Trust recorded against the disputed property. Declaration of Sandra Haight, p. 7, ¶ 33, Exh. R. This financing was secured *before* the Association placed its lien on the disputed property. Even viewing the facts above in the most favorable light to the nonmoving party, reasonable

minds could not differ as to whether the liens placed by the Association prevented defendants from obtaining financing and performing, because defendants did in fact obtain financing. As such, the Court does not find that the Association's actions "imposed conditions which made performance by the defendant impractical." *Sullivan v. Bullock*, 124 Idaho at 742, 864 P.2d at 188. Therefore, this Court finds the defense of preventing performance is not available to the defendants.

4. I.C. § 5-201, the Applicable Statute of Limitation, Has Run Against the Association on its Claims against the Whites.

The defendants contend that, pursuant to I.C. § 5-216 and I.C. § 5-201, the statute of limitation has run on the breach of contract claim (Claim One) against the Whites. Memorandum in Support to Defendants' Motion for Partial Summary Judgment, pp. 2-4. The defendants argue that an action for breach of contract on a written contract must be brought within five years, which begins to run as soon as the cause of action accrues. *Id.,* p. 2. The defendants contend that since Article 8.5 of the CC&Rs required the external appearance to be completed within nine months of the date construction commenced, December 1, 2005, the statute of limitations in this case began to run on September 1, 2006, the date of the initial breach of the CC&Rs. *Id.* (citing Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 6). The defendants conclude that since the Association did not file suit against the Whites by September 1, 2011, any breach of contract action brought against them is time barred. *Id.*

In response, the Association maintains its breach of contract claim against the Whites in their personal capacities was timely filed because each consecutive, ongoing breach of the CC&Rs renews the statutory period in which a claim may be brought. Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, p. 9.

In support of this argument, the Association directs the court to two cases: *Vranesevich v. Pearl Craft*, 241 P.3d 250, 254 (Okla. Civ. App. 2009), an appellate opinion from the Court of Civil Appeals of Oklahoma; and *Ass'n of Apartment Owners of Palms at Wailea-Phase 2 v. Dep't of Commerce & Consumer Affairs*, 124 Haw. 279, 241 P.3d 571 (Ct. App. 2010), an unpublished disposition from the Intermediate Court of Appeals of Hawaii. Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, pp. 9–12. The Association contends that pursuant to these cases, *each day* the Whites failed to comply with Section 8.5 of the CC&Rs is a continuing or ongoing violation that renews the date that the statute of limitations begins to run**.** *Id.*, pp. 10–12. This lawsuit was filed by the Association on December 23, 2013. The Association contends that since the Whites owned the subject property on December 23, 2008, and were not in compliance with Section 8.5 of the CC&Rs on that date, the Association's claim for breach of contract against the Whites was within the five-year statute of limitations and timely filed. *Id.,* p. 11.

The defendants argue that the breach in this case was for failure to meet a "one-time obligation to finish a home" with continuing effects, as opposed to an ongoing or continuing obligation that was violated each day the CC&Rs was not complied with. Reply Memorandum in Support of Defendants' Motion for Partial Summary Judgment, pp. 2–5. The defendants maintain that it is only the latter type of breach that may renew a statute of limitations. *Id.* Relying on two Virginia cases, *Com. ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, Inc.*, 768 S.E.2d 79, 94 (Va. 2014) and *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 271 (4th Cir. 2013), the defendants maintain ill effects of a single breach do not renew a statute of limitations as continual unlawful acts might. *Id.,* at 5. The defendants claim all defendants have

done is attempt "to cure the breach," which is not an unlawful act, and as such, the statute of limitations should still be applicable and bar any claims against the Whites. *Id.*, pp. 2, 5.

The Idaho Supreme Court has equated CC&Rs to written contracts. *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). "When interpreting CC&R's, this Court generally applies the rules of contract construction." *Id.* (citing *Pinehaven Planning Bd. v. Brooks,* 138 Idaho 826, 829, 70 P.3d 664, 667 (2003)). Moreover, "[i]n construing a covenant which imposes restrictions on the use of land, the governing rules are generally the same as those which apply to any contract or covenant." *Sun Valley Ctr. for Arts & Humanities, Inc. v. Sun Valley Co.*, 107 Idaho 411, 413, 690 P.2d 346, 348 (1984) (citing *Smith v. Shinn,* 82 Idaho 141, 147, 350 P.2d 348 (1960)).

Chapter 2, Title 5, Idaho Code regulates CC&Rs and the statutory of limitations of written agreements. Of relevance are I.C. § 5-201 and § 5-216. Idaho Code § 5-201 provides, "[c]ivil actions can only be commenced within the periods prescribed in this chapter *after the cause of action shall have accrued*, except when, in special cases, a different limitation is prescribed by statute." I.C. § 5-201 (emphasis added). "Pursuant to I.C. § 5-216, an action upon any contract, obligation or liability founded upon an instrument in writing must be filed within five years. *A cause of action for breach of contract accrues upon breach for limitations purposes*." *Cuevas v. Barraza*, 146 Idaho 511, 517, 198 P.3d 740, 746 (Ct. App. 2008) (citing *Simons v. Simons,* 134 Idaho 824, 830, 11 P.3d 20, 26 (2000); *Skaggs v. Jensen,* 94 Idaho 179, 180, 484 P.2d 728, 729 (1971)). (emphasis added).

In this case, the Whites' breach occurred on September 1, 2006, when construction was not completed as required by Article 8.5 of the CC&Rs. Declaration of Sandra Haight, p. 3–4, ¶¶ 10–14. This non-compliance began the running of the statute of limitations. The Association's reliance upon *Ass'n of Apartment Owners of Palms at Wailea-Phase 2 v. Dep't of Commerce & Consumer Affairs*, 124 Haw. 279, 241 P.3d 571 (Ct. App. 2010) to support its position is misplaced. In that case, the Hawaii court distinguishes future duties within a contract from an ongoing obligation established by a covenant. Specifically, it held:

> Where a contract imposes a future duty, the statute of limitations does not begin running until the breach actually occurs. Similarly, where a covenant imposes an ongoing obligation, a new and separate violation occurs each time the obligor breaches the covenant. Thus, the statute of limitations begins running anew for each successive breach.

124 Haw. 279, 241 P.3d 571 at *3 (internal citations omitted) (underlining added).

Here, this Court finds White's breach of Article 8.5 of the CC&Rs resulted from failure to perform a "future duty" required by the CC&Rs. The Whites' obligations under the CC&Rs began when they became the owners of their property. Under Article 2.3 of the CC&Rs:

> The Owner of a Unit shall automatically, upon becoming the Owner of the Unit, be a Member of the Association, and shall remain a Member thereof until such time as his ownership ceases for any reason, at which time his membership in the Association shall automatically cease. Membership shall be in accordance with the Articles and the Bylaws of the Association.

Declaration of Sandra Haight, Exh. A, p. 6. As Owners and Members of the Association, the Whites were required to comply with Section 8.5 of the CC&Rs. While stated above, for ease of reference, Section 8.5 provides: "Any Dwelling erected or placed on any Lot shall be completed as to external appearance, including finished painting, within nine (9) months from the date of commencement of construction." *Id.*, p. 23. The only way this Court can read such provision is that it imposes a future duty,

because before the lot owner builds, there is no duty, and once the lot owner begins to build there is only a future duty to complete all construction within nine months.

Pursuant to Section 8.5, once the Whites started construction of a dwelling on their property, they incurred a future duty to complete the external appearance of that dwelling within nine months. Thus, White's breach of Section 8.5 of the CC&Rs resulted from failure to perform a "future duty" required by the CC&Rs. This Court specifically finds that requirement, that "future duty", is not an ongoing obligation. It is a duty with a start date (the date of commencement of construction) and an end date (nine months from commencement). *Id*. In between those two dates, there is no obligation upon owners as set forth in Section 8.5. It is only nine months after commencement of construction that the duty is either met, or it is breached. There is only one requirement for compliance with Section 8.5, and that is to complete a task within nine months. The only way for an Owner to breach Section 8.5 is to not complete the external appearance of the dwelling within nine months of commencing construction. It is not possible for an Owner to breach this requirement on more than one occasion. A definitive date of completion negates the idea of an ongoing obligation, and instead creates a future duty. An Owner will either complete the external appearance within nine months or not. Successive breaches do not occur after the nine month period has expired because it is not possible for there to be separate violations when there is only one requirement imposed by Section 8.5. The CC&Rs impose *one* future duty on Owners: complete the external appearance by future date certain. There is no ongoing obligation provided for under Section 8.5 during or after the nine month period. As such, even following *Ass'n of Apartment Owners of Palms at Wailea-Phase 2 v. Dep't of Commerce & Consumer Affairs*, the statute of limitations began to run when the breach actually occurred on September 1, 2006.

The Association also relies on *Vranesevich v. Pearl Craft*, 241 P.3d 250 (Okla. Civ. App. 2009), to support its position that a continuous breach renews the statute of limitations. Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, p. 11. However, *Vranesevich* is distinguishable from the instant action. In that case, a property owner brought suit against an adjoining property owner for breach of restrictive covenants to which the properties were subject. *Id.,* at 251. The plaintiff only sought to enjoin the alleged violations; he was not seeking monetary damages. *Id.* The alleged violation of the restrictive covenants occurred more than five years before the plaintiff brought suit. *Id.* The defendant claimed the suit was barred by the five-year statute of limitations. *Id.* In finding that the five year statute of limitations did not apply to the plaintiff's breach of restrictive covenant claim, the court held "[a]lthough [the plaintiff] could have sued for breach of the covenants when [breach occurred], the five-year limitation period . . . only applies to any claim for damages resulting from a breach of the restrictive covenants." *Id.* at 254 (emphasis added). That court went on to note "an action to enforce restrictive covenants is an equitable action, which may be subject to equitable defenses, but it is not subject to a statute of limitations defense. Further, [the plaintiff] has not sued for monetary damages." *Id.* (emphasis added).

Unlike in *Vranesevich* where the action was only to enforce restrictive covenants, in the present case the Association is: suing the Whites for monetary damages for breach of contract (Complaint, p. 10, ¶ 1); suing Elk Hills, LLC, for monetary damages for breach of contract (*Id.,* p. 11, ¶ 2); suing Elk Hills, LLC, to abate the nuisance (*Id.,* ¶ 3); suing Elk Hills, LLC, for specific performance where this Court would order it to complete construction (*Id.,* ¶ 4); suing to foreclose the Association's lien (*Id.,* ¶ 5); and suing for injunctive relief to enjoin the nuisance (*Id.,* ¶ 6). The Whites are no longer the

owners of the subject property and the CC&Rs can no longer be enforced against them. "[O]nly a current owner may comply with restrictive covenants, either voluntarily or pursuant to injunction, only a current owner may be liable for their breach." *Independent Sch. Dist. of Boise City v. Harris Family Ltd. Partnership*, 150 Idaho 583, 588, 249 P.3d 382, 387 (2011). Even following the holding in dicta in *Vranesevich*, seeking monetary damages for breach of the CC&Rs is subject to the five year statute of limitations.

Pursuant to I.C. § 5-216, a cause of action against the Whites, arising out of the CC&Rs, was barred five years after the accrual date of September 1, 2006. *See* I.C. § 5-216. Therefore, an action against the Whites must have been brought by September 1, 2011. This action was commenced on December 23, 2013, more than two years after the statute of limitations ran. Verified Complaint, pp. 1, 12. As such, this Court dismisses Claim One of the Verified Complaint, the breach of contract claim, against the Whites.

5. The Applicable Statute of Limitation Has Not Yet Run Against Elk Hills, LLC.

The Association seeks partial summary judgment on its breach of contract claims only as against Elk Hills, LLC. Motion for Partial Summary Judgment, p. 2. The defendants also argue the statute of limitations has run on the claim for breach of a written contract against Elk Hills, LLC. Memorandum in Opposition of Motion for Partial Summary Judgment, pp.6–7; Memorandum in Support to Defendants' Motion for Partial Summary Judgment, pp. 2–3; *see also* I.C. § 5-216. They contend the Association was required to bring an action for breach of contract within five years from the date of completion as required by Article 8.5 of the CC&Rs. Memorandum in Opposition of Motion for Partial Summary Judgment, pp.6–7. As the external appearance was to be

completed within nine months from the date of commencement of construction, in this case September 1, 2006, the defendants claim suit for breach of contract under Article 8.5 of the CC&Rs against Elk Hills, LLC, should have commenced no later than September 1, 2011. *Id.*

Moreover, the defendants contend that CC&Rs are analogous to adverse possession and impose obligations that "run with the land." Memorandum in Support to Defendants' Motion for Partial Summary Judgment, pp. 2–3. Since the obligations imposed by the CC&Rs run with the land, the defendants argue the statute of limitations will not run anew due to the transfer or sale of the subject property from Whites, to the bank, to the investors the bank sold to, to Elk Hills, LLC. *Id.*

The defendants claim I.C. § 5-201 supports this argument because it limits the time period in which a civil action may be brought to the "period[ ] prescribed in this chapter after the cause of action shall have accrued." *Id.*, p. 3 (emphasis in original). As the statute of limitations for a breach of written contract is five years, the defendants conclude any breach of contract claim brought regarding the subject property for a breach that occurred on September 1, 2006, must have been brought by September 1, 2011, regardless of whether there was a subsequent new owner of the property. *Id.*, pp. 2–3; *see also* I.C. § 5-216. As the cause of action was not brought until December 23, 2013, the defendants maintain any breach of contract claim on the new owner, Elk Hills, LLC, is time barred and must be dismissed. *Id.*

Defendants' argument errantly conflates a statute of limitation on a civil action with the statutory period for adverse possession. A statute of limitation, in general, provides "Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a

different limitation is prescribed by statute." I.C. § 5-201. While the time period for establishing a claim by adverse possession, I.C. § 5-210, is found under chapter dealing with Limitation of Actions, I.C. § 5-201, *et seq.*, there is no "limitation" on causes of action set forth in I.C. § 5-210. Indeed, it is just the opposite. If a party can prove by clear and convincing evidence, that they, and/or their predecessors, have adversely possessed (by substantial enclosure or by cultivation or improvement), for the requisite twenty years, then a lawsuit based upon adverse possession may be brought *at any time*. The "limitation" is not on when a civil action may be commenced, as delineated within I.C. § 5-201, the introductory statute in Chapter five of the Idaho Code, but rather a minimum requirement as to the number of years (twenty) one must prove one adversely possessed. Whether one has met those twenty years or not, there is no limitation as to when the lawsuit should be brought.

Defendants argument also ignores the fact that the twenty year period under I.C. § 5-210 applies to current landowners and their predecessors, is a creature of case law, as that feature is not contained in the statute itself. *Lisher v. Krasselt,* 94 Idaho 513, 516. 492 P.2d 52, 55, n. 7. (1974). No such similar case law adaptation has arisen based on breach of contract involving real estate or breach of covenants involving real estate.

The Court specifically finds the defendants' argument that the five year statute of limitation under I.C. § 5-216 ran on September 1, 2011, as against any future landowner, based on the argument that since this involves real property the statute of limitation somehow "runs with the land", is completely without merit.

The Association contends that when Elk Hills, LLC, purchased the property on March 12, 2010, as a separate legal entity from the Whites, the five-year statutory of limitations period for the breach of contract claim started over against Elk Hills, LLC.

Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 11. The Association correctly contends that since Elk Hills, LLC, is managed by David White, the previous owner of the subject property, the entity Elk Hills, LLC, certainly acquired the subject property with knowledge that the subject property was not in compliance with the CC&Rs. Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, p. 12*.; see also* Declaration of Sandra Haight, p. 6, ¶ 27. The Association maintains that since this action against Elk Hills, LLC, was brought in December of 2013, it is timely because it was brought less than four years after Elk Hills, LLC, acquired title to the property, thus, within the statutory time limitation. Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 11. As such, the Association argues Elk Hills, LLC, has no statutory limitation defense. Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, p. 12.

Idaho Code § 5-216 requires an action upon a written contract be brought within five years once a breach occurs. As stated above, "[p]ursuant to I.C. § 5-216, an action upon <u>any contract, obligation or liability</u> founded upon an instrument in writing must be filed within five years." *Cuevas v. Barraza*, 146 Idaho 511, 517, 198 P.3d 740, 746 (Ct. App. 2008) (citing *Simons v. Simons,* 134 Idaho 824, 830, 11 P.3d 20, 26 (2000); *Skaggs v. Jensen,* 94 Idaho 179, 180, 484 P.2d 728, 729 (1971) (emphasis added)). In addition, "[i]n construing a covenant which imposes restrictions on the use of land, the governing rules are generally the same as those which apply to any contract or covenant." *Sun Valley Ctr. for Arts & Humanities, Inc. v. Sun Valley Co.*, 107 Idaho 411, 413, 690 P.2d 346, 348 (1984) (citing *Smith v. Shinn,* 82 Idaho 141, 147, 350 P.2d 348 (1960)).

This Court interprets the CC&Rs as a written contract between the Association, led by its Board of Directors, and an Owner of property. Since the CC&Rs are a written contract imposing restrictions on the land, this Court implements the governing rules which apply to contracts, specifically, Idaho Code § 5-216. Idaho Code § 5-216 requires a breach of contract claim be brought within five years of the accrual, or substantial breach, of the claim. A breach becomes possible only when a person or legal entity enters into a legal contract, which Elk Hills, LLC, did when it purchased the property on March 12, 2010, as a separate legal entity from the Whites. Declaration of Sandra Haight, p. 6, ¶ 27 & Exh. N. Under Article 2.3 of the CC&Rs:

> The Owner of a Unit shall automatically, upon becoming the Owner of the Unit, be a Member of the Association, and shall remain a Member thereof until such time as his ownership ceases for any reason, at which time his membership in the Association shall automatically cease. Membership shall be in accordance with the Articles and the Bylaws of the Association.

Declaration of Sandra Haight, Exh. A, p. 6. Once Elk Hills, LLC, acquired the subject property, it was subject to the conditions of the CC&Rs, including Section 8.5, as a party to the contract.

Again, Section 8.5 provides: "Any Dwelling erected or placed on any Lot shall be completed as to external appearance, including finished painting, within nine (9) months from the date of commencement of construction." Declaration of Sandra Haight, Exh. A, p. 23. The first breach under Article 8.5 of the CC&Rs was by the Whites, and occurred on September 2, 2006, when the Whites owned the subject property. However, on March 12, 2010, Elk Hills, LLC, acquired the subject property. Declaration of Sandra Haight, Exh. N. The moment Elk Hills, LLC, acquired the subject property, it was in breach of the contract, Section 8.5 of the CC&Rs. As such, this Court finds Elk Hills, LLC, had nine months from their date of purchase, March 12, 2010, to complete the external appearance of the dwelling. The CC&Rs effectively gave Elk Hills, LLC,

until November 12, 2010, to comply with Article 8.5. After November 12, 2010, a failure to comply with Article 8.5 would constitute a breach upon a written instrument, and a cause of action for breach of contract would begin to accrue. Pursuant to Idaho Code § 5-201, the accrual of the breach of contract claim starts the statute of limitation on a written contract. *See* I.C. § 5-201; I.C. § 5-216.

As of August 18, 2014, defendants "admit[ ] that the home has not yet been completed, but work is progressing on the home." Answer, Counter-claim, and Jury Demand, p. 4 ¶ XV, p. 6 ¶ XXV. As mentioned above, Elk Hills, LLC, acquired the property on March 12, 2010. Nine months later, a second breach of the CCRs occurred, a breach by a new entity, Elk Hills, LLC. The Association filed its Complaint on December 23, 2013. As such, the action for breach of contract against Defendant Elk Hills, LLC, was filed less than four years after the breach occurred and the action accrued. Since the statute of limitations on a contract claim is five years, the Association's breach of contract claim against Elk Hills, LLC, was timely filed pursuant to Idaho Code § 5-201 and § 5-216.

6. The Association is in Compliance with Idaho Code § 55-115.

Having determined that there is no dispute of fact that Elk Hills, LLC, is in breach of the contract; that Elk Hills, LLC, has failed to prove its affirmative defenses of "impossibility" or "preventing performance"; and having determined the Association's claim of breach of contract against Elk Hills, LLC, is not barred by the statute of limitations, the Court now turns to the issue of damages.

Idaho Code § 55-115 regulates the imposition of fines by a Home Owners Association through CC&Rs. It reads, in pertinent part, as follows:

> (2) No fine may be imposed for a violation of the covenants and restrictions pursuant to the rules or regulations of the homeowner's association unless the

authority to impose a fine is clearly set forth in the covenants and restrictions and:

> (a) A majority vote by the board shall be required prior to imposing any fine on a member for a violation of any covenants and restrictions pursuant to the rules and regulations of the homeowner's association.
>
> (b) Written notice by personal service or certified mail of the meeting during which such vote is to be taken shall be made to the member at least thirty (30) days prior to the meeting.
>
> (c) In the event the member begins resolving the violation prior to the meeting, no fine shall be imposed so long as the member continues to address the violation in good faith until fully resolved.
>
> (d) No portion of any fine may be used to increase the remuneration of any board member or agent of the board.
>
> (e) No part of this section shall affect any statute, rule, covenant, bylaw, provision or clause that may allow for the recovery of attorney's fees.

I.C. § 55-115 (emphasis added). The defendants argue that under Idaho Code § 55-115 (2), "summary judgment should [ ] be denied, because Idaho statutory law requires that no fine may be imposed against a member of a homeowner's association unless the authority to impose such a fine is 'clearly set forth in the covenants and restrictions.'" Memorandum in Opposition of Motion for Partial Summary Judgment, p. 4. The defendants direct the Court to Article 6.5 of the CC&Rs, and claim that provision only grants the Board authority to impose "Special Assessments . . . against an individual Unit and its Owner to reimburse the Association for costs incurred in bringing that Owner and his Unit into compliance with the provisions of this Declaration and the Bylaws." *Id.* (emphasis in original). The defendants contend the Board imposed a Special Assessment of $50 per day against them as a penalty for non-compliance with Article 8.5 of the CC&Rs, not as a reimbursement for costs it incurred to bring the defendants' property into compliance. *Id.*, pp. 4–5. The defendants claim "[r]equiring reimbursement for 'costs incurred' is very different than imposing a penalty

that has no relation to any costs incurred." *Id.*, p. 4. The defendants contend a "costs incurred" is an out-of-pocket expense the Association spent to bring an Owner into compliance. *Id.*, pp. 4–5. As the $50 per day assessment was not an expense incurred by the Association to bring the defendants into compliance, they assert the CC&Rs "do not 'clearly set forth' the right to impose the fine the Association is seeking to recover." *Id.*, p. 5.

Further, the defendants concede that the Bylaws allow the Board to impose monetary penalties against Owners. *Id.* However, the defendants claim the $50 per day penalty assessed by the Association against the defendants is prohibited under the plain language of the statute because the CC&Rs do not contain a provision that provides for monetary penalties in addition to reimbursement for "costs incurred", and the provision from the Bylaws which allows the Board to assess a "monetary penalty" is not incorporated into the CC&Rs by reference. *Id.*; *see also* Reply Memorandum in Support of Defendants' Motion for Partial Summary Judgment, p. 5. The defendants contend that even if the Bylaws had been incorporated into the CC&Rs, "that would not mean that the [A]ssociation was in compliance with the requirements of Section 55-115, which requires the language to be in the CC&Rs" because the Bylaws are not recorded. Reply Memorandum in Support of Defendants' Motion for Partial Summary Judgment, p. 6.

In response, the Association argues the Homeowner's Association can impose fines on a property owner because it has complied with I.C. § 55-115. Memorandum in Support of Motion for Partial Summary Judgment, p. 16; Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, p. 13. It contends "[t]he CC&Rs, which must provide for the authority to impose a fine, specifically incorporate the

Bylaws and make the same an actual part of the CC&Rs." Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 6. In support of this, the Association cites to portions of Articles 2.2, 6.5 and 6.9 of the CCRs as follows:

- Article 2.2. "The duties and powers of the Association are those set forth in this Declaration, the Articles and Bylaws . . . ."
- Article 6.5. "[T]he Board may levy Special Assessments . . . against an individual Unit and its Owner to reimburse the Association for costs incurred in bringing that Owner and his Unit into compliance with the provisions of this Declaration and the Bylaws . . . ."
- Article 6.9. "The Board may impose reasonable monetary penalties including actual attorney's fees and costs . . . [A]gainst a Unit Owner who is in default in payment of any Assessment . . ."

Id. (underline in original). The Association contends as the Bylaws are incorporated by reference into the CC&Rs, the CC&Rs set forth the right to impose the fines the Association seeks to recover. *Id.*, p. 7; Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, p. 14.

"A signed agreement may incorporate by reference to another agreement, which is not signed by the parties, if the terms to be incorporated are adequately identified and readily available for inspection by the parties." *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013) (citing *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.,* 151 Idaho 761, 777, 264 P.3d 400, 416 (2011)). In this case, Article 2.2 of the CC&Rs provides that the duties and powers of the Association are found within the Declaration, Articles and Bylaws. Declaration of Sandra Haight, Exh. A, p. 6. The Bylaws are referenced throughout the CC&Rs. *See Id.*, pp. 6, 7, 15. As there has been no argument made by the defendants that the Bylaws were not "adequately identified [or] readily available for inspection", the Court finds the Bylaws to be sufficiently incorporated and therefore a part of the CC&Rs.

Finding that the Bylaws are incorporated into the CC&Rs, the Court must next determine what fines are "clearly set forth" in the CC&Rs. Pursuant to Article 6.1 of the CC&Rs Unit owners "agree to pay to the Association [ ] Assessments, which [are] established and collected as provided [within the CC&Rs] and in the Bylaws of the Association." *Id.*, p. 15. Those Assessments include regular assessments, extraordinary assessments, and special assessments. *Id.*, pp. 15–18. Of importance to this action are the Special Assessments contained within Article 6.5. *Id.*, p. 16. Article 6.5 provides in pertinent part:

> . . . the Board may levy Special Assessments (without limitation as to amount or frequency and without requiring a vote of Owners) against an individual Unit and its Owner to reimburse the Association for costs incurred in bringing that Owner and his Unit into compliance with the provisions of this Declaration and the Bylaws, including actual attorneys' fees and costs. Additionally, a Special Assessment may be levied to assist in the collection other charges payable to the Association by Unit Owners, such as fees for the use of the RV Parking Area.

Id., p. 16. The Bylaws authorize the Board to impose "monetary penalties… or other appropriate discipline for failure to comply with the Declaration, Articles, these Bylaws or duly-enacted rules. . . ." Declaration of Sandra Haight, Exh. C, p. 8.

The authority to impose regular assessments, extraordinary assessments, special assessments, and monetary penalties are clearly set in the CC&Rs or incorporated into the CC&Rs from the Bylaws by reference. As such, the requirement of I.C. § 55-115(2), which requires "the authority to impose a fine [be] clearly set forth in the covenants and restrictions" has been satisfied.

This, however, does not end the Court's inquiry. The Court must next determine whether the Association complied with subsections (a) through (e) of I.C. § 55-115(2).

The Association maintains it is in compliance with I.C. § 55-115(2)(a)–(c), based on the following facts: On June 30, 2011, a notice was sent to the Whites, via certified

mail, from all three Board members, that if Article 8.5 of the CC&Rs was not complied with, the Association would impose penalties by Special Assessment beginning October 1, 2011. Memorandum in Support of Motion for Partial Summary Judgment, p. 18. Receiving no response, on December 20, 2011, the Association sent a notice via certified mail that if the Whites did not respond to the Board, a lien would be recorded against the property. *Id*. On April 17, 2012, the Whites responded, requesting a hearing in front of the Board to present reasons why Special Assessments should not be imposed against them for violations of Article 8.5 of the CC&Rs. *Id.* The hearing occurred on June 11, 2012. *Id.* On April 30, 2012, approximately 40 days prior to that hearing, a notice of the hearing was sent to Elk Hills, LLC, via certified mail. *Id.* Following the hearing, the three members of the Association's Board unanimously decided to impose Special Assessments. *Id.* On June 19, 2012, this decision was memorialized in a detailed, four-page written decision. *Id.* A copy of the written decision was sent to the Whites. *Id.* The Association contends that since neither Elk Hills, LLC, nor the Whites had an active building permit for the property between May 21, 2009, and March 31, 2011, or between December 8, 2012, and January 22, 2015, "there is no disputed issue of fact that would otherwise suggest that the Whites or Elk Hills, LLC, began 'resolving the violation prior to the meeting' and 'continued to address the violation in good faith until fully resolved.'" *Id.*, p. 19.

Aside from the arguments raised above that the penalty the Association seeks to impose is not clearly set forth in the CC&Rs, the defendants do not address whether the Association complied with Idaho Code § 55-115(2)(a)–(e).

The Court finds the Association complied with the requirements set forth in Idaho Code § 55-115(2)(a)–(e). Each of these subsections will be discussed in turn below.

Idaho Code § 55-115(2)(a) requires: "A majority vote by the board shall be required prior to imposing any fine on a member for a violation of any covenants and restrictions pursuant to the rules and regulations of the homeowner's association." The evidence presented by the Association demonstrates that on June 19, 2012, the three members of the Association's Board unanimously decided to impose "assessments, non-payment fees, finance charges, fines and administrative fees." Declaration of Sandra Haight, Exh. W.

Idaho Code § 55-115(2)(b) requires: "Written notice by personal service or certified mail of the meeting during which such vote is to be taken shall be made to the member at least thirty (30) days prior to the meeting." Here, the evidence presented by the Association shows that notice of the hearing was sent to David and Michelle White via certified mail on April 30, 2012, approximately 40 days before the hearing. Declaration of Sandra Haight, Exh. U.

Idaho Code § 55-115(2)(c) provides: "In the event the member begins resolving the violation prior to the meeting, no fine shall be imposed so long as the member continues to address the violation in good faith until fully resolved." It is undisputed that construction on this property began on December 1, 2005. Declaration of Sandra Haight, pp. 3–4 ¶ 11. The defendants "admit[ ] that Defendant White undertook to construct a residence on the subject property and did not complete construction within the time provided by the CC&R's . . . . [and] admit[ ] that the home has not yet been completed, but work is progressing on the home." Answer, Counter-claim, and Jury Demand, p. 4 ¶ XV, p. 6 ¶ XXV. Neither Elk Hills, LLC, nor the Whites had an active

building permit for the property between May 21, 2009 and March 31, 2011, or between December 8, 2012, and January 22, 2015. Clemans Declaration, pp. 2–3 ¶ 3–7. The Court finds that Elk Hills, LLC, did not begin resolving the violation of Article 8.5 of the CC&Rs prior to the June 11, 2012, hearing and further finds Elk Hills, LLC, has not "continued to address the violation in good faith until fully resolved.'"

Idaho Code § 55-115(2)(d) provides: "No portion of any fine may be used to increase the remuneration of any board member or agent of the board." No evidence has been presented to the Court that the Association has violated this provision, as the defendants have not paid the assessments levied against them.

Finally, I.C. § 55-115(2)(e) provides: "No part of this section shall affect any statute, rule, covenant, bylaw, provision or clause that may allow for the recovery of attorney's fees." I.C. § 55-115(2)(e). Any amount of attorney's fee claim in this case is not challenged by this provision. As such, the Court finds it is inapplicable to this case.

The Association has set forth facts demonstrating the absence of a genuine issue of material fact that it complied with Idaho Code § 55-115(2)(a)–(c). This shifted the burden to the defendants to provide specific facts showing there is a genuine issue for trial. *Kiebert*, 144 Idaho at 228, 159 P.3d at 864. The defendants have failed to meet this burden. The defendants have failed to present any evidence that the Association failed to comply with the relevant subsections of I.C. § 55-115(2). As such, the Court finds in favor of the Association that it has satisfied the provisions of I.C. § 55-115(2) and can levy assessments against defendants.

7. The Association Has Failed to Show no Dispute of Material Fact Exists that it Suffered an Actual Injury and is Entitled to Damages.

While the Court has found the Association has the authority to levy assessments against the defendants, it must now determine whether the monetary judgment the

Association seeks for such assessments, in the amount of $61,529.32, can be awarded as a matter of law on summary judgment.

The Association alleges that, pursuant to the CC&Rs, there is no disputed issue of fact that Elk Hills, LLC, owes the Association its unpaid assessments totaling $61,529.32. Memorandum in Support of Motion for Partial Summary Judgment, p. 19, 10 ¶ 44 (citing Declaration of Sandra Haight, p. 9 ¶ 44); *see also* Exh. Z. This requested amount only reflects the fees assessed against Elk Hills, LLC, between January 1, 2012, and May 22, 2015, and does not reflect fees accrued by the Whites when they personally owned the subject property. *Id.,* p. 10 ¶ 44 (citing Declaration of Sandra Haight, p. 9 ¶ 44).

The defendants allege the penalties provided for in the Bylaws are unenforceable as a matter of law because it is a contract clause merely designed to penalize the breach of contract, rather than recompense the Association for an injury caused by the breach. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, pp. 5–6. The defendants contend courts do not enforce contract clauses that are merely punitive in nature. *Id*. The defendants further argue the Association has not incurred damages as a result of the breach. Verified Answer, p. 9, ¶ 5. Moreover, the defendants request "that all claims for special assessments, whether designated as fines or penalties, that have been or will be imposed upon Defendants, other than out-of-pocket expenses incurred by Plaintiff be dismissed and disallowed." Memorandum in Support to Defendants' Motion for Partial Summary Judgment, p. 1.

In response, the Association claims "Elk Hills has the burden of showing that the Special Assessments bore no relationship to the anticipated damages or were unconscionable" and have failed to meet this burden. Reply Memorandum in Support

of Motion for Partial Summary Judgment, p. 13. The Association maintains the Special Assessments are enforceable because they "were imposed as a means of obtaining compliance." *Id.*

To prevail on a claim for breach of contract a plaintiff must prove "(a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Hull v. Giesler*, 156 Idaho 765, 774, 331 P.3d 507, 516 (2014) (quoting *Mosell Equities, LLC v. Berryhill & Co.,* 154 Idaho 269, 278, 297 P.3d 232, 241 (2013)). The parties do not dispute elements (a) or (b).

To prove element (c), causation, a plaintiff must demonstrate "he was injured and his injury was the result of the defendant's breach; 'both amount and causation must be proven with reasonable certainty.'" *Id.* (quoting *Harris, Inc. v. Foxhollow Constr. & Trucking, Inc.,* 151 Idaho 761, 770, 264 P.3d 400, 409 (2011)). "[E]ven if the plaintiff establishes that 'he has been legally wronged, he may not recover damages unless he has been economically 'injured.'" *Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014) (quoting *Bergkamp v. Martin,* 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App.1988)). As such, the Association must prove that it suffered damages <u>as a result of</u> the defendants' breach.

Here, the Association has failed to clearly present evidence that the defendants' breach of Article 8.5 of the CC&Rs alone caused the Association economic injury. The Association seeks damages in the amount of $61,529.32. Declaration of Sandra Haight, Exh. Z. In support of this amount, the Association submits an invoice of fees assessed against the defendants. *Id*. Included in this invoice are "daily fines for incomplete construction" and "special assessments" of $350.00 a week. *Id*. While it may be true that the Association has chosen to assess the defendants daily and weekly

fines for the breach, they have failed to demonstrate at this juncture that those fines were incurred by the Association as an actual injury resulting directly from the defendants' breach of Article 8.5 of the CC&Rs. No evidence has been presented by the Association that the "daily fines for incomplete construction" and "special assessments" of $350.00 a week were incurred by the Association to get the defendants in compliance with Article 8.5 of the CC&Rs. For the Association to recover those fines as damages, it must demonstrate the economic injury sought resulted from the defendants' breach. Although the Association has submitted evidence that the fees assessed because of the breach are still due and owing, the Association has failed to show at this point that those fees were assessed because the Association suffered actual injury.

"Modern courts continue to refuse to enforce contract clauses that appear designed to deter a breach or to punish the breaching party rather than compensate the injured party for damage occasioned by the breach." *Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 927, 318 P.3d 910, 917 (2014) (quoting *Magic Valley Truck Brokers, Inc. v. Meyer,* 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App.1999)). "[T]he purpose of awarding damages for breach of contract is to fully recompense the non-breaching party for its losses sustained because of the breach, not to punish the breaching party." *Anderson v. Gailey*, 100 Idaho 796, 801, 606 P.2d 90, 95 (1980). Moreover, if either of these clauses are found by this Court to bring about fees that "bear no reasonable relation to the anticipated damage, and [are] exorbitant and unconscionable, [they are] regarded as a 'penalty,' and the contractual provision[s are] therefore [] void and unenforceable." *Id.* (quoting *Graves v. Cupic*, 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954)). The burden of proving that damages are an unenforceable penalty "rests upon

the party seeking to invalidate the forfeiture provision." *Fleming v. Hathaway*, 107 Idaho 157, 161, 686 P.2d 837, 841 (Ct. App. 1984).

Article 6.5 of the CC&Rs governs the Special Assessments at issue in this case. It provides in pertinent part:

> . . . the Board may levy Special Assessments (**without limitation as to amount or frequency** and without requiring a vote of Owners) against an individual Unit and its Owner to reimburse the Association for costs incurred in bringing that Owner and his Unit into compliance with the provisions of this Declaration and the Bylaws, including actual attorneys' fees and costs. . . .

Declaration of Sandra Haight, Exh. A, p. 16 (emphasis added). Viewing this evidence in the light most favorable to the non-moving party, the above provision imposes penalties designed to punish a breaching party, especially when it contains the language "*without limitation as to amount or frequency*", and when the damages sought are in excess of $61,000. *See* Declaration of Sandra Haight, Exh. A, p. 16. While the Association contends these fees were "costs incurred in bringing that Owner and his Unit into compliance", there is at least a dispute that such is the case, as the Association admits defendants are still not in compliance. Specifically, the Association argues the assessments "[a]pparently . . . weren't high enough to obtain the attention of or compliance of Elk Hills." Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 13.

Similarly, Article 6 of the Bylaws states: "[T]he Board shall have the power to impose monetary **penalties**… or other appropriate **discipline for failure to comply** with the Declaration, Articles, these Bylaws or duly-enacted rules . . ." Declaration of Sandra Haight, Exh. C., p. 8 (emphasis added). Viewing this evidence in the light most favorable to the non-moving party, this provision is designed to "punish the breaching party rather than compensate the injured party," because the lot owner failed to comply

with the Declarations, Articles or Bylaws of the Association. *See Melaleuca, Inc. v. Foeller*, 155 Idaho at 927, 318 P.3d at 917 (quoting *Magic Valley Truck Brokers, Inc.*, 133 Idaho at 117, 982 P.2d at 952).

The Court finds there is a genuine issue of material fact as to whether the fees are punitive in nature, whether the amount bears reasonable resemblance to the actual damages sustained, and whether or not the breach caused the damages. As such, there is a genuine issue of material fact as to the amount of damages. Accordingly, the Association's motion for partial summary judgment must be denied as to the amount of damages.

B. The Association's Claim Five, Lien Foreclosure.

The Association also seeks summary judgment that it is entitled to foreclose its Claim of Lien against any and all equity of Elk Hills, LLC, because the Association perfected its Claim of Lien through recording on July 18, 2012, and because the Claim of Lien was properly extended by subsequent recordation on June 28, 2013, on the subject property. Memorandum in Support of Motion for Partial Summary Judgment, p. 20 (citing Declaration of Sandra Haight, Exhs. X, Y).

The defendants contend that because the special assessments are unenforceable under Idaho contract law, "any lien filed based upon such assessments is invalid and constitutes a cloud on the Defendants' title to the subject property." Verified Answer, p. 9 ¶¶ 3-4; Amended Answer, p. 9, ¶¶ 3-4. Moreover, the defendants' Amended Answer alleges that the improper liens "wrongfully disparaged" the defendants' title to the subject property. Amended Answer, p. 11, ¶ 2 2. Defendants then bring a counter-claim for Slander of Title, alleging the same. *Id.*, p. 11 ¶ 23 through p. 12 ¶ 27.

Idaho Code § 45-108 governs liens for performance of future obligations, and provides liens, "may be created by contract to take immediate effect, as security for the performance of obligations not then in existence, which lien, if not invalid on other grounds, shall be valid as against all persons." I.C. § 45-108. Moreover, Idaho Code § 45-810, which governs homeowner's association liens, provides in pertinent part:

> (1) Whenever a homeowner's association levies an assessment against a lot for the reasonable costs incurred in the maintenance of common areas consisting of real property owned and maintained by the association, the association, upon complying with subsection (2) of this section, shall have a lien upon the individual lot for such unpaid assessments accrued in the previous twelve (12) months.

I.C. § 45-810 (emphasis added).

In this case, liens may be created pursuant to Articles 6.9 of the CC&Rs. Article 6.9 provides in pertinent part:

> . . . Each unpaid Assessment shall constitute a lien on each respective Unit . . . . Such lien, when delinquent, may be enforced by sale by the Association, its attorney or other person authorized by this Declaration or by law to make the sale, after failure of the Owner to pay such Assessment, in accordance with the provisions of Idaho law . . . .

Declaration of Sandra Haight, Exh. A, p. 18. While this provision may give the Association and its Board authority to place a lien on a property for any unpaid assessment, Idaho Code § 45-810 restricts these assessments to "reasonable costs incurred in the maintenance of common areas." *Id.*; *see* Declaration of Sandra Haight, Exh. A, p. 18.

According to the Association, the first applicable lien was specifically "due to non-payment of the special assessments fees." Declaration of Sandra Haight, Exh. H. In addition, the Claim of Lien Extension, filed on June 14, 2013, lists monthly assessments, special assessments, late fees, and interest as a portion of the amount of the lien. *Id.*, Exh. Y, p. 1. As noted in the CC&Rs, special assessments are not

designed for maintenance of a common area, as required by the Idaho Code § 45-810, but are instead fees for "costs incurred in bringing that Owner and his Unit into compliance with the provisions of this Declaration and the Bylaws…" *Id.*, Exh. A, p.16.

However, "[a] lien is not invalidated simply because the claimant is not entitled to the amount claimed due in the claim of lien, even when the discrepancy is substantial." *ParkWest Homes LLC v. Barnson*, 149 Idaho 603, 606, 238 P.3d 203, 206 (2010) (internal citations omitted); *see also Electrical Wholesale Supply Co. v. Nielson,* 136 Idaho 814, 824–25, 41 P.3d 242, 252–53 (2001) (holding lien valid where claim of lien demanded $51,571.00, and only $1,069.20 was found to be due).

Because the liens imposed upon the property include the special assessments, and these assessments are not designed to maintain common areas, the Court finds that there is a genuine issue of material fact as to whether Idaho Code § 45-810 authorizes the total lien amount derived from the special assessments. Therefore, the Court denies the Association's motion for partial summary judgment on the Association's Lien Foreclosure Claim.

C. The Association's Claim Four, Specific Performance.

As stated above, the parties do not dispute that defendants breached Article 8.5 of the CC&Rs. The Association contends Article 14.1 of the CC&Rs gives the Association the authority to enforce Article 8.5 "by any proceedings at law or in equity." Memorandum in Support of Motion for Partial Summary Judgment, pp. 20–21 (citing Declaration of Sandra Haight, Exh. A, p. 38). The Association argues that it is entitled to summary judgment granting specific performance ordering Elk Hills, LLC, to comply with the terms of the CC&Rs by a date determined by the court (suggesting October 1, 2015), and that any failure to do so by Elk Hills, LLC, should be enforced by contempt proceedings. *Id.* at p. 21. The defendants do not respond to this claim.

"Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. . . . The decision to grant specific performance is a matter within the district court's discretion. When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate. . . ." *Fazzio v. Mason*, 150 Idaho 591, 594, 249 P.3d 390, 393 (2011) (internal citations omitted) (granting specific performance for a land sales contract). As such, specific performance "should not be granted when it would be unjust, oppressive, or unconscionable." *Kessler v. Tortoise Dev., Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000). "[A] court should not order specific performance where it is impossible—not merely impractical—for the defendant to comply." *Fazzio,* 150 Idaho at 595–96, 249 P.3d at 394–95. A "defendant's *subjective ability[, or inability,]* to comply with the award of specific performance is a relevant equitable factor to be considered," but it is not determinate. *Id.* at 596, 249 P.3d at 395 (emphasis added).

An adequate remedy at law, or availability of damages, does not preclude awards of specific performance. *Id.* at 597, 249 P.3d at 396 (granting specific performance for a land sales contract). Moreover, "[a] contract clause which gives a non-breaching party the right to elect the remedy of specific performance does not require a court to award specific performance," but the agreement to such a clause can shed light on the finding that specific performance is equitable. *Id.* at 598, 249 P.3d at 397.

When considering an action claiming both monetary damages, and specific performance, the Ninth Circuit has stated that "[a] monetary award may be made in an action brought for specific performance, either by granting an alternative prayer for damages for breach of contract or to provide necessary supplemental relief in addition

to a decree of specific performance." *Century Inv. Corp. v. United States*, 250 F.2d 139, 143 (9th Cir.1957) (citing *Daniels v. Brown Shoe Co*., 77 F.2d 899 (1st Cir. 1935)) (internal citations omitted).

Realizing that the Court has the discretion to grant specific performance when equitable, this Court grants summary judgment compelling specific performance for the reasons outlined below.

Initially, there is no genuine issue of material fact as to the breach of the CC&Rs by the defendants. According to the defendants, compliance with the CC&Rs is near, as "the exterior of the home is nearing completion." Affidavit of David White, p. 3, ¶ 9; *see also* Verified Answer, p. 12, ¶ 21. Furthermore, construction on this property began in December 2005. While there were complications to this project, as discussed above in the impossibility and preventing performance section of this memorandum, defendants were able to procure financing in April 2012. There has been ample time to finish the bare minimum requirement in order to bring the property into compliance with Article 8.5 of the CC&Rs.

It should also be noted that the genuine issue of material facts regarding damages sought does not preclude specific performance. In fact, if this Court eventually determines that damages are inadequate, the Association would even *more* likely be entitled to the equitable remedy of specific performance. *Fazzio v. Mason,* 150 Idaho at 597, 249 P.3d at 396.

The Court finds no dispute of material fact exists on the issue of specific performance, Elk Hills, LLC, is in violation of the Association's CCRs. The Association is entitled to a decree of specific performance ordering Elk Hills, LLC, comply with the terms of Article 8.5 of the CC&Rs, with respect to the residential construction located

on Lot 23, Block 2, Armstrong Park PUD, within 90 days of entry of this Court's Judgment.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED there is no genuine issue of material fact that defendants have failed to comply with the unambiguous provisions of Article 8.5 of the CC&Rs, and to that extent, the plaintiff Association's Motion for Partial Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that defendants have placed their affirmative defense of "impossibility" at issue in their defense of the Association's motion for partial summary judgment, and this Court finds the affirmative defense of "impossibility" is not viable or available to the defendants as a matter of law, and that affirmative defense is DISMISSED.

IT IS FURTHER ORDERED that defendants have placed their affirmative defense of plaintiff's actions "preventing performance" by defendants at issue in their defense of the Association's motion for partial summary judgment, and this Court finds the affirmative defense of plaintiff's actions "preventing performance" by defendants is not viable or available to the defendants as a matter of law, and that affirmative defense is DISMISSED.

IT IS FURTHER ORDERED defendants' motion for partial summary judgment is GRANTED to the extent that I.C. § 5-201 precludes any breach of contract action by the plaintiff Association against the defendants the Whites, and as such, breach of contract action by the plaintiff Association against the defendants the Whites are DISMISSED.

IT IS FURTHER ORDERED the five-year statute of limitations on a contract claim under I.C. § 5-216 has not run on the Association's breach of contract claims against Elk Hills, LLC, and to that extent, the Association's motion for partial summary judgment is GRANTED and the defendants' motion for partial summary judgment is DENIED.

IT IS FURTHER ORDERED The Association has set forth facts demonstrating the absence of a genuine issue of material fact that it complied with Idaho Code § 55-115(2)(a)–(c). This shifted the burden to defendants to provide specific facts showing there is a genuine issue for trial. *Kiebert*, 144 Idaho at 228, 159 P.3d at 864. Defendants have failed to meet this burden. Defendants have failed to present any evidence that the Association failed to comply with the relevant subsections of I.C. § 55-115(2). As such, the Court finds in favor of the Association that it has satisfied the provisions of I.C. § 55-115(2) and can levy assessments against defendants. To this extent, the Association's motion for partial summary judgment is GRANTED and the defendants' motion for partial summary judgment is DENIED.

IT IS FURTHER ORDERED the Association's motion for partial summary judgment must be denied as to whether its assessed fees are punitive, whether the amount bears reasonable resemblance to the actual damages sustained, whether or not the breach caused the damages, and the amount of damages must be DENIED as an issue of material fact exists on all those issues.

IT IS FURTHER ORDERED the Association's motion for partial summary judgment on the Association's Lien Foreclosure Claim must be DENIED, as a genuine issue of material fact as to whether Idaho Code § 45-810 authorizes the total lien amount derived from the special assessments.

IT IS FURTHER ORDERED the Court finds no dispute of material fact exists on the issue of specific performance, Elk Hills, LLC, is in violation of the Association's CCRs, thus, the Association's motion for partial summary judgment is GRANTED to that extent, and the Association is entitled to a decree of specific performance ordering Elk Hills, LLC, comply with the terms of Article 8.5 of the CC&Rs, with respect to the residential construction located on Lot 23, Block 2, Armstrong Park PUD, within 90 days of entry of this Court's Judgment.

Entered this 12th day of August, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
John F. Magnuson	667-0500	Douglas B. Marks	208-441-5462

_____
Jeanne Clausen, Deputy Clerk