STATE OF IDAHO)
County of KOOTENAI)ss

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AT 4:30 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

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

FOOTHILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho nonprofit corporation, *Plaintiff,* vs. **JULIE PELZ, Trustee of the Julie Pelz Trust, U/T/A Date March 10, 2021,** *Defendant.*	Case No. **CV28-21-6647** **MEMORANDUM DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Summary Judgment Motions.

Plaintiff Foothills Homeowner's Association, Inc. (HOA) moves for partial summary judgment on: Count Two of its Second Amended Complaint, Declaratory Judgment that defendant Julie Pelz' (Pelz) building was erected in violation of the 1994 Declaration, and Count Three of its Second Amended Complaint, Injunctive Relief (immediate and permanent removal of Pelz' building from her property if it was built in violation of either the 1994 Declaration or the 2010 Declaration). The HOA also seeks partial summary judgment on Count One of Pelz' Counterclaim, Quiet Title, and Count Two of Pelz' Counterclaim, Slander of Title.

Pelz moves for partial summary judgment on the HOA's a) Affirmative Defense of Waiver in the Second Amended Complaint; and b) Count Three of the HOA's Second Amended Complaint, Injunctive Relief. Partial Mot. for Summ. J. 1. Oddly, and

without making a motion, in her briefing Pelz also makes a claim that she is entitled to outright dismissal of the HOA's Second Amended Complaint. Def.'s Br. in Supp. of Def.'s Partial Mot. for Summ J. 21. Pelz cannot be allowed to turn her motion for "partial" summary judgment into a motion for "complete" summary judgment without even making a motion. The Court finds that Pelz has not made a motion for complete summary judgment.

On September 2, 2022, the HOA filed a Motion for Partial Summary Judgment, Statement of Facts – Plaintiff / Counterclaim Defendants Motion for Partial Summary Judgment, Declarations of Joseph Foredyce, Gail Pieknik, Dan Studer, Peter McManus and Kirk Housen in Support of Motion for Summary Judgment, and a Memorandum in Support of Motion for Partial Summary Judgment. On September 19, 2022, Pelz, filed an Objection to Foothill's Partial Motion for Summary Judgment, Statement of Facts in Dispute, Declarations of Jonathon Frantz, Adam McMann and Julie Pelz in Opposition to Plaintiff's Motion for Summary Judgment. On September 26, the HOA filed a Reply in Support of Motion for Partial Summary Judgment.

On September 6, 2022, Pelz, filed a Motion for Partial Summary Judgment, Statement of Undisputed Facts, Declarations of Julie Pelz and Jonathon Frantz in Support of Defendant's Motion for Summary Judgment, and Defendant's Brief in Support of Motion for Summary Judgment. On September 19,2022, the HOA filed a Statement of Disputed Facts, Memorandum in Opposition to Defendant's Partial Motion for Summary Judgment and Declarations of Kirk Houston and Mark Ridgewell in Opposition to Defendant's Partial Motion for Summary Judgment. On September 26, 2022, Pelz filed a Reply Brief regarding Defendant's Motion for Summary Judgment.

Oral argument was held on October 3, 2022. At the conclusion of that hearing, the Court took both motions for summary judgment under advisement.

B. Factual Background of the Litigation.

This case concerns a dispute between the HOA and Pelz, a home owner in the HOA. After a dispute arose over the unapproved construction of a metal shed, the HOA filed a complaint seeking a declaration and injunctive relief. Pelz asserts, among other defenses, that the HOA waived its right to enforce certain provisions of the subdivision's Covenants, Conditions, and Restrictions ("CC&Rs"). Currently before this court is parties' competing motions for partial summary judgment on these claims.

1. Pelz's Building Construction.

Pelz, in her capacity as Trustee of the Julie Pelz Trust, owns real property in Kootenai County, Idaho having a street address of 2404 E. Thomas Hill, Dr., Coeur d'Alene, Idaho 83815 (the "Property"), and described more particularly as follows:

> LOT 8, BLOCK 1, FOOTHILLS, ACCORDING TO THE PLAT RECORDED IN BOOK G OF PLATS, PAGE 130, RECORDS OF KOOTENAI COUNTY, IDAHO.

Complaint, ¶ 6; *Answer* ¶ 6. Pelz has resided on the Property since 2006. *Complaint*, ¶ 9; *Answer* ¶ 9. The Property is located in Foothills Subdivision, *Declaration of Kirk Houston* ("Houston Decl."), *Ex. A*, and the 1994 Declaration was recorded against Pelz's property. *Houston Decl.*, *Ex. A*. Between 2008 (or 2009) and 2018, Pelz served on the Board of Directors for the Association. *Complaint*,¶ 12; *Answer*¶ 12.

In spring of 2021, Pelz hired a contractor to construct a do-it-yourself metal shed ("Building"). *Declaration of Julie Pelz in support of Defendant's Motion for Summary Judgment.* ("*Pelz Decl.*"), ¶ 42. The Building was to be installed on ground asphalt chippings only and held to the ground with bolts; there was no permanent foundation and the building could be removed entirely. *Pelz Decl.*, ¶¶ 47-48. Pelz began construction of the Building without the prior written approval of the Architectural Control

Committee ("ACC") or the Board. *Complaint*, ¶ 20; *Answer*, ¶ 20. The Building's roof does not have shingles and the roof pitch is 3/12. *Houston Decl., Ex. B* (Answer to RFA No. 8, 5). The Building does not have a roll-up door. Houston Decl., Ex. B (Answer to RFA No. 6). Pelz contends that the shed will have a roll-up door once the litigation is completed. *See Houston Decl., Ex. B* (DF's Answer to RFA No. 5, 2). Pelz represented to the City of Coeur d'Alene in her Residential Permit Application that the value of the structure was $20,416.00. *Pelz Decl.*, ¶¶ 51, 52.

On or about May 29, 2021, Peter McManus (HOA Vice President and Architectural Control Committee Chair) and Dan Studer (HOA President) observed that a metal building was being erected on Pelz' property. *Declaration of Dan Studer* ("Studer Decl."), ¶ 9; *McManus Decl.*, ¶ 5. Studer sent Pelz an email stating that as a former officer of the HOA, she must have known that an application needed to be filed with the HOA before commencing construction. Studer Decl., ¶ 9, *Ex. B*. Plez disputes that she "must have known an application need to be filed." *Objection to Foothills Partial Motion for Summary Judgment – Statement of Facts in Dispute* at 4; *see generally* Pelz Decl. (Sept. 6, 2022).

On June 4, 2021, Pelz received a letter from McManus, who stated that he was the chairman of the ACC. *See* Pelz Decl. at ¶57. In that letter, McManus indicated that, even though no application had been filed, the ACC had met and denied Pelz's shed project. *Id.* at ¶¶58-61, Exhibit C.

On or about June 14, 2021, Pelz sent a letter to Gail Pieknik (current Secretary of the HOA, Pieknik Decl. ¶3) in which Pelz stated that she would submit an application as soon as she had the required information. *See* Pelz Decl. at ¶¶62-66, Ex. D. Pelz also requested a hardship exemption from having to comply with the CC&R's due to the

cost of compliant materials. Pieknik Decl., ¶ 5, *Ex. A.* Within the letter, Pelz expressed her "exasperation and shock at why the [HOA] now felt compelled to consider temporary sheds (such as the one she was erecting) as falling under the purview and requirements of the CCRs when it had never done so in the past." *Partial Motion for Summary Judgment- Statement of Undisputed Facts* at 5; Pelz Decl. at ¶¶62-66, Ex. D.

On June 24, 2021, the HOA sent to Pelz yet another letter informing her that her project was denied and that the Building must be removed. *See* Pelz Decl. at ¶¶ 67-77.

On July 2, 2021, Pelz sent a letter to Pieknik described as a "formal application" for construction of the Building. Pieknik Decl., ¶ 6, *Ex. B.* Enclosed with this letter was a diagram and "plans from the Versatube company," which Pieknik understood be the manufacturer of the building Pelz had begun erecting on their property. The enclosed diagram states that "siding samples" are "forthcoming." *Id., Ex. B*

On or about August 5, 2021, McManus sent a letter to Pelz asking for clarification regarding the materials intended to be used. McManus Decl., *Ex. C.* However, Pelz contends that she did not received such letter. *Id.* at ¶¶85-89.

On August 24, 2021, McManus sent Pelz a letter informing her that the Board and the ACC had determined that the Building would not be allowed to remain on the property. McManus Decl., *Ex D.* As of today's date, the Building remains on Pelz's property. McManus Decl., ¶ 14. Pelz applied for a building permit with the City of Coeur d'Alene and a copy of the plans for the Building were submitted along with that application. Houston Decl., *Ex.B* (Request for Admission No. 9, and Ex A).

Currently, the Building is incomplete, as Pelz stopped construction when she was served with this lawsuit. *See* Pelz Decl. at ¶¶93-94.

2. Foothills Homeowner Association (HOA)

On April 26, 1994, the Declaration, Covenants, Conditions, and Restrictions of Foothills Homeowners Association (HOA) was executed and recorded in the official records of Kootenai County, Idaho as Instrument No. 1351628 (the "1994 Declaration"). *Second Amended Complaint* ("Complaint"), ¶ 10, Exhibit A; *Answer* ¶ 10. The HOA was incorporated pursuant to the 1994 Declaration. *Complaint*, ¶ 11; *Answer* ¶ 11. The Foothills subdivision consists of eighty-seven (87) homes. *Declaration of Dan Studer* ("Studer Decl."). The CC&Rs are enforced and administered by the HOA through a Board of Directors ("the Board").

Under the 1994 CC&Rs, homeowners must obtain prior written approval from the HOA's "Architectural Control Committee" to implement "improvements" on their property. The 1994 Declaration provides in pertinent part:

> 5.5 Approval Required.
> No *construction, alteration, removal or destruction of any improvements of any nature whatsoever, whether real or personal in nature*, shall be initiated or be permitted to continue or exist within the property without the prior express written approval of the ACC [Architectural Control Committee].
> . . . .
> 6.2 Approval of Use and Plans.
> *No improvements shall be built, constructed, erected, placed or materially altered within Foothills* unless, or until the plans, specifications and site plans therefor have been reviewed in advance and approved by the ACC in accordance with the provisions of Article 5 above. *Improvements shall include outbuildings which must be of similar design and constructed with similar materials and painted the same color as the house.* All outbuildings must have Architectural Control Committee approval. *The minimum roofing allowed shall be architectural grade 25-year laminated composition shingle.*

1994 Declaration ¶¶ 5.5, 6.2. (emphasis added) (italics in the original).

The 1994 Declaration also contains certain Architectural Control Committee Design Standards, attached as Exhibit A to the 1994 Declaration, including:

Minimum Roof Pitch	5/12
Roof Construction	Laminated composition shingles with 25-year life
Garage Doors	Roll-up door

1994 Declaration, Exhibit A at 19. These Design Standards further state, "These are general guidelines, All plans must be submitted to the A.C.C. and approved prior to construction." *Id.*

The 1994 Declaration contains a no-waiver clause as it pertains to enforcement of violations:

> 8.1 Enforcement
> "The Association (acting through the Board), any owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the project shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration or by the prior Protective Covenants described in the recitals above... *Failure by any such person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter."*

1994 Declaration ¶ 8.1, (emphasis added).

On January 5, 2010, the Restatement of the Declaration of Covenants and Restrictions (CC&R's), was recorded in the official records of Kootenai County, Idaho as Instrument No. 2248040000 (the "2010 Declaration"). Houston Decl., *Ex. C.*

The HOA claims the Board and the ACC work actively to bring CC&R violations to homeowners attention, work with homeowners to remedy CC&R violations, advise homeowners on how to make a proposed project compliant with the subdivision's CC&R's, and work with homeowners through the pre-construction application process. Studer Decl.¶ 5, Ex. A; Pieknik Decl.,¶ 13; Foredyce Decl.,¶¶ 7, 12. 0. Pelz contends that, while the HOA sends out letters requesting compliance, the HOA has "specifically

and affirmatively in writing stated that it will not seek enforcement through litigation. Moreover, the Association has not worked actively to bring sheds into compliance with the CCRs because the Association has in the past not considered sheds to be items requiring ACC approval." *See Decl. Pelz*, ¶¶ 4-53, and referenced Exhibits.

3. HOA's Previous Enforcement Efforts

Pelz states that in 2009, there was a dispute between the HOA and a member over a fence. *See Decl. of Pelz.* at ¶5. As a result of this dispute, the HOA consulted with Terrance Harris, an attorney, and determined it would not pursue legal action against the violating member because the CCRs were too vague and ambiguous to be enforceable. *Id.* at ¶6-7. In conjunction with that decision, the HOA Board determined that the Association CCRs were too vague to be enforceable in court. *Id.* at ¶7.

The HOA Board then proposed to the members two amendments to the CCRs. *Id.* at ¶8. However, the members did not approve the amendments. *Id.* at ¶9. As a result, on December 30, 2009, the Board sent out a letter to the members reporting the rejection of the amendments as well as the resulting actions the board would take. *Id.* at ¶¶9-12, Ex. A. The letter sent out to the members is reiterated in relevant as:

> ...[y]our Board will continue to handle violations of the CC&Rs in the following manner:
> - The Board will accept any violation complaint filed by any homeowner at any time.
> - The Board will investigate the complaint to determine if a violation of the CC&Rs has occurred.
> - If there is a violation, a letter will be written to the offender. This letter will describe how the CC&Rs have been violated. It will also contain a request for the member to comply with the CC&Rs.
> - Aside from this letter, the Board can take no further action.
>
> However, since the CC&Rs still remain in force, any complainant or other homeowner has the right to initiate legal action on his or her own behalf in order to enforce the CC&Rs.
>
> An exception to the procedure noted above could occur if the Board determines that a serious violation has taken place, one that

> adversely impacts many homeowners. In such an instance, the Board may choose to proceed with legal action.

Pelz Decl., *Ex. A.*

The HOA did not file any litigation during Pelz's entire tenure on the board; Pelz contends that is consistent with the determination of the December 30, 2009, letter. *Id.* at ¶13. *Id.* at ¶13. Pelz additionally contends that the entire time that she was on the board, the Association did not require applications for temporary structures because the Association did not consider such temporary structures (i.e. removable sheds without permanent foundations) to be within the definition of "improvements" requiring Association approval, *Id.* The Association disputes this statement. See Ridgewall Decl.,¶¶

Pelz contends that almost half of the temporary structures (sheds and gazebos) currently built, and approximately 15% of properties in the Association, would not comply with the CCRs. Pelz Decl. at ¶¶27-33, Exhibit B; see also Studer Decl.¶15 (setting forth the number of lots in the Association); see also *Declaration of Jonathan Frantz ("*Frantz Delc.*")* ¶26 (setting forth the approximate number of lots with sheds in the Association). The HOA disputes the structures that Pelz claims are not in compliance with the CCRs because Pels did not identify any structures with more than a photo, and did not identify what owners applied and/or obtained a variance for these structures. *Obj. to Def.'s Mot for Partial Summ. J.*

The current HOA Board contends that it is aware of the extensive existence of sheds and temporary structures (such as gazebos) which would otherwise be nonconforming to the CCRs. However, due to limited finances, the Board cannot file a lawsuit against every homeowner whose property is noncompliant. See Frantz Decl. ¶¶18-25, Ex.'s D & E.

Pelz claims that after more than ten years of the HOA not considering temporary buildings to fall under the purview of the CCRs, in 2021, Pelz decided to erect a temporary do-it-yourself metal shed kit to house her boat. *Pelz Decl.* ¶¶40-42.

4. The 1994 and 2010 CC&Rs of the HOA

In relevant part the 2010 CC&Rs state:

> 5.5 Approval Required.
> No construction, alteration, removal or destruction of any *improvements of any nature whatsoever*, whether real or personal in nature, shall be initiated or be permitted to continue or exist within the property without the prior express written approval of the ACC.
> 5.5 Basis of Approval.
> Approval by the ACC shall be based, among other things, on the ACC Rules/ACC Standards, the adequacy of the lot dimensions; conformity and harmony of external design with the neighboring lots; operations and uses' relation to topography, grade, finished ground elevation and landscaping of the lot being improved to that of neighboring lots; proper fencing of the main elevation with respect to nearby streets' and the conformity of the plans and specification to the purpose and general plan and intent of this Declaration... These standards may be amended by the ACC.
> 5.7 Variances
> The ACC may authorize variances from compliance with the requirements of any conditions and restrictions contained in this Declaration, the ACC Rules/ ACC Standards, or any prior approval when, in the sole discretion of the ACC, circumstances such as topography, natural obstructions, aesthetics or environmental considerations or hardship may require to do so. Such variances must be evidenced in writing signed by at least two (2) members of the ACC.
> If a variance is granted as provided herein, no violation of this Declaration, ACC Rules/ ACC standards or prior approval shall be deemed to have occurred with respect to the matter for which the variance was granted. The granting of such a variance shall not operate to waive any of the terms and provisions of this Declaration or the ACC Rules / ACC Standards for any purpose expect as to the particular subject matter of the variance thereof and the specific lot covered thereby.

The ACC shall have the right to consider and grant a variance as herein provided either with or without notice to other owners or a hearing of other owners thereon.

5.8 Application

To request ACC approval for the construction, alteration, modification, removal or demolition of any improvement within the property, the owner shall submit a written application in a form required by the ACC which must be signed by the owner and contain all information requested and be accompanied by all other material to be submitted hereafter provided.

All applications must contain, or have submitted therewith, the following material (collectively called "plans and specifications") prepared in accordance with acceptable architectural standards and submitted with the application form, if any, approved by the ACC:

(a) Site Plan. A site plan showing the location of the building(s) and all other structures and improvements including fences and walls on the lot, lot drainage and all setbacks, curb cuts, driveways, parking areas and other pertinent information related to the improvements.

(b) Building Plan. A building plan which shall consist of preliminary or final blueprints, elevation drawings of the north, south, east and west sides, and detailed exterior specification which shall indicate, by sample if required by the ACC, all exterior colors, materials and finishes, including roof to be used.

The ACC may, in its discretion, require the owner to furnish additional specifications, drawings, material samples or such other information as the ACC, in its sole discretion reasonably exercised, shall deem necessary or convenient for the purpose of assisting the ACC in reviewing and processing the application.

The ACC shall have the right to require an owner submitting an application for approval of plans and specifications to pay a fee at the time the application is submitted, the amount to such fee to be based upon the reasonable and actual express of the ACC in review and processing of an application until such fee, if required, is paid.

5.9 Decision

In reviewing the application of the owner and the ACC, the ACC shall render its decision with respect to an application within forty-five (45) days after the receipt of a properly submitted application.

. . . .

5.13 Enforcement

The ACC, upon approval by the Board, shall be authorized on behalf and in the name of the Association to commence such legal action or equitable proceedings as are determined by it to be necessary or proper to correct or enjoin any activity or condition existing within the property, the continuation of which violates the provision of the Declaration, the ACC Rules/ACC Standards or the approved plans and specifications.

The ACC shall not commence such legal or equitable proceedings until a written notice of the deviation or violation has been appropriately prepared and given to the owner, but thereafter, the ACC shall have the sole discretion to commence such proceedings.

The authority of the ACC as hereby provided shall include the power to retain legal counsel and expert witnesses, pay filing fees, deposition costs, witness fees and all other ordinary and necessary expense incurred in commencing and carrying out said legal or equitable proceedings, all of which costs shall be paid by the Association.

. . . .

6.2 Approval of Use and Plans.

No *improvements shall be built*, constructed, erected, placed or materially altered within Foothills unless, or until the plans, specifications and site plans therefor have been reviewed in advance and approved by the ACC in accordance with the provisions of Article 5 above. *Improvements shall include outbuildings* which must be of similar design and constructed with similar materials and painted the same color as the house. *All outbuildings must have Architectural Control Committee approval.* The minimum roofing allowed shall be architectural grade 25-year laminated composition shingle.

6.3 Prohibited Buildings

No trailer or other vehicle, tent, shack, garage, accessory building or outbuilding shall be used as a temporary or permanent residence. No noxious or offensive activity shall be conducted on any lot, nor shall anything be done therein which may be or become an unreasonable annoyance or nuisance to the occupants of the other lots within the subdivision by reason of unsightliness or the excessive amount of fumes, odors, glare, vibration, gasses, radiation, dust, liquid waste, smoke, or noise.

. . . .

6.9 Maintenance

The following provisions shall govern the maintenance of lots and home improvements thereon:

(g) In the event that any owner shall permit *any improvement, including any landscaping*, which is the responsibility of such owner to maintain...

. . . .

8.1 Enforcement

The Association (acting through the Board), any owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the project shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration or by the prior Protective Covenants described in the recitals above... Failure by any such person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter.

2010 CCRs. Emphasis added. Underlining in original.

A comparison of the 1994 CCRs and the 2010 CCRs is attached to the HOA's Reply in Support of Motion for Summary Judgment as Exhibit "C." The HOA claims this "establishes that the 'Restated' 2010 Declaration contains no substantive amendments, and that the CC&R's were re-recorded primarily to improve their readability and to make other documents related to the subdivision (specifically the bylaws and articles of incorporation) easier for homeowners to find." *Foothills Reply*, p 9.

B. Procedural History of this Litigation

On September 22, 2021, the HOA Board elected to file this lawsuit. McManus Decl.,¶ 13. The Board felt that pursuing this action against Pelz, "was important in spite of limited finances due to the physical characteristics of the project, Ms. Pelz's knowledge of the requirements through her prior board service, and the efforts that other homeowners have made to comply with the CC&R's." *Plaintiff/Counterclaim Defendant's Statement of Facts In Support Of Motion for Partial Summary Judgment* at 9; McManus Decl.¶ 19; Studer Decl.¶ 19; Pieknik Decl.¶ 13; Foredyce Decl.¶ 12.

On October 13, 2021, Foothills HOA initiated this action by filing a petition for a temporary restraining order "to halt construction and order removal of a non-conforming structure on [Ms. Pelz's] property." *Petition for Temporary Restraining Order* (Oct. 13, 2021), at 1. On July 20, 2022, the HOA filed its Second Amended Complaint seeking: (A) a declaration that pursuant to either the Declaration of CC&R's that was recorded in 2010 or the Declaration that was recorded in 1994, Pelz erected a nonconforming structure on her property without prior approval, and, as such, the HOA has the express right to remove it (Counts One and Two, plead in the alternative); and (B) injunctive relief, requiring Pelz to remove the structure.

On August 9, 2022, Pelz filed an Answer to Second Amended Complaint, Affirmative Defenses, Counterclaim and Demand for Jury, in which she asserted her counterclaims for Declaratory Judgment/Quiet Title; and Slander of Title. Pelz alleges that the 2010 Declaration "was recorded without authorization, without approval, and without notice to [Pelz]" and that it "is a cloud on [her] property title." Counterclaim¶¶ 34, 35. Pelz concedes that the 1994 Declaration was duly executed and properly recorded (Complaint, ¶ 10; Answer, ¶ 10), but denies that its terms are enforceable against the Property. (Complaint, ¶ 14; Answer, ¶ 14).

As set forth at the outset of this Memorandum Decision, Foothills HOA moves for partial summary judgment on Count Two of its Second Amended Complaint, Declaratory Judgment that defendant Julie Pelz' (Pelz) building was erected in violation of the 1994 Declaration. As set forth in the reasoning below, this portion of the HOA's motion for partial summary judgment is granted, Pelz built her building in violation of the 1994 Declaration (although waiver may be a defense to Pelz for that violation of erecting her building in violation of the 1994 Declaration, and this Court finds a dispute of fact exists on the defense of waiver). The HOA also moves for partial summary

judgment on Count Three of its Second Amended Complaint, Injunctive Relief (immediate and permanent removal of Pelz' building from her property if it was built in violation of either the 1994 Declaration or the 2010 Declaration). Because there is a dispute of fact of the defense of waiver, this Court cannot grant the HOA summary judgment on Count Three, Injunctive Relief. The HOA's motion for partial summary judgment on injunctive is denied. The HOA also seeks partial summary judgment on Count One of Pelz' Counterclaim, Quiet Title, and Count Two of Pelz' Counterclaim, Slander of Title. The Court grants the HOA's motion for partial summary judgment on Pelz' counterclaims of quiet title and slander of title. Pelz moves for partial summary judgment on the HOA's a) Affirmative Defense of Waiver in the Second Amended Complaint; and b) Count Three of the HOA's Second Amended Complaint, Injunctive Relief. As just mentioned, there is an issue of material fact on Pelz' affirmative defense of waiver, so Pelz' motion for partial summary judgment on the defense of waiver is denied. Finally, Pelz' motion for summary judgment against the HOA on its Count Three of its Second Amended Complaint, is denied as there are issues of material fact. As an aside, Pelz claim in her brief that she is entitled to outright dismissal of all aspects of the HOA's Second Amended Complaint (not made in her Partial Motion for Summary Judgment but discussed in her briefing) is denied.

II. STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on filed with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 498 P.3d 1195, 1202 (2021) (quoting *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008)). The district court "must grant summary judgment if the movant shows

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). Not only are "all disputed facts ... liberally construed in favor of the non-moving party," but "[t]he burden of proving the absence of a material fact rests at all times upon the moving party." *Gregory v. Stallings*, 167 Idaho 123, 128, 468 P.3d 253, 258 (2020) (*quoting McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). "That said, the resisting party's case 'must not rest on mere speculation' because 'a mere scintilla of evidence' is insufficient to create a genuine issue of fact." *Id.*

III. ANALYSIS.

A. There Is a Dispute of Material Fact on the Issue of Intent on Pelz' Affirmative Defense of Waiver.

Both the HOA and Pelz move for Summary Judgment on Pelz's Counterclaim of waiver. In their Motions for Summary Judgment, both the HOZ and Pelz cite to the same two cases: *Eagle Springs Homeowners Association, Inc. v. Rodina*, 165 Idaho 862, 454 P.3d 504 (2019) and *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348 (1960). The Idaho Supreme Court in *Eagle Springs* wrote:

> In *Smith v. Shinn*, this Court addressed how certain CC&Rs may be waived and why the factual circumstances are important to that determination. 82 Idaho 141, 350 P.2d 348 (1960). There, the defendant purchased property within a subdivision and began to build a home. *Id.* at 145, 350 P.2d at 350. Halfway through construction, the HOA filed suit alleging that the home would violate the CC&Rs' prohibition against homes located within certain distances from "street lines" *Id.* at 145-46, 350 P.2d at 350. At trial, the issue was whether "street line" referred to the curb line or the property line. *Id.* at 147, 350 P.2d at 351. Determining the CC&Rs to be unambiguous, the district court refused to admit the lot owner's proffered testimony from eight witnesses. *Id.* at 146, 350 P.2d at 351. The testimony would have, according to the lot owner, "disclose[d] that ten of the fourteen homes built in said subdivision were built at a distance of 25 feet back from the curb line, not 25 feet back from the property line." *Id.* at 147, 350 P.2d at 351.

Eagle Springs, 165 Idaho 862, 871, 454 P.3d 504, 513 (2019). In *Smith*, the Idaho Supreme Court reversed the district court, finding that the terms were ambiguous, and therefore testimony regarding their common usage in the subdivision is admissible. *Id.* Quoting from *Smith*, the Idaho Supreme Court in *Eagle Springs* held:

> Such testimony "would enable the court to determine if there had been such acquiescence in a particular interpretation by the parties interested as to in effect constitute an abandonment of the construction and interpretation contended for by respondents." *Id.* The Court further noted that "[w]hether there has been such acquiescence depends upon the circumstances of each case." *Id.* (citing 14 Am. Jur. 644, § 295.).
>
> The Court then articulated why such testimony was important:
>
> > Where a court of equity is asked to enforce a covenant by ordering specific performance and granting an injunction to prevent a breach of it, equitable principles will prevail and the rules of fair dealing and good conscience must be applied. So in this case if such proffered evidence discloses that a *substantial number of homes* within the subdivision are in fact located less than 25 feet from the front property line it would be inequitable to require appellants to comply with the restrictions under an interpretation or construction different from that applied to other property owners.
>
> *Id.* at 148, 350 P.2d at 351-52 (emphasis added).
>
> . . . .
>
> Another material reason is that if such proffered evidence discloses that respondents have knowingly and without objection permitted *several other* grantees within the subdivision to *violate* the restrictions which they here seek to enforce against appellants equity will not assist them in such enforcement. Such rule rests upon the equitable ground that, if any one who has a right to enforce the covenant and so preserve the conditions which said covenant was designed to keep unaltered shall acquiesce in *material alterations* of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them.
>
> *Id.* at 148, 350 P.2d at 352 (emphasis added).

Eagle Springs, 165 Idaho at 871-72, 862 454 P.3d 513-14.

In *Eagle Springs*, which analyzes *Smith*, the subdivision's CC&Rs contained multiple no-waiver provisions stating that an approval shall not be deemed a waiver to

similar proposals or plans; such approval does not waive the CC&Rs except for that particular building lot; and that the failure to enforce a provision does not constitute a waiver. *Eagle Springs*, 165 Idaho at 870-873, 454 P.3d at 512–515.

As summarized by the HOA in the present case:

> In *Eagle Springs*, the defendant-homeowner filed an application to repair and extend a fence, and to plant additional landscaping. *Eagle Springs*, 165 Idaho at 865, 454 P. 3d at 507. The committee conditionally approved this first application. The homeowner began work, but the improvements exceeded the work set forth in the application and violated height restrictions in the subdivision's covenants, conditions, and restrictions ("CC&R's"). The homeowners association asked the homeowner to submit a second application, which it denied because the fence exceeded the height limit in the CC&R's and was too close to the street. *Id.*, at 866, 454 P.3d at 508.
>
> The homeowner refused to bring the improvements into conformance with the CC&R's and the association sued for injunctive relief. The homeowner contended that the association's claim was barred by waiver, laches, and estoppel. With regard to waiver, the homeowner alleged that the association "waived its ability to deny [the] improvements because it had approved the construction of similar improvements with similar fences atop similar landscaping and retaining walls." Id., at 866, 454 P.3d at 508. The association moved for summary judgment, arguing inter alia that the no-waiver provisions in the CC&R's defeated the affirmative defense of waiver. The district court awarded summary judgment to the association and ordered the homeowner to restore the property to its previous condition, noting that the CC&R's expressly provided that the association does not waive the enforcement of the CC&R's by approving prior similar proposals or granting variances. *Id.*
>
> The homeowner appealed and the Idaho Supreme Court affirmed, holding that the district court properly dismissed the defense of waiver in part because (1) granting variances for other projects did not evidence the association's intention to waive the architectural requirements or the anti-waiver provisions in the CC&R's (*Id.* at 515-16, 454 P.3d at 873-74); and (2) the board had granted variances for other projects to avoid legal fees. *Id.* at 516, 454 P.3d at 874.
>
> The Court also observed that even if the variances that the homeowner relied upon were construed as violations of the CC&R's that the association had failed to enforce, the evidence demonstrated that the majority of properties were in compliance. See id. ("[E]very example of a 'noncompliance' that Rodina produced was not a violation under the express terms of the CC&R's because each was granted a variance.... And even if the variances were violations, they would represent only 4 homes in a 230-lot subdivision, or just under 2% of the homes.") (emphasis added) (internal citations and quotations omitted).

Mem. Supp. of Mot. 7-8.

Pelz states:

> [S]o-called anti-waiver clauses, in and of themselves may be waived. *Eagle Springs Homeowners Assn Inc. v. Rodina*, 454 P.3d 504, 514 (Idaho 2019). While ultimately *Eagle Springs Homeowner Assn Inc.* was successful in relying on its anti-waiver clause, that is because Rodina did not produce sufficient evidence to show that the Association also intended to waive any of its rights. *Id.* at pp. 515-16 ("the district court's decision pointedly relied more on that lack of evidence than a broad application of the no waiver provisions"). Instead, Rodina only provided evidence that "the HOA approved two (at most, four) variances for fences. Under the CC&Rs, granting a variance excuses the violation for which it is granted." Id. at 516.
>
> In the particular case at hand, Ms. Pelz provided evidence that the Association for more than 10 years did not consider temporary or non-permanent sheds as requiring Association approval. See Decl. Pelz (Sept. 6, 2022), ¶¶ 14 – 40; Ex. B. This is not just evidence that the Association failed to take some action; Ms. Pelz testifies that the Association "determined that only permanent structures were required to comply with the CCRs." Id. at ¶14. Ms. Pelz was aware of this because she was on the board for those 10 years. Id. at ¶¶4 – 40. That is an affirmative action/decision made by the Association. Moreover, Ms. Pelz has provided evidence that almost half of all sheds do not comply in any way, shape or form with the regulations which the Association currently seeks to impose. *Id.* at Ex. B (there are thirteen sheds that do not comply with the rules the Association seeks to impose); see also Decl. Frantz, ¶26 (there are 27 properties in the Association with sheds).
>
> What is present here and which was missing in Eagle Springs, is the fact that there was an affirmative decision/action (the Association determining that sheds were not regulated by the CCRs) combined with more than 10 years of compliance and acquiescence in accordance with the determination that temporary sheds are regulated by the CCRs. Additionally, there is also evidence that Ms. Pelz acted in reliance on that conduct. See *id.* at ¶¶ 43. Ms. Pelz constructed a temporary shed. She did so without Association approval because she relied on the position that the Association had maintained and comported with for the entire 10 years she was on the board.

Pelz Obj. to Mot. for Sum. J. 10.

The HOA states:

> Ms. Pelz's waiver argument is no stronger than the waiver argument that was rejected in Eagle Springs. Just like the Eagle Springs Subdivision, the 1994 Declaration has a clear anti-waiver provision.

> Specifically, Section 8.1 of the 1994 Declaration states, "Failure by any such person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter." SOF ¶ 16 (quoting, 1994 Declaration, Section 8.1). As such, in order to prevail on a theory of waiver, Ms. Pelz must demonstrate a clear intent to waive both the terms of the CC&R's that she has violated, as well as the anti-waiver provisions.
>
> Pursuant to Eagle Springs, Ms. Pelz cannot establish a waiver by simply pointing to other homes in the subdivision that are allegedly not in compliance with CC&R's. This is particularly true because her summary of violations provides no context and alleges that violations exist on only one-third of the properties (30 out of 87). Ms. Pelz's summary also fails to account for the fact that in light of the Association's budget, the Board cannot simply file a lawsuit against every homeowner who violates the CC&R's. SOF ¶ 38. Ms. Pelz's cursory summary also overlooks the fact that as a former member of this board, her failure to file an application before beginning construction was viewed as particularly egregious. SOF ¶ 39.

Mem. Supp. of Mot. 9.

"Waiver is an equitable doctrine based upon fairness and justice." *Hecla Mining Co. v. Star-Morning Mining Co.,* 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992). It is "a voluntary, intentional relinquishment of a known right or advantage ...." *Pocatello Hosp. v. Quail Ridge Med. Inv'r,* 156 Idaho 709, 719, 330 P.3d 1067, 1077 (2014) "A party to a written contract can waive a provision of that contract by conduct despite the existence of a so-called antiwaiver or failure to enforce clause in the contract." *Eagle Springs*, 165 Idaho at 870-873, 454 P.3d at 512–515 (quoting *13 Williston on Contracts § § 39:36 (4th ed.)).* This rule "is based on the view that the nonwaiver provision itself, like any other term in the contract, is subject to waiver by agreement or conduct during performance." *Id.* (quoting *Smith*).

In the context of restrictive covenants, "[w]aiver usually involves a failure to object to other violations of the same or similar servitudes such that it would be unfair to allow the claimant to enforce the servitude against the current violation." *Eagle Springs Homeowners Association, Inc.)* (citing Restatement (Third) of Property (Servitudes) §

8.3 (2000)). Absent 'a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel' a waiver will not be inferred based on the parties conduct. *Id.* (quoting *Pocatello Hosp.,* 156 Idaho at 719, 330 P.3d at 1077).

> "The existence of waiver ordinarily is a question of fact and is foremost a question of intent." *Hecla Mining Co.,* 122 Idaho at 782, 839 P.2d at 1196. "In order to establish waiver the intention to waive must clearly appear, although it may be established by conduct." *Id.* "[I]f there is any substantial evidence in the record to support a waiver it is for the trier of fact to determine whether the evidence establishes such a waiver." *Fletcher v. Lone Mountain Rd. Ass'n*, 162 Idaho 347, 354, 396 P.3d 1229, 1236 (2017) (quoting *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 660 (1982)). "When ... there is no dispute as to the material facts and only one reasonable inference can be drawn from them, the question of whether a waiver has occurred becomes one of law." 13 Williston on Contracts § 39:21 (4th ed.).

Eagle Springs, 165 Idaho at 870-873 454 P.3d at 512–515.

Here, there is only one anti-waiver clause in each of the 1994 and 2010 CC&Rs. Each clause is identical:

> 8.1 Enforcement
> The Association (acting through the Board), any owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the project shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by this Declaration or by the prior Protective Covenants described in the recitals above... *Failure by any such person or entity to enforce any such provision shall in no event be deemed a waiver of the right to do so thereafter.*

1994 and 2010 CCR ¶ 8.1. (Italics in original, underlining added).

The HOA in this matter does not deny that there are other structures that violate the CCRs as they are currently being allowed in the subdivision. However, the HOA claims that it does not have the financial resources to file a suit against all of the violations. There is a question as to whether the HOA's choice to not go after the multiple other violations would rise to the level of "'a clear and unequivocal act

manifesting an intent to waive, or from conduct amounting to estoppel." This material fact in dispute creates a question of fact for the trier of fact on the issue of intent. Because the Court finds a dispute as to the material fact of intent of the Foothills HOA to waive the provision, summary judgment on the Pelz' affirmative defense of waiver is denied.

B. There is a question of fact whether Pelz' application was properly submitted, thus summary judgment as to whether the HOA approved Pelz' application by default is not appropriate.

Confusingly, counsel for Pelz conflates Pelz' submittal of the application and the HOA's action (or inaction) with waiver. Pelz argues that:

> Both the 1994 and the 2010 versions of the CCR's state, "the ACC shall render its decision with respect to an application within forty-five (45) days after receipt of a properly submitted application." CCRs §5.9.
>
> In this case, Ms. Pelz sent a full application to the HOA on July 2, 2021, with the $10.00 application fee enclosed. See *Pl.'s Statement of Facts* (Sept. 2, 2022) ¶25. For whatever reason, when the HOA received Ms. Pelz application, it shredded Ms. Pelz application (or at least the application fee check) and never responded within forty-five days as required. See *Pelz Decl.*, ¶¶ 78-92; Ex. F. In fact, Plaintiff admits that on August 5, 2021, the ACC, via Mr. McManus, sent a letter asking for clarification from Ms. Pelz (although, Ms. Pelz never received or saw that communication until this litigation). See *Pl.'s Statement of Facts* (Sept. 2, 2022) ¶26; see also *Decl. Pelz* ¶ 86-89. But, it was not until August 24, 2021 that the ACC/Association, via Mr. McManus, sent a letter "informing [Ms. Pelz] that the Board and ACC had made a final decision. . ." See Pl.'s Statement of Facts (Sept. 2, 2022) ¶27; see also Decl. of Pelz, ¶90.
>
> Per the CCRs §5.9:
>
> 5.9 Decision: In reviewing the application of the owner and the ACC, the ACC shall render its decision with respect to an application within forty-five (45) days after the receipt of a properly submitted application.
>
> The ACC only had 45 days to render a decision; the language is mandatory: "shall". Since the application was submitted on July 2, 2021, the ACC had until August 16, 2021 to render a decision. As admitted by the Association, it did not make a timely response. Whether such action is construed as a waiver, or a default, it does not matter. Either way, the Association has failed timely reject the

application filed by Ms. Pelz. As such, the Association is barred from now denying the application by Ms. Pelz.

Def.'s Br. in Supp. 20-21.

The HOA responds:

> First, there is a genuine issue of material fact regarding whether and when Ms. Pelz provided a complete application. The Board received Ms. Pelz's "formal application" on July 2, 2022. *Pieknik Decl.* ¶ 6, Ex. B. On August 5, 2021, Peter McManus sent a letter to the Pelzes asking for clarification regarding the materials they intended to use for the Building. *McManus Decl.* ¶ 11, Ex. C.8 In that letter, Mr. McManus stated that the application would not be processed further until this information was provided. *Id.* Mr. McManus's testimony therefore shows that as of August 5, 2021, Ms. Pelz's application was not complete and that as such, the 45-day deadline to render a decision had not been established.
>
> Second, even if Ms. Pelz provided a complete application and the Board did not issue a decision timely, Ms. Pelz has not alleged that this indecision caused her damages.
>
> This Court has characterized "CC&R's as a written contract between the Association, led by its Board of Directors, and an Owner of Property." *Armstrong Park Homeowners Association v. White*, Case No. CV-2013-9609 (Kootenai County) (Memorandum Decision and Order on Cross Motions for Summary Judgment) (Mitchell, J.) (Aug. 12. 2015).
>
> The elements of a claim for breach of contract are well established: (1) the existence of the contract; (2) the breach of the contract; (3) the breach caused damages; and (4) the amount of those damages. See, *Mosell Equities v. Berryhill & Co. LLC*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013).
>
> If Ms. Pelz's argument is properly understood as a claim for breach of contract, she has failed to allege, much less prove, that the Board's supposed failure to timely deny her application caused her damages. Because Ms. Pelz erected the building without obtaining prior approval, she had no legitimate expectation of keeping the Building. Assuming the truth of her allegation that the Board should have issued a final decision on August 16, 2021, but that this final decision was not provided until August 24, 2021, she has not explained how such delay damaged or prejudiced her. Ms. Pelz has also not cited any provisions in the CC&R's or any case law supporting her position that the Association cannot pursue removal of her building simply because the Association did not deny her application faster. Since the 1994 Declaration does not provide a different remedy, Ms. Pelz would be entitled to no more than actual damages, which she has neither proven nor alleged.

Mem. in Opp'n to Def.t's Partial Mot. for Summ. J. 12-13.

While the 1994 CCR and the 2010 CCR differ somewhat, in pertinent part Provision 5.9 "Decision" in both CCRs state that:

> In reviewing the application and the materials submitted therewith and in reaching a decision thereon, the ACC shall use its best efforts and judgment to assure that all improvements shall produce and contribute to an orderly and aesthetically complementary design and appearance to be of the quality required to maintain Foothills as a first class residential development.
>
> Unless extended by mutual consent of the owner and the ACC, the ACC shall render its decision with respect to an application within forty-five (45) days after receipt of a properly submitted application.

1994 and 2010 CCR ¶ 5.9. Provision 5.8 Application states: "[t]o request ACC approval for the construction, ... of any improvement within the property, the owner shall submit a written application in a form required by the ACC which must be signed by the owner and contain all information requested and be accompanied by all other material to be submitted hereafter provided." *1994 and 2010 CCR* ¶ 5.8. Requested information must contain a site plan and a building plan (collectively called "plans and specifications"). *Id.*

Here, the HOA claims that there is a dispute if the July 1, 2021, application submitted by Pelz is considered a full, properly submitted application. If it was a properly submitted application, the forty-five day deadline would be on or about Sunday, August 15, 2021. The HOA and Pelz disagree that the application was sufficient to trigger the deadline.

Further, the HOA claims that Pelz essentially claims a breach of contract cause of action without claiming any damages as to the approximately nine days that the Application approval was delayed. Therefore, there is a dispute as to the presence and the amount of damage that occurred from the delay in denying Pelz's application.

Because there is a dispute as to material fact related to whether the July 1, 2021, application triggered the forty-five day deadline, and if so, what the damages related to this deadline delay was, summary judgment that the HOA accepted the application by default, is denied.

C. Pelz's structure is in violation of both the 1994 Declaration and the 2010 Declaration, because both require ACC Approval for Temporary Structures, and there is no ambiguity in the work "improvement(s)". Summary judgment is granted on Count II of the HOA's Second Amended Complaint.

Foothills HOA contends that Pelz' building that was erected on her property violates the subdivision's CC&R's and the HOA has requested its removal. On summary judgment, the HOA seeks a declaration that the Building was erected in violation of either (1) the 2010 Declaration; or (2) the 1994 Declaration. These causes of action were pleaded in the alternative due to Pelz' contention that the 2010 Declaration was recorded without proper authorization.

> Foothills is entitled to the declaration it seeks because there is no question that Ms. Pelz began construction without the association's approval. Ms. Pelz began construction of the Shed on or before May 29, 2021. *SOF* ¶ 21. Ms. Pelz sent an email to Gail Pieknik several weeks later that she referred to as her "formal application" with the Association. *Id.*¶ 25. She has also admitted in her pleading that she began construction of the Shed without the prior written approval of the ACC or the Board. *Id.* ¶ 23. The structure also does not comply with the architectural guidelines set forth in the 1994 Declaration. *Id.* ¶¶ 11-15. Because of these clear violations together with the ACC's discretion to deny applications (SOF ¶ 12), even if Ms. Pelz had submitted an application in advance of construction, she is not entitled to a presumption that her application would have been approved had she submitted one in advance.
>
> As such, Foothills is entitled to a declaration that the Building was erected in violation of the 1994 Declaration, and that its continued existence on the Property is a further violation of the same.

Mem. in Supp. of Mot.for Partial Summ. J. 4-5.

Pelz contends that the CC&R's as a whole do not require ACC approval for temporary structures and prior approval is required only for "permanent" structures such as residences (*Def.'s Br. in Supp. of Mot. for Summ. J.* 5-10.); or in the alternative, the CCRs requirement is ambiguous. *Id.* at 10-12.

> Looking at the CCRs as a whole and applying the common definitions to the undefined terms therein (such as "improvement"), it is clear to see that the CCRs never had any intent to force temporary structures to require Association approval. As such, Ms. Pelz's shed is not an "improvement" requiring the review or approval of the Association or ACC.

Id. at 10. In detail, Ms. Pelz argues:

> At first blush, a review of Section 5.5 of the CCRs may be interpreted as requiring each and every item erected on property in the Association to have approval from the ACC. However, after a review of the CCRs *as a whole*, and the Association's previous interpretation thereof, it can be seen that the CCRs do not require approval for sheds and non-permanent structures. The appropriate review starts in Article 5 of the 1994 CCRs. See CCRs, §5.5. The very next section, however, is important to understanding the CCRs.
>
> 5.5 Approval Required
> No construction, alteration, modification, removal or destruction of any improvements of any nature whatsoever, whether real or personal in nature, shall be initiated or be permitted to continue or exist within the property without the prior express written approval of the ACC.
>
> See CCRs, §5.5 The very next section, however, is important to understanding the CCRs intent:
>
> 5.6 Basis of Approval
> Approval by the ACC shall be based, among other things, on the ACC Rules/ACC Standards, the adequacy of the lot dimensions; conformity and harmony of external design with neighboring improvements, the effect of the lot being improved to that of neighboring lots; operation and uses; relation to topography, grade, finished ground elevation and landscaping of the lot being improved to that of neighboring lots; proper facing of the main elevation with respect to nearby streets; and the conformity of the plans and specification to the purpose and general plan and intent of this Declaration. The initial Design Standards are attached as Exhibit "A". These standards may be amended by the A.C.C.

As noted in Section 5.6, approval is to be based upon the ACC design standards. However, the ACC design standards relate exclusively to a primary residence. In no way, shape or form can the design standards be read to imply a restriction on sheds and other non-permanent structures. For example, the design standards set forth a minimum square footage of "1,300 square feet" and a "Double car" garage. Additionally, in multiple places the design standards reference the term "house." It is obvious from a brief perusal of the design standards, that they were intended to apply to homes only.

ARCHITECTURAL CONTROL COMMITTEE DESIGN STANDARDS
FOOTHILLS SUBDIVISION

Minimum Square Footage .	1,300 sq. ft. – 1 story structure with basement; 1,400 sq. ft. – 1 store structure with no basement; 1,800 sq. ft. – 2 or more stories; 1,300 sq. ft. on main level for split or multi-level houses
Garage	Double Car
Minimum Roof Pitch . .	5/12
Roof Construction	Laminated composition shingles with 25-year life
Shingle Color	To agree w/paint color
House & Trim Color . .	Subject to the approval of the A.C.C.
Minimum Eve Overhang . .	16"
Siding.	Horizontal siding with 8" maximum reveal at front elevation. On corner lots, aforementioned siding shall be required on the sides of the house facing the street.
Garage Door.	Roll – up door
Windows must be	trimmed

The foregoing design standards are Exhibit A to the 1994 CCRs (which can be found as Exhibit A to the *Second Am. Compl.*). Moreover, the CCRs, throughout Section 5, refers only to "improvements." Yet, in Article 6, the CCRs draw a distinguishment between the terms "improvements," "outbuildings," "shacks," "garage," and "accessory building."

6.2 Approval of Use and Plans.

No *improvements shall be built*, constructed, erected, placed or materially altered within Foothills unless, or until the plans, specifications and site plans therefor have been reviewed in advance and approved by the ACC in accordance with the provisions of Article 5 above. *Improvements shall include outbuildings* which must be of similar design and constructed with similar materials and

painted the same color as the house. *All outbuildings must have Architectural Control Committee approval.* The minimum roofing allowed shall be architectural grade 25-year laminated composition shingle.

6.3 Prohibited Buildings

No trailer or other vehicle, tent, shack, garage, accessory building or outbuilding shall be used as a temporary or permanent residence. No noxious or offensive activity shall be conducted on any lot, nor shall anything be done therein which may be or become an unreasonable annoyance or nuisance to the occupants of the other lots within the subdivision by reason of unsightliness or the excessive amount of fumes, odors, glare, vibration, gasses, radiation, dust, liquid waste, smoke, or noise.

Section 6.2 of the CCRs declares that "outbuildings" are included in the definition of "improvements." However, in Section 6.3, the CCR's distinguish a "shack," "garage," and "accessory building" as different from an "outbuilding." If "shack" or "garage" were intended to be included in the term "outbuilding" then the drafters of the CCRs would not have listed them separately.

Pelz' Obj. to Foothill's [sic] partial Mot for Summ. J. 3-5. Pelz argues that "looking at the common understating of the term 'improvement' is also instructive; the term 'improvement' refers to permanent structures only." *Id.* at 5. To support this conclusion, Pelz cites two unpersuasive and unbinding definitions from www.law.cornell.edu and www.definitions.uslegal.com. *Id.* at 6-7.

The HOA responds:

There is a genuine issue of material fact regarding whether the Building is "temporary" or "permanent." Black's Law Dictionary defines temporary as "Lasting for a time only; existing or continuing for a limited (usu. short) time; transitory." Webster's defines "permanent" as "continuing or enduring without fundamental or marked change" or "not easily removed, washed away, or erased." See, https://www.merriam-webster.com/dictionary/permanent (last accessed Sept. 18, 2022).

Regardless of how the Building is affixed to the ground, the evidence in the record undermines Ms. Pelz's contention that the Building is temporary. The Building has been on-site continuously for approximately a year and a half. McManus Declaration, ¶¶ 5, 14. Additionally, according to the engineer-stamped plans that Ms. Pelz submitted to the City of Coeur d'Alene, the "Value of Work" exceeds $20,000 (Houston Decl., Ex. A, p. 1), the building is

> designed to be bolted into concrete (Id., Ex. A., p. 10), 3 the roof of the Building is rated to tolerate 40 pounds of snow per square foot, and the Building itself is designed to withstand 115 mph winds. Id., Ex. A, p. 15. The Building is also 14 feet high and 567 square feet in total area. Id. Ex. A, p. 15 (21 feet wide by 27 feet deep = 567 square feet). In light of these specifications - particularly the wind and snow tolerances - the Building can remain in its present location indefinitely and tolerate a harsh North Idaho winter without suffering any damage.

Mem. in Opp'n to Def.'s Partial Mot. for Summ. J. 3-4. Further, the HOA argues that:

> Ms. Pelz contends that her building is not an "outbuilding" subject to the prior approval requirement in Section 6.2 because Section 6.3 lists "shacks," "garages," and "accessory buildings" in addition to "outbuildings" as structures that cannot be used as residences. She reasons that "shacks," "garages," and "accessory buildings" must not be subject to the pre-approval requirement that applies to "outbuildings." Objection at 5.
>
> Ms. Pelz's argument must be rejected. The most logical explanation for the CC&R's broad pre-approval requirements is that the drafters wanted homeowners to obtain prior approval before erecting durable structures (regardless of whether the homeowner calls that structure a "shed," "garage," "outbuilding," "accessory building" or otherwise) that contribute to the value or utility of their properties.

Foothills Reply. at 4.

The term "improvements" is not a defined term in the CCRs. However, the term "improvement" is defined by Black's law dictionary as "[a]n addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance. — Also termed *land improvement." Black's Law Dictionary* (11th ed. 2019).

Further, despite the lack of definition of "improvements," within the document, the CCR's have several relevant provisions that guide our interpretation of the term "improvements." The first provision which assists in interpreting "improvements" is provision 5.5 "Approval Required", which states, "No construction, alteration, removal or destruction of any improvements of any nature whatsoever, whether real or personal in

nature..." This provision clearly shows that improvements can be both real or personal in nature. The second provision which assists in interpreting "improvements" is 6.2 "Approval of Use and Plans", which states: "No improvements shall be built, constructed, erected, placed or materially altered. . . .Improvements shall include outbuildings which must be of similar design and constructed with similar materials and painted the same color as the house. All outbuildings must have Architectural Control Committee approval." This provision clearly shows that all outbuildings, which are improvements, must have approval. The third provision which assists in interpreting "improvements" is 6.3 "Prohibited Buildings" which states that: "No trailer or other vehicle, tent, shack, garage, accessory building or outbuilding shall be used as a temporary or permanent residence." This only aids interpretation by analogy. This provision gives examples of what can and cannot be used as a residence. While this list does not define what an "improvement" is (it discusses what cannot be used as a residence), it makes clear that items on this list cannot be used as a temporary or permanent residence. This list is not extensive, nor does this Court find this list to be mutually exclusive (meaning that if something is not on this list then it can be used as a residence). The CCRs treat temporary and permanent residences consistent with the way the CCRs treat temporary and permanent structures...both temporary and permanent structures are included.

This Court notes that counsel for Pelz consistently called what Pelz built a "shed." The word "shed" is not defined within the CCR's, so this Court is unsure why counsel for Pelz has chosen that word. This Court finds that Pelz use of the word "shed" is without significance. What Pelz cannot ignore is the undeniable fact that what she built is a "structure" ¶ 1.6, "structure or improvement" ¶ 5.8(a), "improvements" ¶ 5.5, "improvements shall include outbuildings" ¶ 6.2. It is all of those. It also could be a

"shack, garage, accessory building or outbuilding" ¶ 6.3. It is one thing for counsel for Pelz consistently calling what Pelz built a "shed" which is not defined in the CCRs. It is entirely another thing for counsel for Pelz to make the argument that the "shed" is something outside of the CCRs because a "shed" it is not one of those **other** things which are listed in the CCRs. And that is what counsel for Pelz is doing. Counsel for Pelz argues:

> In order for Plaintiff's preferred interpretation (that even sheds require ACC approval) this Court would have to ignore the fact that the CCRs include differences between the various terms. For example, if the term "outbuilding" included "shacks," "garages," or "accessory building", then there is no reason to include them all as separately listed. The words "shack," "garage," and "accessory building" would all be superfluous and ignored. The same goes for the distinguishment between structures and improvements in Section 5.8(a).

Pels' Reply Br. Re: Def.'s Mot for Partial Summ. J. 3. Such an argument defies logic.

Pelz argues that the CCRs are ambiguous on whether a temporary structure would require ACC approval, and that the ambiguity must be resolved in favor of free land use, and thus in favor of Pelz. *Pelz's Reply Br. Re: Def.'s Mot. for Partial Summ. J. 2, n. 2 citing. Pinehaven Planning Bd. v. Brooks*, []70 P.3d 664, 667-69 (2003). Specifically, Pelz states:

> While the Association would like to pretend that the CCRs do not convey an ambiguity and that they clearly require approval for every accessory building on a piece of property, the Association's interpretation would require that the Court ignore certain words and make others superfluous. By way of a short recap, the CCRs reference:
>
> a. "structures" in paragraph 1.6;
> b. "structures and improvements" in paragraph 5.8(a);
> c. "improvements" in paragraph 5.5;
> d. "Improvements shall include outbuildings" in paragraph 6.2;
> e. "shack, garage, accessory building or outbuilding" in paragraph 6.3; and
> f. "house" throughout the ACC Rules/ACC Standards.
>
> In order for Plaintiff's preferred interpretation (that even sheds require ACC approval) this Court would have to ignore the fact that the CCRs include differences between the various terms. For example, if the term "outbuilding" included "shacks," "garages," or "accessory building", then

there is no reason to include them all as separately listed. The words "shack," "garage," and "accessory building" would all be superfluous and ignored. The same goes for the distinguishment between structures and improvements in Section 5.8(a). In Section 5.8 it states the procedure for requesting approval from the ACC "for the construction, alteration, modification, removal or demolition of any improvements within the property." Then, when listing out the requirements for an application, it states in subsection (a) that "A site plan showing the location of the building(s) and all other structures and improvements..." (emphasis added). The CCRs assume that there are "structures" other than those considered to be "improvements." As such, it is clear to see by looking at all of the CCRs that there was no intention for the term "improvements" to be all encompassing as the Association claims.

Moreover, if the definitions and terms were so clear, then why is the current leadership of the Association unable to identify what types of structures are required by the CCRs to have ACC approval? See *Decl. Frantz ISO Df.'s Mot. for Summ. Judg.*, Ex. D (email by and between board members asking "Are gazebos considered an outbuilding?"). After reviewing the CCRs as a whole, it is plain to see that approval by the ACC was intended for houses and large, permanent structures. If nothing else, the CCRs are at least ambiguous and therefore must be construed in the favor of free use of real property.

The parties, while differing in the interpretation thereof, do not dispute the language of the 1994 CCRs. Since interpretation of a contract and the determination of whether or not there is an ambiguity is a matter of law, this Court is free to enter summary judgment on that matter and a decision is ripe. Of course, being that the CCRs, as considered as a whole, do not require ACC approval for sheds, or in the alternative there is an ambiguity regarding the same, this Court must enter summary judgment in Defendant's favor.

Pelz's Reply Br. Re: Def.'s Mot. for Partial Summ. J. 2-4.

The Idaho Supreme Court has held, "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." *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995). Rather, a covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Post v. Murphy,* 125 Idaho 473, 475, 873 P.2d 118, 120 (Idaho, 1994) (citing *Rutter v. McLaughlin,* 101 Idaho 292, 612 P.2d 135 (1980)). To determine

whether or not a covenant is ambiguous, the court must view the agreement as a whole. *Id.* at 193, 923 P.2d at 437.

As discussed above, in reviewing the document as a whole, there is not more than one reasonable interpretation. The word "improvements" includes both temporary and permeant structures. In reading of the CCRs as a whole, this Court finds the word "improvements" includes **both** permanent and temporary structures, such as outbuildings or sheds. That is the finding of this Court as a matter of law. It simply does not matter whether Pelz' improvement is temporary or permanent, as both are covered.

Because there is not an ambiguity, Pelz' motion for partial summary judgment on Count Two of the HOA's Second Amended Complaint is denied. For the same reason, the HOA's motion for partial summary judgment on Count Two of its Second Amended Complaint, Declaratory Judgment that defendant Pelz' building was erected in violation of the 1994 Declaration, is granted.

D. Because there is a Dispute as to the Material Fact of the Affirmative Defense of Waiver, an Injunction cannot be granted.

The HOA's prayer for relief asks that if the Court determines that the building is in violation of either the 1994 Declaration or the 2010 Declaration, the HOA asks this Court for positive injunctive relief requiring Pelz to immediately and permanently remove the Building from the Property. Mem. in Supp. of Mot for Partial Summ. J. 5-6. However, because the Court is unable to grant summary judgment on the matter of waiver (due to a dispute of material fact), an injunction cannot be given at this summary judgment juncture.

E. The HOA's Motion for Partial Summary Judgment regarding Pelz's Counterclaim for Slander of Title is Granted as that Cause of Action is Time-Barred.

The HOA contends that Pelz's counterclaim for slander of title is time barred, because it is either (1) subject to a two-year limitations period pursuant to Idaho Code § 5-219(5), which accrued twelve years ago when the 2010 CC&R's were recorded against her property, or (2) subject to the "catch all" four year statute of limitations pursuant to Idaho Code § 5-224 ("An action for relief not hereinbefore provided must be commenced within four (4) years after the cause of action shall have accrued."). Mem. in Supp. of Mot for Partial Summ. J. 11-13.

In response, Pelz contends that her counterclaim for slander of title is not time barred because accrual date continues for as long as the association's claim is asserted; or alternatively, slander of title is a continuous tort. *Pelz' Obj. to Foothill's Partial Mot. for Summ. J.* 16.

> With respect to a slander of title claim, the injury is not a one-and-done at the time of recording. The injury is repeated for each and every day that the claim against the title persists. As such, Ms. Pelz's slander of title claim continues to accrue anew each and every day the 2010 CCRs continue to be asserted against Ms. Pelz's property. Therefore, the statute of limitations, no matter what time period is applied, has not run.

Id. at 17. The HOA response Pelz' continuing tort argument that Pelz' counterclaim for slander of title stems from a single act, not a series of continual acts. Foothills Reply in Supp. of Mot. for Partial Summ. J. 9-11. Both Pelz and the HOA cite to *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993) and *Yerion v. Branchy Banking & Trust Co.*, 27 F.Sopp.3d 677 (E.D. Va 2014). *Id.* After reading both cases, the Court finds no support for Pelz' claim that there is a continuing tort for her claim of slander of title. This Court specifically finds that any claim for slander of title occurred at one discreet point in time with one act, the recording of the 2010 Declaration. Pelz' claim otherwise is specious. Every single allegation and every single paragraph in her Counterclaim II

"Slander of Title" is based on the recording of the 2010 Declaration. Answer to First Am. Compl., Affirmative Defenses, Countercl., and Demand for Jury 10, ¶¶ 38-44. "Slander of title requires proof of four elements: (1) publication of a slanderous statement; (2) its falsity; (3) malice; and (4) resulting special damages." *McPheters v. Maile*, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). The tort is based on what the tortfeasor did to the others' title, a one-time event. This Court finds as a matter of fact and law that slander of title as counterclaimed by Pelz is not a continuing tort.

That being the case, it matters not whether a two-year statute of limitation applies or a four-year statute of limitation applies. Pelz' slander of title counterclaim arose on December 4, 2010, upon the HOA's act of recording of the 2010 Declaration. Pelz had at most until December 4, 2014 to file her claim of slander of title. This Counterclaim was filed on August 9, 2022, approximately eight years after the statute of limitations passed. Therefore, the Court finds that Pelz' slander of title counterclaim is time barred, and hereby grants the HOA's motion for summary judgment on that counterclaim.

F. Because Pelz did not affirmatively prove that the 2010 CCRs are "void *ab initio*," the four year statute of limitations apply and Pelz' Count I of her Counterclaim for declaratory judgment/quiet title is time barred. Therefore, the HOA's Motion for Partial summary Judgment is Granted.

Pelz' filed a counterclaim for declaratory judgment/quiet title. Answer to First Am. Compl., Affirmative Defenses, Countercl., and Demand for Jury 9, ¶¶ 29-37. As with her counterclaim for slander of title, every single allegation and every single paragraph in her Counterclaim I "Declaratory Judgment/Quiet Title" is based on the recording of the 2010 Declaration.

The HOA contends that Pelz' counterclaim for declaratory judgment/quiet title is time barred as it is subject to the four-year limitations period pursuant to Idaho Code §

5-224, because the cause of action accrued twelve years ago when the 2010 CC&R's were recorded against her property:

> By and through her counterclaim for declaratory judgment/quiet title, Ms. Pelz contends that the Amended and Restated CC&R's were recorded against her property on December 4, 2010. *Counterclaim* ¶ 31. She alleges that this recording was made "without authorization, without approval, and without notice to Defendant." *Id.* ¶ 34. She alleges further that the 2010 Declaration "affects" and "is a cloud" on her real property. *Id.*¶¶ 33, 35.
>
> Assuming the truth of Ms. Pelz's allegations, her cause of action for quiet title accrued on December 4, 2010 when the 2010 Declaration was recorded against her property. Because the 2010 Declaration "affects" Ms. Pelz's real property, the Kootenai County Recorder's Office was the appropriate place to make the filing. See, Idaho Code §§ 55-801; 55-808. Pursuant to *Sommer* and *Brown*, supra, the statute of limitations ran on December 4, 2014 - four years after the 2010 Declaration was recorded.

Mem. in Supp. of Mot. for Summ. J. 10-11.

In response, Pelz contends that her counterclaim is not time barred, because the 2010 CCRs are "void ab initio" due to HOA's failure to secure an affirmative vote on several submitted amendments:

> When the 2010 amended and restated CCRs were recorded, there was no vote! In fact, an amendment to the CCRs was actually voted down and rejected. The Association sent out a letter on December 30, 2009 informing the association that the attempt to amend the CCRs had failed. Then, five days later, Mr. Ridgewell and Mr. Nilges went ahead and recorded an amended set of CCRs anyway -- and after the association voted "no" on amending the CCRs.
>
> Not only was there no approval of the amendment, but the 2010 CCRs failed to contain the "certificate, signed and sworn to by two offices of the Association, that the record owners of the required number of lots have either voted or consented in writing to any amendment." There is no statement anywhere in the document indicated that its approval had been obtained by the Association members. Furthermore, the Association is presently aware of these deficiencies. On or about October 27, 2021, Dan Studer emailed the Association board members stating that he had spoken with past board members who remember that "they had a

vote, and he believed there was items not approved." *See* Decl. Frantz, dated Sept. 19, 2022, Ex. A.

Pelz' Obj. to Pl.'s Partial Mot. for Summ. J.; *Statement of Undisputed Facts* ¶ 17. *See also Defendant's Objection to Plaintiff's Partial Motion for Summary Judgment-Statement of Facts in Dispute,* 3-4, ¶ 19:

> They are void ab initio because:
> a. The 2010 CCRs were not voted upon; ...
> b. The 2010 CCRs factually do not comply with the amendment process set forth in the 1994 CCRs; and c. The signors of the 2010 CCRs were not authorized to do so.

The HOA responds that none of the proposed amendments that were rejected by the members were included in the 2010 Declaration. *Foothills' Reply in Supp. of Mot. for Partial Summ. J.* 7. The "allegation that the Board violated the will of the homeowners (on her watch, coincidentally) does not withstand scrutiny." *Id.* Further, the HOA states:

> Second, Mr. Ridgewell's Declaration also establishes that Ms. Pelz was advised during a September 2010 Board meeting that the 2010 Declaration had been recorded, and that she could receive a copy if she desired:
>
> BOARD OF DIRECTORS
> Minutes of Meeting on September 13, 2010
> Members present:
> Mark Ridgewell
> Julie Pelz
> Joy O'Brien
> Tom Connor
> Members absent:
> Ralph Angle (out-of-town)
>
> This meeting was called to order by President Mark Ridgewall at 7:10 p.m.
>
> CC&Rs Now Available in PDF Format
>
> Attorney Harris has forwarded and e-mail of the recently recorded CC&Rs to Tom. This document can be made available to members either electronically (without charge) or in printed form (with a small charge for printing). Mark required Tom to send him a copy of the e-file.

Id. at 8.

Pelz does not cite any case law defining "void ab initio," instead stating that when an agreement is "void ab initio, it [can] be challenged at any time" and is not subject to the statute of limitations. *Thompson v. Ebbert,* 160 P.3d 754, 757 (Idaho 2007) (citing *Southern Id. Rlty. v. Larry J. Hellhake, Etc.*, 636 P2d 168 (Idaho 1981). *Pelz Mot. for Partial Summ. J.* "A contract is void ab initio where the law provides that the promise or agreement is 'void of legal effect.'" *Drug Testing compliance Group, LLC V. DOT Compliance Service* 161 Idaho 93, 102 383 P.3d 1263, 1272 (Idaho, 2016) (citing Restatement (Second) of Contracts § 7, cmt. a.).

Here, the crux of the "void ab initio" argument set forth by Pelz is that the 2010 CCRs were recorded without the "certificate, signed and sworn to by two offices of the Association that the record owners of the required number of lots have either voted or consented in writing to any amendment." *Pelz Objection.* p 15. However, there is no law cited by Pelz that provides that this agreement is "void of legal effect." Both cases cited by Pelz, *Thompson v. Ebbert*, 160 P.3d 754, 757 (Idaho, 2007) and *Southern Id. Rlty. v. Larry J. Hellhake, Etc.*, 636 P2d 168 (Idaho, 1981), rely on Idaho statutes. In the present case, Pelz has provided no Idaho statute or case law. As a result, the Court does not find that the 2010 CCRs are void ab initio.

Since the CCRs are not void ab initio, the next question is if the claim is barred by the Statute of Limitations. As summarized by the HOA:

> A cause of action for quiet title "accrues where another person claims an interest in property 'adverse to' another." *Brown v. Greenheart*, 157 Idaho 156, 162, 335 P.3d 1, 7 (2014). A person claims interest "adverse" to another when he or she makes a filing "with the appropriate government agency" that puts the other party on notice of the claim. *Sommer*, 511 P.3d at 843 (citing, *Brown*); see also, *Brown*, 157 Idaho at 162, 335 P.3d at 7 (holding that plaintiff's cause of action for quiet title to water rights accrued when Defendant filed a notice of change of ownership with the Idaho Department of Water Resources). Thus, the cause of action

accrues, and the statute of limitations begins to run, when such a filing is made. *Id.*

Mem. in Supp. of Mot. for Summ. J. 10.

In the present case, the 2010 CCRs were filed and recorded with the Kootenai County Recorder on December 4, 2010. This filing is the event upon which Pelz bases her counterclaim for declaratory judgment/quiet title upon. Thus the statute of limitations began running on December 4, 2010. Idaho Code does not provide a specific statute of limitations for quiet title, however, as discussed above, "an action for relief not hereinbefore provided must be commenced within four (4) years after the cause of action shall have accrued" *Idaho Code § 5-224.* Therefore, Pelz' counterclaim of declaratory judgment/quiet title has a four year statute of limitations which began running on December 4, 2010 and expired on December 4, 2014. Because Pelz did not file her counterclaim for declaratory judgment/quiet title until 2022, Pelz' counterclaim is time barred.

Because the counterclaim for declaratory judgment/quiet title is time barred, the HOA's motion for partial summary judgment regarding on this issue is granted.

IV. CONCLUSION AND ORDER.

Based on the foregoing, the defendant Pelz' motion for partial summary judgment is denied in all aspects.

Based on the foregoing, the plaintiff Foothills HOA motion for partial summary judgment is granted as to: a) Count Two of its Second Amended Complaint, Declaratory Judgment that Pelz' building was erected in violation of the 1994 Declaration, b) Count One of Pelz' Counterclaim, Quiet Title, and c) Count Two of Pelz' Counterclaim, Slander of Title; and denied as to Pelz' affirmative defense of waiver and as to the HOA's claim of Count II, Injunction.

IT IS HEREBY ORDERED the defendant Pelz' motion for partial summary judgment is DENIED in all aspects.

IT IS FURTHER ORDERED the plaintiff Foothills HOA motion for partial summary judgment is GRANTED as to: a) Count Two of its Second Amended Complaint, Declaratory Judgment that Pelz' building was erected in violation of the 1994 Declaration, b) Count One of Pelz' Counterclaim, Quiet Title, and c) Count Two of Pelz' Counterclaim, Slander of Title.

IT IS FURTHER ORDERED the plaintiff Foothills HOA motion for partial summary judgment is DENIED as to Pelz' affirmative defense of waiver and as to the HOA's claim of Count II, Injunction.

Entered this 5th day of October, 2022.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 5th day of October, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	email	Lawyer	email
Jonathon Frantz	Service@PostFallsLaw.com ✓		
Kirk Houston Tara Malek	service@smithmalek.com ✓		

Jeanne Clausen, Deputy Clerk