STATE OF INDIANA	)	MARION SUPERIOR COURT
	) ss:	CIVIL DIVISION 4
COUNTY OF MARION	)	CAUSE NO. 49D04-1810-OV-041583

THE CITY OF INDIANAPOLIS, INDIANA, and THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, INDIANA,

Plaintiff,

vs.

RAYMOND PECK,

Defendant.

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

Plaintiffs, The City of Indianapolis, Indiana, and The Metropolitan Development Commission of Marion County, Indiana, filed their Complaint for Permanent Injunction and Fine ("Complaint") against Defendant Raymond Peck ("Defendant") on October 17, 2018. The Complaint alleges that Defendant, the owner of the property located at 10832 Portside Court, Indianapolis, Indiana ("Real Estate"), was in violation of multiple sections of the Revised Code of the Consolidated City of Indianapolis and Marion County ("Revised Code") relating to Defendant's 2017 construction of what has been described, collectively or in component parts, as a tiered porch, tiered patio, patio, and/or outdoor kitchen at the Real Estate. Additionally, the City filed a companion case against the property's co-owner, Kimberly Peck, for the same alleged violations under cause number 49D04-1810-OV-041597.

In the Complaint, the Plaintiffs request judgment in their favor, fines, costs, an order requiring the Defendant to immediately correct the violations, and an order that the Defendant be permanently enjoined from the following: working over any stop work orders in violation of §561-263 of the Revised Code; engaging in or maintaining any land alteration without a drainage permit as required by §561-221 of the Revised Code; engaging in or maintaining any construction activity in violation of §536-201 of the Revised Code; maintaining any improvements without first obtaining an improvement location permit in violation of §740-1005.A.2 of the Revised Code; and maintaining any minor residential structures in the side yard setback in violation of §740-1005.A.8 of the Revised Code. The Defendant did not file an answer to the Complaint, but instead, filed his Counterclaim and Demand for Jury Trial ("Counterclaim") on December 14, 2019, alleging due process and equal protection claims against the Plaintiffs, and seeking both monetary damages and injunctive relief. The case was briefly removed to the United States District Court for the Southern District of Indiana on January 9, 2020, but was ordered remanded to the Marion County Superior Court shortly thereafter on January 27, 2020. The Plaintiffs filed their Answer to Counterclaim on April 6, 2020.

Following the return of the case to the Marion Superior Court, and the onset of the COVID-19 pandemic, the parties continued to engage in the discovery process. Ultimately, on July 1, 2022, Plaintiffs filed their Motion for Summary Judgment, Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum"), and Designation of Evidence in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Designation"). The Plaintiffs argue that they are entitled to judgment as a matter of law on their Complaint, as

there are no genuine issues of material fact in dispute, and that Defendant's Counterclaims have no basis in law.

The Defendant filed his Response in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendant's Response") and Designation of Evidence in Response to Plaintiffs' Motion for Summary Judgment ("Defendant's Designation") on September 20, 2022. As to the Plaintiffs' Complaint, Defendant contends that there are genuine issues of material fact in dispute which preclude summary judgment and that the Plaintiffs lack jurisdiction to enforce permitting and zoning requirements on Defendant's Real Estate. (Defendant's Response, pp. 13-18). As to his due process counterclaim, the Defendant states that summary judgment would not be appropriate until after a decision is made on the ordinance violation counts contained within Plaintiffs' Complaint. (*Id*. at p. 19). Regarding the equal protection counterclaim, the Defendant asserts that there is evidence by which a reasonable juror could find that the Defendant was treated differently from similarly situated individuals and/or that City employees acted vindictively in regard to enforcement of the ordinances at issue. (*Id*. at p. 19-20). Defendant neglected to assert the affirmative defense of estoppel in his Response, but did raise the issue in his Motion for Partial Summary Judgment.

Plaintiffs filed their Reply on October 5, 2022.

The Court scheduled a hearing on Plaintiffs' Motion for Summary Judgment, and on October 5, 2022, the Court heard argument from both parties. On the same date, the Court also heard argument on Defendant's Motion for Partial Summary Judgment, but that motion will be addressed separately.

II. FINDINGS OF FACT

The filings and argument establish no dispute between the parties as to the following facts:

1. Defendant owns the real estate located at 10832 Portside Court, Indianapolis, Indiana ("Real Estate"), the subject of this litigation (Plaintiffs' Designation: Ex. 1, ¶3; Ex. 2, ¶1; Defendant's Response, p. 5; Defendant's Designation: Ex. 10, ¶1; Ex. 11, ¶4;).

2. The Real Estate is located within the Geist Harbors subdivision. (Plaintiffs' Designation Ex. 2, ¶1; Defendant's Response, p. 5; Defendant's Designation Ex. 10, ¶1).

3. The Real Estate includes a patio on the property's twenty-five feet of water frontage. (Plaintiffs' Designation Ex. 2, ¶¶2-3; Defendant's Response, p. 5; Defendant's Designation Exhibit 10, ¶¶2-3).

4. The Real Estate is zoned "D-P," a Planned Unit Development. (Plaintiffs' Designation: Ex. 1, ¶4; Ex. 2, ¶4; Defendant's Response, p. 9; Defendant's Designation Ex. 10, p. 4).

5. The zoning district development standards for the Real Estate are found in the Plat Restrictions of the rezoning petition that created the D-P zoning district, 79-Z-107, recorded with the Marion County Recorder's Office as instrument number 81-292865. (Plaintiffs' Designation: Ex. 2, ¶4; Ex. 3; Defendant's Response, p. 10; Defendant's Designation: Ex. 10, ¶4; Ex. 14).

6. The Plat for 79-Z-107 ("Plat") states that the Department of Metropolitan Development of Marion County, it's successors, or assigns are granted the right to enforce the covenants contained within the Plat. (Plaintiffs' Designation Ex. 3, ¶10; Defendant's Designation Ex. 14, ¶10).

7. The Plat requires that no above ground structure shall be constructed or placed on a residential lot within the side-yard setback. (Plaintiffs' Designation Ex. 3, ¶5; Defendant's Designation Ex. 14, ¶ 5).

8. On May 15, 2017, Defendant began a construction project at the Real Estate. (Plaintiffs' Designation Ex. 2, ¶5; Defendant's Response, p. 5; Defendant's Designation Ex. 10, ¶5).

9. Defendant's construction project included replacing drainpipes, replacing paver stones on the twenty-five-foot-wide patio, and rebuilding the existing retaining wall to consolidate two walls into a single structure. (Plaintiffs' Designation Ex. 2, ¶5; Defendant's Response, p. 5; Defendant's Designation: Ex. 10, ¶5; Ex. 11, ¶5).

10. In May 2017, city inspector(s) inspected the Real Estate and generated a stop work order and notice of violation for the failure to obtain a drainage permit prior to engaging in land alteration. (Plaintiffs' Designation: Ex. 2, ¶9; Ex. 4-4b; Defendant's Response, pp. 6-7; Defendant's Designation Ex. 10, ¶9).

11. Defendant completed the patio project on approximately June 15, 2017. (Plaintiffs' Designation Ex. 2, ¶12; Defendant's Response, p. 8; Defendant's Designation Ex. 10, ¶12).

12. On July 31, 2017, city inspector Justin McBride inspected the Real Estate and opened three violation cases and issued three stop work orders for failing to obtain a structural, an electrical and an improvement location permit prior to constructing the tiered patio/outdoor kitchen. (Plaintiffs' Designation: Ex. 2, ¶14; Ex. 5, ¶7; Defendant's Response, pp. 8-9; Defendant's Designation Ex. 10, ¶14).

13. On October 17, 2018, Plaintiffs filed their Complaint, alleging the following:

a. On or about May 24, 2017, inspection revealed that Defendant caused, suffered, or allowed land alteration at the Real Estate without first obtaining a drainage permit, in violation of §561-221 of the Revised Code. (Plaintiffs' Designation Ex. 1, ¶¶21, 26).

b. On or about May 25, 2017, a stop work order was issued to Defendant pursuant to §561-263 of the Revised Code. (*Id*. at ¶22).

c. A June 29, 2017, reinspection of the Real Estate found that the land alteration/construction of a tiered porch and/or outdoor kitchen was completed without having first obtained a drainage permit, a violation of §561-264 of the Revised Code. (*Id.* at ¶¶23, 28).

d. On or about July 3, 2017, a notice of violation was issued to Defendant for the failure to obtain a drainage permit for land alteration at the Real Estate. (*Id*. at ¶29).

e. A June 11, 2018, reinspection of the Real Estate found the land alteration that had occurred without a drainage permit had not been remediated, a violation of §561-221 of the Revised Code. (*Id*. at ¶¶24, 30).

f. On July 31, 2017, inspection revealed that Defendant caused, suffered or allowed construction activity at the Real Estate without first obtaining structural or electrical permits, specifically, the construction of a tiered patio and/or outdoor kitchen that exceeds thirty (30) inches above finished grade and electrical service to the tiered patio and/or outdoor kitchen, and failing to obtain an improvement location permit for the construction of a tiered patio and/or outdoor kitchen exceeding eighteen inches in height, a violation of §740-1008.A.2 of the Revised Code. (*Id*. at ¶¶32, 37, 43).

g. The July 31, 2017, inspection also revealed that Defendant had caused, suffered, or allowed the location of a minor residential structure, the tiered patio and/or

outdoor kitchen, within the side yard set-back, in violation of the zoning district development standards, a violation of §740-1008.A.8 of the Revised Code. (*Id*. at ¶52).

h. On or about July 31, 2017, three stop work orders were issued to Defendant for failing to obtain structural, electrical and improvement location permits. (*Id*. at ¶¶33, 38, 44).

i. On August 1, 2017, a notice of violation was issued to Defendant for the failure to obtain an improvement location permit and for locating the minor residential structure in the side yard set-back. (*Id*. at ¶¶45, 53).

j. Re-inspection of the Real Estate on or about April 26, 2018, revealed that the violations remained uncorrected, and a first notice of violation was issued to Defendant for the failure to obtain a structural and electrical permit and zoning citations were issued to Defendant for the failure to obtain the improvement location permit and for locating the minor residential structure within the side yard set-back. (*Id*. at ¶¶34, 39, 47, 55).

k. Re-inspection of the Real Estate on or about August 17, 2018, revealed that all violations remained unabated, and a second notice of violation was issued to Defendant for the structural and electrical permit violations. (*Id*. at ¶¶35, 40).

l. As of October 12, 2018, no permits had been obtained for Defendant's construction project. (Plaintiffs' Designation Ex. 1, ¶¶31, 36, 41, 50).

14. On July 23, 2019, Plaintiff City issued improvement location permit ILP18-01605 and structural permit STR19-03976 to Defendant. (Plaintiffs' Designation: Ex. 1, ¶¶10, 12; Ex. 4g; Ex. 4k).

15. On July 24, 2019, Plaintiff City issued drainage permit DRN18-01516 to Defendant. (Plaintiffs' Designation: Ex. 4, ¶¶11; Ex. 4i).

III. LAW AND ANALYSIS

Summary judgment is appropriate and shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56 (C). Once the movant has put forth evidence to establish that there is no genuine issue of material fact, the burden shifts to the non-movant to make a showing sufficient to establish the existence of a genuine issue for trial. *Butler v. City of Peru*, 733 N.E.2d 912, 915 (Ind. 2000). See also *Shambaugh & Son, Inc. v. Carlisle*, 763 N.E.2d 459, 461 (Ind. 2002) (holding that the "movant must designate sufficient evidence to eliminate all genuine factual issues, and once the movant has done so, the burden shifts to the nonmovant to come forth with contrary evidence.") "A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law." *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind.Ct.App. 2005), trans. denied. A trial court may not look beyond the designated evidence when ruling on a party's motion for summary judgment. *Id*. "To be considered genuine for the purpose of summary judgment, an issue of material fact must be established by sufficient evidence in support of the claimed factual dispute to require a jury or judge to resolve the parties' differing version of the truth at trial." *Estate of Sullivan v. Allstate Co.*, 841 N.E.2d 1220, 1225 (Ind.Ct.App. 2006).

The presence of a disputed fact will not prevent the granting of summary judgment if the fact is immaterial. In order for summary judgment to be appropriate in Plaintiffs' favor, it must also demonstrate that it is entitled to judgment as a matter of law. Ind. Trial Rule 56(C).

At the outset, the Court will note that the Plaintiffs have asserted that, due the Defendant's failure to file a responsive pleading to the Complaint, he should be found to have

admitted to the facts as alleged in said document. In support of this position, the Plaintiffs reference portions of the Indiana Rules of Trial Procedure. More specifically, they observe that Indiana Trial Rule 8(B) specifically requires that a "responsive pleading shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or controvert the averments set forth in the preceding pleading." Likewise, they draw attention to Indiana Trial Rule 8(D), which states that "averments in a pleading to which a responsive pleading is required, except those pertaining to the amount of damages, are admitted when not denied in the responsive pleading."

The Plaintiffs further contend that in neglecting to plead the affirmative defenses of estoppel and lack of subject matter jurisdiction prior to the filing of his Motion for Partial Summary Judgment, the Defendant has effectively waived the ability to raise the defenses. In making this argument the Plaintiffs turn to Indiana Trial Rule 8(C), which requires that a responsive pleading "set forth affirmatively and carry the burden of proving estoppel…lack of jurisdiction over the subject-matter…and any other matter constituting an avoidance, matter of abatement, or affirmative defense." Moreover, they invoke caselaw that holds the failure to file a responsive pleading setting forth affirmatively all defenses results in waiver. *Molargik v. W. Enters, Inc*., 605 N.E.2d 1197, 1199 (Ind.Ct.App. 1993).

Responding to this line of argument, the Defendant contends that, despite the lack of a responsive pleading, the Court need not regard the facts alleged in the Complaint as having been admitted, due to said facts being litigated by the supposed consent of the parties. To be more precise, the Defendant argues that the filing of his Counterclaim and the admission of evidence at summary judgment, without objection from the Plaintiffs, is sufficient to overcome the presumptive admission of the factual allegations in the Plaintiffs' Complaint. The Defendant

makes a similar stance as it pertains the affirmative defenses of estoppel and lack of subject matter jurisdiction.

In addressing this dispute, it should be noted at the outset that Indiana courts have a strong preference for deciding matters on the merits as opposed to legal technicalities. *Mizen v. State ex rel. Zoeller*, 72 N.E.3d 458, 466-67 (Ind. Ct. App. 2017). In the *Mizen* case, the defendant asserted an affirmative defense explicitly included in Trial Rule 8(C) for the first time at summary judgment. The trial court found that the defense was waived for failure to plead, but the Court of Appeals reversed, holding that "there is a presumption that issues can be raised as they, in good faith, are developed. In order to rebut this presumption, the party against whom the new issue is raised may make an affirmative showing of prejudice. In order to demonstrate prejudice, the party must show that it will be deprived of, or otherwise seriously hindered in the pursuit of some legal right if injection of the new issue is permitted." (*Id*. at 467).

A subsequent appellate case, *City of Lawrenceburg v. Franklin City*., 131 N.E.3d 758, 762-64 (Ind. Ct. App. 2019), reached a similar conclusion on the issue of waiver. The Court noted that the party asserting waiver had ample time and opportunity to respond to arguments made at summary judgment and designated no evidence showing prejudice from the timing of the arguments. The Court was unpersuaded by the contention that the only way for a party to raise an affirmative defense is through an answer; finding this viewpoint to be overly technical and failing to account for the preference that issues be resolved on their merits when possible. (*Id*. at 763)

For further guidance on the issue, *B & B, LLC v. Lake Erie Land Co.*, 943 N.E.2d 917, 924 (Ind. Ct. App. 2011), holds that when evidence is offered by a party related to an affirmative defense and the opposing party fails to object to the admission of evidence related to such a

defense, the issue is deemed to tried by the parties' consent. *Wampler v. Tusing*, 711 N.E.2d 533, 536 (Ind. Ct. App. 1999), directs that there are generally two factors to consider when addressing whether a party has impliedly consented to a non-pleaded issue. First, the Court needs to determine whether the opposing party had notice of the issue, and second, it must conclude whether the opposing party objected to the issue being litigated. If the Court finds that the opposing party had notice of the issue and failed to object, then that party will have impliedly consented to litigation of the non-pleaded issue. (*Id*.). Concerning summary judgment, if facts at issue and the merits of an affirmative defense are addressed and argued extensively at a hearing on a motion for summary judgment, the defense has not been waived by the failure to raise the affirmative defense in responsive pleadings. *Paint Shuttle, Inc. v. Cont'l Cas. Co*., 733 N.E.2d 513, 525 (Ind. Ct. App. 2000).

As stated previously, the Plaintiffs did argue, in their Memorandum, Reply, and at the summary judgment hearing itself, that the Defendant's failure to file a responsive pleading to the Complaint constitutes an admission of the facts as alleged in the Complaint. The same is true of their contention that the Defendant waived his affirmative defenses for failing to plead them prior to filing his Motion for Partial Summary Judgment. While this does indicate a stance on the part of the Plaintiffs that the Court should refrain from considering the Defendant's defenses, the analysis put forth in the relevant caselaw regarding implied consent does not focus solely on whether an argument has been made related to waiver. Rather, it directs attention to a determination of whether there was notice and a failure to object.

Turning to the present case, the Defendant clearly raised lack of subject matter jurisdiction and estoppel in his Motion for Partial Summary Judgment and addressed the subject matter jurisdiction affirmative defense in his Response to Plaintiffs' Motion for Summary

Judgment. (Defendant's Response, pp. 13-18; Defendant's Brief in Support of Defendant's Motion for Partial Summary Judgment, pp. 7-15). Moreover, Defendant's Counterclaim makes reference to both detrimental reliance on the statements of Department of Business and Neighborhood Services employees as well as the contention that the Plat is the applicable law concerning the Real Estate. (Defendant's Counterclaim, pp. 2-9). The parties also engaged in a lengthy discovery process during which the issues of estoppel and lack of subject matter jurisdiction were clearly being raised. (Defendant's Designation: Ex. 1-9; Ex. 12). Thus, it cannot be said that the Plaintiffs were lacking notice regarding the Defendant's potential affirmative defenses.

Pertaining to evidence offered related to the Defendant's affirmative defenses, outside of a single objection to the deposition testimony of Justin McBride, a challenge that was based on grounds unrelated to waiver or failure to plead, the Plaintiffs failed to object to the Court taking the Defendant's designated evidence into consideration. Moreover, the affirmative defenses were addressed and argued extensively at the hearing on the Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Partial Summary Judgment.

Therefore, the Plaintiffs have impliedly consented to litigating the Defendant's defenses and these defenses have not been waived by the failure to raise them in responsive pleadings. This outcome is in line with the basic policies underlying the modern Indiana Rules of Trial Procedure, which are "to avoid pleading traps and, to the greatest extent possible, ensure that cases are tried on the issues that their facts present." *Mizen v. State ex rel. Zoeller*, 72 N.E.3d 458, 466-467 (Ind. Ct. App. 2017). Finally, while it is certainly reasonable to argue that the Defendant waived the issue of estoppel in regard to Plaintiffs' Motion for Summary Judgment, for failing to assert such a defense in his Response, due to estoppel being raised by Defendant in

the course of this litigation, including at the hearing on Plaintiffs' Motion for Summary Judgment, it will be considered for the purposes of Plaintiffs' Motion.

A. Contract Law and Real Estate Zoned D-P

Defendant maintains that the Plaintiffs have no authority to enforce their zoning ordinances against Defendant under a contract theory. Defendant is mistaken in the applicability of this theory to his case. The Defendant has admitted that the Real Estate was zoned D-P by rezoning petition 79-Z-107 and that the zoning district development standards applicable to the property are contained in the Plat Restrictions found in 79-Z-107. (Defendant's Response, p. 13; Defendant's Designation Ex. 14). "PUDs are designed to allow municipalities to adopt a flexible approach to zoning...The PUD district, once established, constitutes a separate zoning district in addition to the more conventional types of zoning districts." *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n*, 819 N.E.2d 55, 60 (Ind. Ct. App. 2004) (emphasis added). The City's zoning ordinance establishes a PUD district classification known as "D-P." Revised Code §742-102(M). As a matter of law, the authorized uses and specific development standards, including the setbacks, are established in the plat restrictions of the rezoning petition that created the zoning district. (*Id.*). The authorized uses and development standards established in the plat then become the new authorized uses and development standards for the zoning district and enforced by the City the same as any other zoning district standard.

Zoning ordinances are not contracts. "Zoning ordinances are enacted for the purpose of promoting the health, safety, morals or general welfare of a community by regulating the use and development of land." *Evansville Outdoor Advertising, Inc. v. Board of Zoning Appeals of Evansville and Vanderburgh County*, 757 N.E.2d 151, 160 (Ind.Ct.App. 2001). Regulating the use and development standards allowed on property, as those uses and development standards

can impact adjacent properties, is a function of zoning and the general police powers granted to municipalities. Since D-P zoning districts are created by the developer of land filing a petition to rezone the property, which is then enacted by *ordinance*, not by contract, the Revised Code and the enforcement mechanisms contained therein are applicable to zoning violations that may be occurring on the Defendant's Real Estate.

B. <u>Subject Matter Jurisdiction</u>

On the issue of lack of subject matter jurisdiction, the Defendant claims that no provisions of the Revised Code apply to his Real Estate due to the D-P zoning designation and that neither the City nor this Court has jurisdiction to enforce the provisions of the Revised Code on Defendant and his Real Estate. As an initial observation, at the October 5, 2022, hearing on Plaintiffs' Motion for Summary Judgment, counsel for Defendant conceded that the Court *does* in fact have jurisdiction over all counts of the Plaintiffs' Complaint. However, even independent of this concession on the part of the Defendant, it must be acknowledged that nowhere in the Plat Restrictions of rezoning petition 79-Z-107 are any statements or limitations suggesting that the Revised Code does not apply to real estate zoned D-P.

The permitted uses and development standards are included in the Plat Restrictions, as those are zoning issues. Non-zoning issues, such as permitting requirements found in ordinances regulating construction and land alteration, for example, are not included in the Plat Restrictions as those ordinance requirements are not zoning. Regarding the allegations found in counts 1-4 of the Complaint, the working over the stop work order and three permitting violations (drainage, structural and electrical), the Plat Restrictions do not limit the Plaintiffs' ability to enforce the non-zoning sections of the Revised Code. The Defendant has admitted in his Response and Designated Evidence that he engaged in construction and land alteration at the Real Estate

without first obtaining structural, electrical, drainage and improvement location permits. (Plaintiff's Designation Ex. 2, ¶5; Ex. 4-5i; Defendant's Response, pp. 5-9; Defendant's Designation Ex. 10, ¶5). The Defendant is not exempt from the relevant provisions of the Revised Code simply because his property is zoned D-P.

As to the two zoning violations alleged in Counts 5 and 6 of the Complaint, the requirement to obtain an improvement location permit and the development standards prohibition from locating above grade structures within the aggregate twenty-two-foot side yard setbacks, both issues are specifically addressed in the Plat. (Plaintiffs' Designation Ex. 3, ¶5). The undisputed evidence clearly establishes that a twenty-five-foot-wide tiered patio and/or outdoor kitchen is located on a twenty-five-foot-wide property with a twenty-two-foot aggregate set-back (and no less than an eight-foot set-back on one side). (Plaintiffs' Designation Ex. 2, ¶3; Defendant's Response, p. 5; Defendant's Designation Ex. 10, ¶3). The development standards as defined by the Plat Restrictions would, therefore, limit the maximum width of Defendant's minor residential structure (the tiered patio and/or outdoor kitchen) to three feet. Additionally, the Plat Restrictions for the zoning district specifically state that enforcement authority is granted to, among other parties, "the Department of Metropolitan Development of Marion County, its successors or assigns." (Plaintiffs' Designation Ex. 3, ¶10). Thus, while it is conceivable that there could be disagreement as to whether the Real Estate is in violation of the Plat Restrictions, it cannot be disputed that the Plaintiffs possess the authority to enforce the Plat Restrictions. Accordingly, the Court finds that the Defendant's lack of subject matter jurisdiction argument fails.

C. Estoppel

A party arguing for the application of the affirmative defense of equitable estoppel "must show (1) a lack of knowledge as to the facts in question and of the means of acquiring that knowledge; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in position based upon the conduct of the party estopped." *Barnette v. U.S. Architects*, LLP, 15 N.E.3d 1, 10 (Ind. Ct. App. 2014). Estoppel cannot be applied if the facts are equally known by or accessible to both parties. *City of Crown Point v. Lake Cnty*., 510 N.E.2d 684, 687 (Ind. 1987). And "[a]ll persons are charged with the knowledge of the rights and remedies prescribed by statute." *Middleton Motors, Inc. v. Ind. Dep't of State Revenue*, 269 Ind. 282, 285, 380 N.E.2d 79, 81 (1978).

Additionally, equitable estoppel cannot ordinarily be applied against government entities." *Metro. Dev. Commn. of Marion County v. Schroeder*, 727 N.E.2d 742, 752 (Ind.Ct.App. 2000) (quoting *Hannon v. Metropolitan Development Commission of Marion County*, 685 N.E.2d 1075, 1080 (Ind.Ct.App.1997)). See also *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 581 (Ind.2007). "The reason behind this rule is two-fold. If the government could be estopped, then dishonest, incompetent, or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government, itself, could be precluded from functioning." *Barnette v. U.S. Architects, LLP*, 15 N.E.3d 1, 10 (Ind. Ct. App. 2014), rehearing denied, citing *Samplawski v. City of Portage*, 512 N.E.2d., 456, 459 (Ind. Ct.App.1987). The Indiana Supreme Court has reasoned that the law "cannot be circumvented by the unauthorized acts and statements of officers, agents or staff of the various departments of our state government." *Middleton Motors, Inc. v. Ind. Dept. of Revenue*, 380 N.E.2d 79, 81 (Ind. 1978).

Nevertheless, estoppel may still be appropriate where the party asserting estoppel presents clear evidence that it has detrimentally relied on a governmental entity's affirmative assertions or its silence where there was a duty to speak. *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n*, 758 N.E.2d 34, 39 (Ind. 2001). However, this statement should be tempered by the fact that Indiana courts remain reluctant to apply equitable estoppel against the government unless the elements of equitable estoppel are present, and it is in the public interest to apply the doctrine. *Cablevision of Chicago v. Colby Cable Corp.* 417 N.E.2d 348, 354 (Ind. Ct. App 1981).

Concerning the public interest portion of the analysis, a successful estoppel defense requires the identification of an "articulable public policy reason" for estoppel that is superior to the interests served by the general rule that estoppel should be denied in cases involving the government. *Samplawski v. City of Portage* 512 N.E.2d 456, 459 (Ind. Ct. App. 1987). In undertaking this inquiry, the Indiana Court of Appeals has consistently found that although it does certainly serve the public interest for citizens to be able to rely upon the representations made by their public officials, such an interest is "clearly" outweighed by the interests articulated in support of the general rule denying estoppel as applied to the government. (*Id.*).

Perhaps most germane to the present matter, the weighing of competing public interests applies similarly to situations where a party has expended funds and/or may suffer economic harm based on misrepresentations made by the government. *Advisory Board of Zoning Appeals of the City of Hammond v. The Foundation for Comprehensive Mental Health, Inc.*, 497 N.E.2d 1089 (Ind. Ct. App. 1986). In reviewing the caselaw, there are numerous pertinent factors to be considered in undertaking this balancing test. For example, the nature and status of the party negatively impacted by the government conduct could be relevant, since the public interest

served in mitigating economic harm suffered by a private individual or business is clearly diminished in relation to the interest served protecting the well-being of entities doing work in furtherance of the public good. *Nat'l Salvage & Serv. Corp. v. Comm'r of Ind. Dep't of Envtl. Mgmt.*, 571 N.E.2d 548, 557-558 (Ind. Ct. App. 1991). In cases involving permits, the Court may give greater weight to the public interest served by instilling confidence in the citizenry that permits lawfully applied for and obtained will be honored, as opposed to situations where necessary permits were never actively pursued. (*Id*.). This distinction in magnitude is also true of circumstances where a party relies on an authoritative representation, such as an ordinance, as a basis for action, versus dependence on unauthorized representations made by a government agent, with a greater public interest being served by fostering faith in the former. (*Id*. at 557). Finally, the espoused justifications underpinning the general rule prohibiting estoppel as applied to the government are not the sole elements that may be considered on the government side of the equation. Rather, the public interest served by enforcing legislation designed to promote a wide range of laudable goals, such as safety and the preservation of aesthetics and natural beauty, may also be taken into account. *Ind. DOT v. FMG Indianapolis*, LLC, 167 N.E.3d 321, 332, (Ind. Ct. App. 2021).

A review of the designated evidence in this case exposes no dispute that the construction activity commenced prior to permits being sought by the Defendant. (Plaintiff's Designation Ex. 2, ¶5; Ex. 4-5i; Defendant's Response, pp. 5-9; Defendant's Designation Ex. 10, ¶5). However, there are certainly factual disagreements between the parties as to the timing of the stop-work orders and content of the statements made by Business and Neighborhood Services employees. (Plaintiff's Designation: Ex. 2, ¶¶9-11, 13-15; Ex. 4, ¶¶7-8; Defendant's Designation: Ex. 10, ¶¶9-11, 13-15; Ex. 11, ¶2; Ex. 12, Interrogatory No. 3-4). The Defendant claims that no stop-

work orders were served until after the construction activity was completed in July of 2017, while the Plaintiffs contend that an order was issued as early as May 24, 2017. (*Id.*). The Defendant also asserts that multiple BNS employees affirmatively indicated that no permits were required for the construction prior to its completion, while the Plaintiffs submit otherwise. (Plaintiffs' Designation: Ex. 2, ¶¶9-11; Ex. 4, ¶ 7; Defendant's Designation: Ex. 10, ¶¶9-11; Ex. 12, Interrogatory No. 3).

Though these differing accounts are noted, the designated evidence still unequivocally fails to suggest that the Defendant lacked knowledge as to the facts in question and the means of acquiring that knowledge. Paragraph 4 of Defendant's Designation Exhibit 2 states that there was familiarity regarding the zoning classification for the Real Estate and a knowledge of where the plat restrictions for the Real Estate may be found. Paragraph 9 of Defendant's Designation Exhibit 2 further states that three different city employees brought stop work orders to the Real Estate, and Paragraph 14 acknowledged receipt of the July 31, 2017, stop work orders. Additionally, the Revised Code is codified law and is available to the public at www.indy.gov and at www.municode.com. Defendant's own designated evidence includes multiple email contacts with City staff after the issuance of stop work orders and notices of violation. (Defendant's Designation Ex. 17-18). From the opposite end, there has been no evidence offered by the Defendant demonstrating that he lacked knowledge as to the facts in question and the means of acquiring that knowledge.

Regardless, the Indiana Supreme Court has recognized the "longstanding legal principle" that "presumes that citizens know the law and must obey it." *Bellweather Properties, LLC v. Duke Energy Indiana, Inc*., 87 N.E.3d 462, 467 (Ind. 2017). This principal applies equally to laws regarding land use- "[p]roperty owners are charged with knowledge of ordinances that

affect their property." *Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm'n*, 819 N.E.2d 55, 64 (Ind. 2004). In this instance, the Defendant had the same access to the pertinent ordinances as the City employees, had the means of acquiring all relevant information, and is charged with knowing the ordinances that affect his property. Accordingly, his estoppel claim fails for lack of evidence on this element alone.

However, the Defendant's estoppel argument is unconvincing for additional reasons. As it pertains to the elements of reliance and prejudicial change, the fact that the construction activity commenced before permits were pursued, and prior to the Defendant interacting with employees from the Department of Business and Neighborhood Services, undeniably cuts against his position. The photos from the May 24, 2017, inspection reveal a project that was already well underway before the City was even made aware of the Defendant's construction activity. (Plaintiffs' Ex. 4c). The Defendant quite straightforwardly admits that work started at the Real Estate more than a week before any inspector ever stepped foot on the property. (Plaintiffs' Designation Ex. 2, ¶5; Defendant's Designation, Ex. 10, ¶5). As such, if there was reliance, it cannot be that the Defendant would have never removed the old patio, declined to undertake the new project, and incurred no costs. The argument can only be that the Defendant would have modified or paused the project that he had already commenced, rather than continue down the planned construction path. In sum, the reliance argument fails because it is beyond dispute that the Defendant chose to greenlight construction activity at the Real Estate prior to doing the necessary homework, a step that he took without any identifiable influence, promises, or guidance from the Plaintiffs.

Finally, the Defendant has produced no discernible public policy reason for estoppel, let alone one that is superior to the interests served by the general rule that estoppel should typically

be denied in cases involving the government. There is no evidence that the Defendant sought guidance from the City prior to engaging in construction activity at the Real Estate or that he relied upon an authoritative representation, such as a controlling ordinance, before undertaking such action. To the contrary, the evidence clearly establishes that the construction activity commenced prior to the Defendant obtaining permits. (Plaintiff's Designation Ex. 2, ¶5; Ex. 4-5i; Defendant's Response, pp. 5-9; Defendant's Designation Ex. 10, ¶5). Moreover, the only party that would arguably suffer harm, economic or otherwise, by enforcement of the ordinances at issue are the Pecks. The public interest scale is tipped even further in the Plaintiff's favor when considering the goals espoused within the pertinent sections of the Revised Code, which include: (1) protecting the life, public safety, health and general welfare of the citizens of Indianapolis (§536-102)**;** protecting the safety, health and general welfare of the citizens of Marion County by requiring compliance with standards and practices which result in proper stormwater drainage and sediment control in the accomplishment of land alterations (§561-101); protecting and improving the quality of life in Marion County by improving the number and quality of housing options and protecting and improving strong neighborhoods (§740-102); and protecting and improving residential property values in Marion County (*Id*.).

For the reasons articulated above, the Defendant's estoppel argument fails in relation to all counts contained within the Plaintiffs' Complaint. The facts in dispute, even if resolved in the Defendant's favor, are not material, in that they could never lead to a finding under the law that the Plaintiffs are estopped from enforcing the permitting and/or zoning requirements found within the Revised Code and/or Plat Restrictions. Despite the Court's sincere feelings of compassion for the Defendant's predicament, the consequences of his choice to begin work

without performing due diligence rest with him alone, and he should receive no benefit or special treatment for his failure to know and/or follow the law.

D. Plaintiffs' Count 1: Working Over the Stop Work Order

The Plaintiffs allege under Count 1 of the Complaint that the Defendant failed to obtain the necessary drainage permit(s) required under, §561-221 of the Revised Code for land alteration occurring at the Real Estate in the form of the construction of a tiered porch. (Plaintiffs' Designation Ex. 1, pp. 4-5). Section 561-109 of the Revised Code defines land alteration as "any action taken relative to land which either: (1) changes the contour; or (2) increases the runoff rate; or (3) changes the elevation; or (4) decreases the rate at which water is absorbed; or (5) changes the drainage pattern; or (6) creates or changes a drainage facility; or (7) involves construction, enlargement or location of any building on a permanent foundation; or (8) creates an impoundment." Examples of land alteration noted in the ordinance include terracing, grading, excavating, constructing earthwork, draining, installing drainage tile, filling and paving. (*Id*.).

The Plaintiffs contend that, due to the Defendant's failure to obtain drainage permits for the land alteration, on or about May 25, 2017, a Stop Work Order was issued pursuant to §561-263 of the Revised Code, requiring all construction and or land alteration to cease until the required permits were issued. (Plaintiff' Designation Ex. 1, pp. 4-5). The Plaintiffs claim that subsequent re-inspections of the Real Estate on June 29, 2017 and June 11, 2018, revealed that work had continued over the May 25, 2017, Stop Work Order, specifically, the construction of a tiered porch and/or outdoor kitchen in violation of §561-264 of the Revised Code. (*Id*.).

Plaintiffs point to their Designated Exhibits 4-4b as evidence that stop work orders were issued to Defendant. However, there appear to be factual disagreements as to whether the stop

work orders were ever actually served on the Defendant. To be more specific, Defendant's Designated Exhibit 12, which is comprised of Plaintiffs' Response to Defendant's First Set of Interrogatories, asserts that the stop work order issued on May 25, 2017, was not posted at the Real Estate, but rather, sent to the Defendant via mail. Additionally, the Defendant claims that he never received any stop work orders prior to the completion of the land alteration. (Plaintiffs' Designation Ex. 2, ¶¶9, 11; Defendant's Designation: Ex. 10, ¶¶9, 11; Ex. 11, ¶2). No proof of service regarding the May 25, 2017, stop work order has been provided by the Plaintiffs, and there has been no evidence presented that the structure at issue would qualify as a porch.

The Court finds these factual disagreements to be material and would further highlight that §561-263 of the Revised Code requires that a copy of the stop work order must be posted on the impacted property in a conspicuous place and that one copy must be delivered to the owner of the property or his agent. Consequently, even if an order was issued and land alteration activity undertaken without a drainage permit, and even if the construction activity could be regarded as porch rather than a patio, it is not clear that the Plaintiff complied with the terms of its own ordinance regarding service and/or notice of the stop work order. Summary judgment is denied as to Count 1.

E. Plaintiffs' Count 2: Failure to Obtain a Drainage Permit

Like Count 1, the Plaintiffs contend under Count 2 that the Defendant failed to obtain the necessary drainage permit(s) required under §561-221 of the Revised Code. The exact allegations are that on or about May 24, 2017, an inspection of the Real Estate revealed land alteration, as defined by §561-109 of the Revised Code, including but not limited to the construction of a tiered porch, at the Real Estate without first obtaining a drainage permit, which the Plaintiffs contend to be a violation of §561-221 of the Revised Code. (Plaintiffs' Designation

Ex. 1, p. 5). It is also asserted that re-inspection of the Real Estate on or about June 29, 2017, and June 11, 2018, revealed that the violation persisted in the form of the completed or nearly completed construction of a tiered porch and/or outdoor kitchen, without first having obtained the required drainage permit. (*Id*.). Per the Complaint, the Defendant was alleged to have been issued an initial notice of violation for the failure to obtain a drainage permit for the land alteration at the Real Estate on July 3, 2017, with a second notice of violation being issued for the same reason on June 11, 2018. (*Id*.). As of October 12, 2018, the Plaintiffs allege no drainage permit had been issued and the violation remained uncorrected. (*Id*.).

The definition of land alteration provided under §561-109 of the Revised Code includes activity such as terracing, grading, excavating, constructing earthwork, installing drainage tile, filling and paving. Based on the evidence presented by the parties, it would appear the land alteration activity at issue could not be accurately characterized as the construction of a tiered porch, but rather, the construction of a tiered patio. (Plaintiffs' Designation: Ex. 2, ¶¶2-3, 5, 12; Ex. 4-4e; Ex 5b; Ex. 5d; Ex. 5g; Ex. 5i; Defendant's Response, p. 5; Defendant's Designation Ex. 10, ¶¶2-3, 5, 12; Ex. 11, ¶5). Although definitional guidance concerning these two types of structures is found within the zoning portion of the Revised Code, rather than the chapter related to drainage and sediment control, it is clear that patios and porches are distinct from one another. Section 740-202 of the Revised Code defines a "porch" as being an enclosed or unenclosed structure, supported from the ground and *attached to or a part of a building*, while a "patio" is considered a hard-surfaced area accessory to the primary structure. In this particular case, the designated evidence clearly depicts a structure or combination of structures distinct in character from a porch, in that the construction at issue is not attached to, nor part of, any building. (Plaintiffs' Designated Evidence: Ex. 4c-4d; Ex. 5b; Ex. 5d; Ex. 5g; Ex. 5i).

However, Plaintiffs' Complaint uses "including but not limited to" language, and also refers to the construction of an outdoor kitchen. Upon review of the evidence, it is abundantly clear, and beyond dispute, that an outdoor kitchen**,** which would necessarily include the paver surface on which it was erected**,** was in fact constructed at the Real Estate. (Plaintiffs' Designation: Ex. 4-4e; Ex. 5b; Ex. 5d; Ex. 5g; Ex. 5i; Defendant's Designation: Ex. 10, ¶5; Ex. 11, ¶5; Ex. 20). It is further obvious that grading and/or terracing activity was completed, as illustrated by the new retaining wall; the purpose of which was to create a level surface on which to fashion and/or install the outdoor kitchen and paver surface on which it rests. (*Id.*).

Defendant has admitted through his Response and Designated Evidence that he engaged in construction activity and land alteration at the Real Estate without first obtaining permits. (Defendant's Response, pp. 5, 8; Defendant's Designation: Ex. 10, ¶5; Ex. 11, ¶5). In fact, the evidence establishes that the only permits issued for Defendant's 2017 project were applied for and issued after this litigation commenced. (Plaintiffs' Designation Ex. 4, ¶¶10-12). It is also evident that the construction of the outdoor kitchen fits within the definition of land alteration as defined by the §561-109 of the Revised Code.

In that the Court has already ruled that the Defendant's affirmative defenses are inapplicable to the present case, and there is no dispute concerning the material facts that land alteration activity was completed at the property, in the construction of an outdoor kitchen, without the necessary drainage permit(s), the Court grants the Plaintiffs' Motion for Summary Judgment as to Count 2.

F. Plaintiffs' Count 3: Failure to Obtain a Structural Permit

Count 3 of the Plaintiffs' Complaint alleges that, on or about July 31, 2017, inspection of the Real Estate found that the Defendant was in violation of §536-201(a) of the Revised Code for engaging in the construction of a tiered patio and/or outdoor kitchen that exceeds thirty (30) inches above finished grade without the required structural permit. (Plaintiffs' Designation Ex. 1, p. 6). It further asserts that stop work orders were issued to the Defendant on the same July date, with notices of violation being issued subsequent to inspections occurring on April 26, 2018, and August 17, 2018. (*Id*.). The Plaintiffs allege that as of October 12, 2018, no structural permit had been issued and the violation remained uncorrected. (*Id*.).

Section 536-201 of the Revised Code prohibits a person from engaging in the construction, demolition, or removal of structures unless a written building permit has been issued by the division of construction and business services, and each day that an offense continues constitutes a separate violation. Per §536-111 of the Revised Code, a structure is defined as "that which is built or constructed, such as…any piece of work artificially built up or composed of parts formed together in some definite manner, or any part thereof." Construction, as delineated in the Revised Code, can include the following: the erection or assembly of any part of a Class 2 structure at the site where it will be used; work undertaken to alter, remodel, rehabilitate, or add to any part of a Class 2 structure; or work undertaken to relocate any part of a Class 2 structure. (*Id*.). One or two-family residential structures are regarded as Class 2 structures. (*Id*.).

While generally all construction activity requires a building permit, §536-201(b) of the Revised Code provides exemptions to the permitting requirement for certain construction-

related activities as applied to Class 2 structures. For example, §536-201(b)(4) licenses "ordinary maintenance and repair." This phrase encompasses "construction commonly accomplished in or on an existing structure for the purpose of preventing deterioration or performance deficiencies, maintaining appearance, or securing the original level of performance." (*Id*.). By its unambiguous terms, this definition does not cover the deconstruction and/or complete rebuild of an entire structure, even if the footprint and features were to be completely identical, or "like for like" in materials, appearance, and performance. Rather, it refers to activities performed on an ***existing structure***, such as caulking windows, painting, pointing brick, sandblasting masonry, replacing broken glass, or patching a roof. (*Id.*). Consequently, there is no "like for like" exception found within §536-201(b) that could be applicable to the present case.

However, there are additional permitting exemptions outlined within §536-201(b), including: the erection of retaining walls that do not support a surcharge and do not exceed four (4) feet in height as measured from the lowest finished grade to the top of the wall; the erection of structures that do not exceed one hundred twenty (120) square feet of base area, are less than fifteen (15) feet in height, are not placed on or attached to a permanent foundation, and do not contain an electrical power distribution system, heating system, space heating equipment, cooling system, or space cooling equipment; and the erection or installation of a fence or structural barrier in conformance with zoning requirements. Perhaps most relevant to this case, there is also an exception to the permitting requirement concerning the erection or installation of a deck where no part of the floor is more than thirty (30) inches above finished grade. (*Id*.).

Despite this exemption, the Court needs to clarify that there is no general exception to the permitting requirement for structures built at or below grade, nor is their language within the Revised Code indicating that the results of construction activity occurring at or below grade cannot be regarded as a structure. Again, §536-111 of the Revised Code defines the term "structure" broadly, encompassing all that is built or constructed, and the exemptions contained within §536-201(b) have no bearing on this general definition. Rather, they merely constitute a list of exemptions to the permitting requirement.

At this point, the Court must acknowledge that the Plaintiffs Complaint alleges that the Defendant constructed a tiered patio, while the exception noted in §536-201(b)(15) is focused on exclusively on decks. Although the definitions of what constitute a patio or deck are not outlined within Chapter 536 of the Revised Code, Chapter 740 of the Revised Code provides some guidance**.** Section 740-202 defines a deck as being a "ground-supported, unenclosed, accessory platform structure….designed and intended for the recreational enjoyment of the occupants and guests of the primary structure or use," while a patio is regarded as a "hard-surfaced area accessory to the primary structure…of which the horizontal area is at grade level with at least one side open to the weather and essentially unobstructed to the sky…specifically designed and intended for the recreational enjoyment of the occupants and guests of the primary structure." Thus, even though the structures may be regarded as related, in that they are accessory in nature and designed for recreational use and enjoyment, decks are platform structures, whereas patios are constructed at grade level.

Based on these definitions, in concert with the common understanding of the terms, the reference within Plaintiffs' Complaint to the patio structure being thirty (30) inches above

finished grade is problematic. This is because there is no specific mention of patios or outdoor kitchens, at least based on height relative to finished grade, contained within §536-201(b) of the Revised Code. Furthermore, the Plaintiffs' Complaint makes broad reference to the tiered patio and/or outdoor kitchen structure(s) being more than 30 inches above finished grade, without drawing a distinction between the floor of the structure(s) and the pertinent component parts or features. Since the exemption noted in §536-201(b)(15), does not it concern itself with anything other than the height of the structure's *floor* relative to the finished grade, the vertical stature of any retaining walls, counters, fire pits, and/or rails would be irrelevant to the consideration. Moreover, in that the definition of a patio as articulated above, indicates that the horizontal areas are by their very nature at grade level; meaning, the floor area of a structure cannot rise above grade level and still retain the status of a patio, it is impossible to see how the Plaintiffs could be entitled to judgment as a matter of law as to the violation alleged in their complaint.

Nonetheless, the Plaintiffs must be taking the position that there is no distinction between the two types of structures, and that the Court should treat the terms "patio" and "deck" as being synonymous. If this is in fact the position of the Plaintiffs, the Court declines to subscribe to such a viewpoint. The Plaintiffs are obligated to meet their burden as to the allegations outlined within the Complaint, and they would have to prove that the construction of a tiered patio or outdoor kitchen in excess of thirty (30) inches without a structural permit constitutes a violation of §536-201(a) of the Revised Code. While there might be potential violations at the Real Estate regarding the lack of a building permit, such as, for the construction of the retaining wall, whether based on height relative to finished grade or due to its support of a surcharge, the overall footprint or size of the structure(s), or the presence of structural barriers, the Plaintiffs' failed to specify such violations in the Complaint.

In considering the designated evidence as to this count, it must solely be determined whether there is a material dispute of fact regarding the height of the patio relative to the finished grade, and if no disagreement exists, whether the Plaintiffs are entitled to judgement as a matter of law. This position stems from the recognition that the Defendant unquestionably engaged in construction activity in building a new tiered patio and/or outdoor kitchen without first obtaining a structural building permit. Defendant has admitted as much in his Response and Designated Evidence. (Defendant's Response, pp. 5, 8; Defendant's Designation: Ex. 10, ¶5; Ex. 11, ¶5). Plaintiffs have further provided undisputed evidence that the only permits issued for Defendant's construction activity were applied for and issued after this litigation commenced. (Plaintiffs' Designation, Ex. 4, ¶¶10-12).

It is the conclusion of the Court, that the Plaintiffs are unable meet their burden. While the Plaintiffs have provided evidence that the patio structure and/or outdoor kitchen measured at least thirty (30) inches above grade, they cannot establish that they are entitled to judgment as a matter of law at this time. (Defendant's Designation Ex. 12, Interrogatory No. 12-13). Precisely stated, the exemption contained within §536-201(b)(15), that the Plaintiffs' Complaint so plainly tracks, does not address patios or outdoor kitchens, but decks. Further, it does not address the height of counters, fire pits, or retaining walls, but focuses solely on the height of a deck *floor* relative to finished grade. The Plaintiffs have not articulated how, independent of the inapplicable exemption language, it is a violation of 536-201(a) to construct a tiered patio and/or outdoor kitchen in excess of thirty (30) inches above finished grade. Consequently, the Court denies the Plaintiffs' Motion for Summary Judgment as to Count 3.

G. Plaintiffs' Count 4: Failure to Obtain an Electrical Permit

Count 4 of the Plaintiffs' Complaint alleges that, on or about July 31, 2017, inspection of the Real Estate found that the Defendant was in violation of §536-201(a) of the Revised Code for engaging in the installation of electrical service to an exterior patio and/or outdoor kitchen without first obtaining the required electrical permit. (Plaintiffs' Designation, Ex. 1, pp. 6-7). It further asserts that stop work orders were issued to the Defendant on the same July date, with notices of violation being issued subsequent to inspections on April 26, 2018, and August 17, 2018. (*Id.*). The Plaintiffs maintain that as of October 12, 2018, no electrical permit had been issued and the violation remained uncorrected. (*Id.*).

As stated previously, §536-201(a) of the Revised Code prohibits a person from engaging in construction activity unless a written building permit has been issued. The installation of electrical service to a Class 2 structure fits within the definition of construction activity as defined by §536-111 of the Revised Code; and there is no exemption to the permitting requirement contained within §536-201(b) of the Revised Code for engaging in the installation of electrical service to an exterior patio and/or outdoor kitchen. Therefore, the only matter to resolve as to Count 4 is whether there are material facts in dispute regarding whether the Defendant installed electrical service to the new patio and/or outdoor kitchen structure(s) without first obtaining a permit.

As to this question, there are no facts in dispute. The designated evidence establishes that the Defendant did install electrical service to both a tiered patio structure and an outdoor kitchen (Plaintiffs' Designation: Ex. 4d; Ex. 5, ¶7; Ex. 5b; Ex. 5d; Ex. 5g; Ex. 5i; Defendant's Designation: Ex. 8, pp. 22-23, 27-28; Ex. 12, Interrogatory No. 14). Plaintiffs have also provided

uncontroverted evidence that the only permits issued for Defendant's 2017 project were applied for and issued after this litigation commenced. (Plaintiffs' Designation Ex. 4, ¶¶10-12). Whether electrical may have been present in some other incarnation of a prior patio at roughly the same location is irrelevant. (Defendant's Designation, Ex. 11, ¶ 1). The patio and retaining wall were *rebuilt* by the Defendant's own admission, and a new kitchen area was added. (Plaintiffs' Designation: Ex. 4d; Ex. 5, ¶7; Ex. 5b; Ex. 5d; Ex. 5g; Ex. 5i; Defendant's Designation: Ex. 8, pp. 22-23, 27-28; Ex. 10, ¶5; Ex. 11, ¶5; Ex. 12, Interrogatory No. 14; Ex. 20). This entails that the Defendant's installation of electrical to the patio and/or kitchen would not qualify as ordinary maintenance and repair of an existing structure, even if some of the same wiring was used. Rather, it would be regarded as the addition of electrical to a new structure.

As articulated earlier, the Defendant's affirmative defenses are inapplicable to the present case, as are the exemptions outlined in §536-201(b) of the Revised Code. Additionally, there is no dispute concerning the material facts that the construction activity, in the form of the installation of electrical service to an exterior patio and/or outdoor kitchen was completed at the property without the required electrical permit. Accordingly, the Court grants the Plaintiffs' Motion for Summary Judgment as to Count 4.

H. Plaintiffs' Count 5: Failure to Obtain an Improvement Location Permit

Count 5 of the Plaintiffs' Complaint alleges that the Defendant failed to obtain an improvement location permit when one was required by the terms and provisions of the Zoning Ordinance. (Plaintiffs' Designation, Ex. 1, pp. 7-8). More specifically, it is asserted that an inspection of the Real Estate, on or about July 31, 2017, revealed the erection or construction of a minor residential structure, specifically a patio exceeding eighteen (18) inches in height,

without first obtaining an improvement location permit in violation of §740-1005.A.2 of the Revised Code. (*Id*.). The Plaintiffs' Complaint further contends that on July 31, 2017, a stop work order was issued to the Defendant and posted at the Real Estate, with a notice of violation following on August 1, 2017, for the failure to obtain an improvement location permit regarding the erection or construction of a minor residential structure, a patio exceeding eighteen (18) inches in height. (*Id*.). It is also claimed that a re-inspection of the Real Estate on or about April 26, 2018, revealed that the violation remained, with a citation being issued on the same date for the failure to obtain an improvement location permit in violation of §740-1005.A.2 of the Revised Code. (*Id*.). Several months later, on August 17, 2018, it is alleged that an additional re-inspection of the Real Estate found the violation remained uncorrected, constituting a second and/or subsequent violation in a twelve-month period. (*Id*.). Finally, the Plaintiffs contend that as of October 12, 2018, no improvement location permit had been issued for the patio construction, and that the violation remained uncorrected. (*Id*.).

Section 740-1005A.2. of the Revised Code makes it unlawful for any person who is the owner of real property located within Marion County to fail to obtain an improvement location permit when one is required by the terms and provisions of the Zoning Ordinance. Section 740-801 of the Revised Code requires that no structure shall be located, erected, altered or repaired upon any land within Marion County, Indiana, until the owner of the property has applied for and obtained an improvement location permit. There are certain delineated exemptions to this requirement found within §740-801.A.3. of the Revised Code, including the erection of minor residential structures that extend less than 18 inches above grade level, excluding handrails. Per §740-202 of the Revised Code, "minor residential structures" are defined as "structures that are subordinate and secondary to the primary residential use of a property, such as…porches,

decks or patios 18 inches or greater in height….and other accessory buildings or structures similar and comparable in character to these uses." Moreover, the rules of construction contained within §740-201 of the Revised Code direct that the term "structure" includes *any part* of the relevant structure. Finally, as far as applicable definitions are concerned, Section 740-202 of the Revised Code defines grade level as "the lowest point of elevation of the finished surface of the ground, paving or sidewalk and similar surface improvements." (*Id*.).

As stated in prior sections of this Order, the evidence is undisputed that the Defendant, engaged in the creation of a new tiered patio at the Real Estate, and that relevant permits for Defendant's 2017 project were only applied for, and issued, after this litigation commenced. (Plaintiffs' Designation: Ex. 2; Ex. 4; Ex. 4d; Ex. 5; Ex. 5c; Ex. 5d; Ex. 5g; Ex. 5i; Defendant's Designation: Ex. 8; Ex. 10; Ex. 12; Ex. 20). Once again, the tiered patio structure at issue, inclusive of the retaining wall, was not subjected to routine maintenance and repair, but was rather, *rebuilt* by the Defendant's own admission. (Plaintiffs' Designation Ex. 2, ¶5; Defendant's Designation: Ex. 10, ¶5; Ex. 11, ¶5; Ex. 20).

Plaintiffs have established that there is no genuine issue of material of fact, shifting the burden to Defendant to establish the existence of material facts in dispute. Defendant has provided no such evidence. Defendant argues that the Plat Restrictions apply only to "above grade" structures, which they contend constitutes a material issue of fact that precludes the granting of Plaintiffs' Motion for Summary Judgment. However, interpretation of the law, including the meaning of the Plat Restrictions, is a matter of law, not of fact.

The terms "above grade", and "structure" are not defined within the Plat Restrictions, but the Revised Code does provide guidance concerning these definitions. As outlined earlier, per

§740-202 of the Revised Code, a "structure" is identified as "a combination or manipulation of materials to form a construction, erection, alteration or affixation for use, occupancy, or ornamentation, whether located or installed on, above, or below the surface of land or water, and whether permanently affixed to the ground, temporary, or mobile…" Most relevant to the present case, the Revised Code defines "minor residential structures" as "structures that are subordinate and secondary to the primary residential use of a property, such as…porches, decks or *patios*..." (*Id.*). A basic review of these definitions reveals that a tiered patio and/or outdoor kitchen would qualify as structures. For one thing, patios are explicitly spelled out as a type of structure; while an outdoor kitchen could undeniably be characterized as a construction formed by a combination or manipulation of materials located or installed on the surface of land. Furthermore, there is nothing within the Revised Code to suggest that at or below grade construction would fail to qualify as a structure. Quite the opposite, §740-202 clearly indicates that the definition of a structure includes construction located or installed "on, above, or below the surface of land or water." Legal conclusions to the contrary are immaterial. (Defendant's Designation Ex. 5, pp. 13-15).

There is no specific definition for "above grade" provided within the Revised Code. However, the meaning of this term is not difficult to determine, even without having to resort to an extensive analysis of the rules of statutory interpretation. Section 740-202 of the Revised Code defines grade level as "the lowest point of elevation of the finished surface of the ground, paving or sidewalk and similar surface." This would denote that "above grade" means something that is higher than, or in excess of, the lowest point of elevation of the finished surface of the ground or paving.

Yet, for the sake of thoroughness, the Court will further note that if the law is silent on a definition, the rules regarding statutory interpretation require that words are to be given their plain and ordinary meaning. City ordinances are construed under the interpretive principles applicable to statutes. *Hauck v. City of Indianapolis*, 17 N.E.3d 1007, 1014 (Ind. Ct. App. 2014), trans. denied. Under the "cardinal rule" of statutory construction, courts must ascertain the legislative body's intent by giving effect to the plain and ordinary meaning of the language it used. Id. In determining that plain and ordinary meaning, courts must "consider the structure of the statute as a whole." *ESPN, Inc. v. Univ. Of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (2016). Courts avoid selective readings that lead to "irrational and disharmonizing results," as Indiana courts will not presume that legislatures intended their language to be applied illogically or in a manner that brings about an unjust or absurd result. *Id.*

Merriam-Webster's online dictionary does not define "above grade" but does define "grade" as such: the degree of inclination of a road or slope; a datum or reference level. www.Merriam-webster.com. Merriam-Webster's thesaurus also provides guidance for determining the meaning of "grade:" the degree to which something rises up from a position level with the horizon. https://www.merriam-webster.com/thesaurus/grade. Applying the dictionary definition and the synonyms for the word "grade," it is clear that the plain and ordinary meaning of the term "above grade" in the context of Defendant's construction is something that rises above or sits upon the natural level or slope or the pre-existing level of the land. Defendant's construction is not just a simple paver patio sitting atop the ground. It is, rather, a paver patio with a retaining wall, seating walls, and kitchen-type counters and other fixtures that rise above the ground exceeding thirty (30) inches as measured by the inspector. (Plaintiffs' Designation: Ex. 2; Ex. 4; Ex. 4d; Ex. 5; Ex. 5d; Ex. 5g; Ex. 5i; Defendant's

Designation: Ex. 8; Ex. 10; Ex. 12; Ex. 20). And as §740-201 of the Revised Code reminds us, the term "structure" includes *any* part of the relevant structure.

Employing the rules of statutory interpretation and giving the plain and ordinary meaning to words, the work completed by the Defendant constitutes above grade construction that is in violation of 740-1005.A.2 of the Revised Code. To break this down further, patios greater than 18 inches in height are unambiguously designated as minor residential structures by §740-801A.3. of the Revised Code. Thus, the only evidence that the Court need consider for purposes of this count, is that pertaining to the height of the tiered patio, which would be inclusive of *all* parts of the structure.

There is no need to make this determination as to height more complicated than necessary. Any layperson could review the inspection photos depicting the Real Estate, when taken in concert with additional undisputed pieces of the designated evidence and reach the undeniable conclusion that the tiered patio structure is more than eighteen (18) inches above grade level in several aspects. The retaining wall clearly extends more than a foot and a half above the finished grade of the lower-level portion of the tiered patio and/or rises more than 18 inches above the natural level or slope or the pre-existing level of the land. (Plaintiffs' Designation: Ex. 4d; Ex. 5; Ex. 5b-5d; Ex. 5g; Ex. 5i; Defendant's Designation Ex. 12, Interrogatory No. 12-13). In this scenario, the Court wants to make it plain that the pavers comprising the lower-level patio surface are regarded as constituting the grade or grade level; at least relative to the retaining wall, as they are the lowest point of elevation of the finished surface of the ground and/or paving. Moreover, the outdoor kitchen and walls, inclusive of the

counter area, are without question more than 18 inches above the floor pavers constituting the finished grade of the upper-level patio. (*Id*.).

To summarize, there are no disputed material facts suggesting that the height of the Defendant's tiered patio extends less than eighteen (18) inches above grade level. Accordingly, the Court finds that the tiered patio constitutes a minor residential structure as defined by §740-202 of the Revised Code. Moreover, because this minor residential structure is a patio that extends at least eighteen (18) inches above grade level, it is does not qualify for an exemption to the permitting requirement found within §740-801A.3. of the Revised Code. To the contrary, it is subject to the obligation delineated in of §740-801A.2. of the Revised Code that an improvement location permit be obtained for the location and/or erection of the tiered patio on the Real Estate. Finally, since the Defendant failed to obtain an improvement location permit prior to the erection of the tiered patio, he is, as a matter of law, in violation of §740-1005A.2. of the Revised Code.

Summary Judgment is granted for Plaintiff as to Count 5.

I. Plaintiffs' Count 6: Failure to Comply with Use-Specific Standards and Zoning District Development Standards

Count 6 of Plaintiffs' Complaint contends that the Defendant violated §740-1005.A.8 of the Revised Code for failing to comply with use specific standards and zoning district development standards. (Defendant's Designation Ex. 1, pp. 8-9). Specifically, inspection of the Real Estate, on or about July 31, 2017, is alleged to have revealed the location, erection or construction of a minor residential structure, described as a tiered patio and/or outdoor kitchen, within the side-yard setback. (*Id*.). The Plaintiffs' Complaint asserts that the structure was

located within the eight-foot side and twenty-two-foot aggregate side-yard setback articulated within the governing language of the 79-Z-107 Plat Restrictions. (*Id*.). The placement of such a structure within the side-yard setback would establish a §740-1005.A.8. violation. (*Id*.). The Complaint further states that on August 1, 2017, a Notice of Violation was issued to Defendant in regard to the aforementioned allegations. (*Id*.). A re-inspection of the Real Estate on April 26, 2018, is claimed to have revealed that the 740-1005.A.8 violation remained uncorrected, with a citation being issued on the same date for the aforesaid violation. (*Id*.). An additional inspection of the Real Estate on August 17, 2018, was said to have found the that violation still remained uncorrected. (*Id*.). And lastly, Count 6 declares that the Defendant has failed to admit or deny the violation according to the provisions of Chapter 103 of the Revised Code. (*Id*.).

The Court notes initially, that it has already spelled out its conclusions and reasoning for finding that the Defendant's tiered patio fits within the definition of an above grade minor residential structure. As established in the designated evidence, Defendant has admitted that the construction at issue is located within the side yard set-back as established by the Plat Restrictions, stating that the property is twenty-five feet wide and the patio is twenty-five wide. (Plaintiffs' Designation Ex. 2, ¶¶2, 3, 5; Defendant's Response, p. 5; Defendants Designation, Ex. 10, ¶¶2, 3, 5). Furthermore, Plaintiffs have presented undisputed evidence that the Defendant's tiered patio and/or outdoor kitchen was constructed above grade. More precisely, Plaintiffs' evidence indicates that the patio was measured to be over eighteen (18) inches in height and in excess of thirty (30) inches above finished grade. (Plaintiffs' Designation Ex. 5a; Defendant's Designation Ex. 12, Interrogatory No. 12-13). The inspection photos taken at the Real Estate also unquestionably depict a tiered patio structure that is more than eighteen (18) inches above grade, with both the retaining wall and outdoor kitchen extending more than a foot

and a half above the applicable grade. (Plaintiffs' Designation: Ex. 4d; Ex 5b; Ex. 5d; Ex. 5g; Ex. 5i).

Plaintiffs have established that there is no genuine issue of material of fact, shifting the burden to Defendant to establish the existence of material facts in dispute. Defendant has provided no such evidence. More specifically, Defendant has provided no evidence that the structures at issue are less than eighteen (18) inches above grade. Since the tiered patio is an above grade minor residential structure located in the side yard setback, as prohibited in the governing Plat Restrictions, the Defendant is, as a matter of law, in violation of §740-1005.A.8 of the Revised Code for failing to comply with use specific standards and zoning district development standards.

Summary judgment is granted for Plaintiff as to Count 6.

J. Defendant's Counterclaim 1: Due Process

Plaintiffs' Motion for Summary Judgment also seeks judgment in their favor on the two counts of Defendant's Counterclaim. Count 1 of Defendant's Counterclaim alleges that his due process rights have been violated. (Counterclaim, pp. 7-8). To assert a due process claim, a party must demonstrate: (1) state deprivation of life, liberty, or property; and (2) the absence of notice and an opportunity to be heard. *Matthews v. Eldridge*, 42 U.S. 319, 332-33 (1976). Defendant's counterclaim does not identify what interest he has been deprived of—life, liberty, or property—but alleges only generally that he has been "deprived…of their right to due process of law." (*Id.* at ¶57). Assuming the alleged deprivation is that of property, no such deprivation has occurred as Defendant still has his tiered patio/outdoor kitchen/new retaining wall, nearly five and a half years after construction was completed.

The designated evidence presented by Plaintiffs demonstrates that Defendant was given notice and an opportunity to be heard. It is undisputed that no later than July 31, 2017, Plaintiffs provided notice of the need for permits for the construction activity at the Real Estate. (Plaintiffs' Designation: Ex. 2, §14; Ex. 5-5h). The stop-work orders, notices of violation and citations include not only the contact information for the department and the particular inspector who issued the notice but also the precise code citation that Defendant is alleged to have violated. Defendant's own Designated Evidence provides confirmation of the opportunity to be heard on this matter. Dozens of emails were exchanged between Defendant and City staff regarding both the violation and the eventual permitting process. (Plaintiffs' Designation: Ex. 4; Ex. 4-f; Ex. 4h; Ex. 4j; Defendant's Designation: Ex. 5; Ex. 18). Additionally, Defendant applied for a modification of the Plat Restrictions, a petition that was slated for hearing until Defendant withdrew the petition. (Plaintiffs' Designation Ex. 7-7c). Plaintiffs have presented evidence that Defendant has suffered no deprivation as the construction still exists and notice and opportunity to be heard were provided. Defendant has not presented any evidence of a disputed material fact to the contrary.

Finally, at the October 5, 2022, hearing on Plaintiffs' Motion for Summary Judgment, Defendant conceded that the due process claim is not yet ripe, as Defendant has not suffered any deprivation. As such, the Court grants summary judgment for Plaintiff as to Count 1 of Defendant's Counterclaim.

L. Defendant's Counterclaim 2: Equal Protection

Count 2 of Defendant's Counterclaim alleges that his equal protection rights have been violated by the Plaintiffs attempts to enforce setbacks and other zoning and construction regulations at the Real Estate, that are not enforced with respect to other properties in the Geist

Harbor subdivision. (Counterclaim, p. 8). Defendant does not allege that he is a member of a protected class, so his claim must be analyzed as a "class-of-one" claim. A class-of-one claim requires proof that (1) the state irrationally treated the claimant differently, (2) from others similarly situated, and (3) without a rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

Plaintiffs argue that Defendant has not alleged any facts in this claim that, if true, would lead to a finding of that he was treated any differently from a similarly situated person. "[A] court need not accept as true any conclusory, non-factual assertions or legal conclusions." *Ankeny v. Governor of State of Indiana*, 916 N.E.2d 678, 681 (Ind.Ct.App. 2009). The only evidence that Defendant has been treated differently is the assertion of Raymond Peck that he has "personally observed multiple Geist waterfront homes that are [sic] patios and retaining walls nearly identical to mine – all of which predated my patio. In talking with several of the owners, I have learned that the City has made no attempt to enforce zoning ordinances against them." (Defendant's Designation Ex. 11, ¶6). Mr. Peck's statement is the type of conclusory, non-factual assertion that cannot support an equal protection claim.

Noticeably absent from this statement are the names of the property owners with allegedly similar patios and retaining walls, the addresses of the relevant properties, and a statement indicating whether these properties are within the boundaries governed by the Plat Restrictions. There are also no facts provided regarding the dimensions of the other patios and retaining walls, the location of these structures relative to the governing set-backs, and whether these structures are above grade. Further, there has been no evidence designated pertaining to whether the construction of these patios and retaining walls would have required the owner to obtain similar permits or variances at the time of their construction, and if so, whether the

necessary permits and variances were not obtained. In sum, Defendant has presented no actual evidence of other patios, retaining walls, or outdoor kitchens being constructed in violation of the Revised Code and/or evidence of similar violations having been ignored by the Plaintiffs.

Additionally, planning staff declining to support a land use petition being presented for approval to an administrative board is not sufficient evidence, even for summary judgment purposes, that anyone has acted vindictively or that the government employees deliberately sought to deprive Defendant of equal protection of the law for reasons of a personal nature unrelated to the duties of those employees. (Defendant's Response, p. 20; Defendant's Designation Ex 1, pp. 8-9). The same is true of assertions that a particular City employee was unaccommodating concerning a continuance request, terse in an individual communication, and ungregarious in neglecting to knock on the front door to speak with the Defendant during a trip to the Real Estate. (Defendant's Designation Ex 1, ¶¶ 7-9).

Plaintiffs' Designation Exhibits 4g, 4i, and 4k consist of the improvement location, drainage and structural permits issued to Defendant by Plaintiffs. Plaintiffs have presented evidence that several of its employees in different departments attempted to assist the Defendant in an effort to (a) allow Defendant time to seek a modification of the Plat Restrictions and (b) ultimately obtain permits. (Plaintiffs' Designation: Ex. 4; Ex. 5; Ex. 7-7c). Defendant has failed to provide any evidence to the contrary. Regardless, Defendant has failed to designate any actual evidence that she was treated differently from others similarly situated and that such treatment was without a rational basis. As such, Defendant has failed to make the necessary showing regarding her equal protection claim, and summary judgment is granted for Plaintiffs as to Count 2 of Defendant's Counterclaim**.**

IV. ORDER

BASED ON THE ABOVE FINDINGS AND CONCLUSIONS, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment is GRANTED as to Counts 2, 4, 5, and 6 of Plaintiffs' Complaint, and DENIED as to Counts 1 and 3 of Plaintiffs' Complaint. Plaintiffs' Motion for Summary Judgment is further GRANTED as to all counts of Defendant's Counterclaim.

IT IS FURTHER ORDERED that the parties are to appear for a Status Conference on January 25, 2023, at 10:00 a.m., at Marion Superior Court D04, in-person, at the Community Justice Center, 675 Justice Way, Indianapolis, Indiana.

SO ORDERED ADJUDGED AND DECREE THIS 28th DAY OF DECEMBER 2022.

Travis G. Sandifur, Magistrate
Marion Superior Court, Civil Division
Room 4

Distribution:

All Parties