

**STATE OF NORTH CAROLINA**  
**COUNTY OF WAKE**

**IN THE GENERAL COURT OF JUSTICE**  
**SUPERIOR COURT DIVISION**  
**10-CVS-019930**

**BRIAN CECCARELLI, TIMOTHY  
CASPERSON, PAUL D. METTERS and  
LORI MILLETTE,**

**Plaintiff,**

**v.**

**TOWN OF CARY,**

**Defendant.**

**ORDER**

On April 25, 2011 Defendant Town of Cary's motion to dismiss Plaintiffs' Complaint was called to be heard and was heard during the April 25, 2011 motions session by the Honorable Carl R. Fox, Superior Court Judge Presiding. Plaintiffs were represented by Paul Stam, Jr. and Caroline Nickel and the Defendant was represented by Elizabeth A. Martineau. After reviewing the Complaint, the applicable North Carolina General Statutes and Session Laws, after listening to the arguments of counsel, and after reviewing the post hearing proposed orders and submissions presented by the parties, this Court finds as follows:

1. Plaintiffs' Complaint alleges that each Plaintiff received a Notice of Violation of Cary Town Code Section 34-303 sometime between 2008 through 2010. (Complaint "Cmpl." ¶¶ 19, 31, 32.)
2. Plaintiff's Complaint asserts that Mr. Ceccarelli exhausted his administrative appeals. (Cmpl. ¶ 22.)
3. Plaintiff's Complaint does not allege or assert whether or not Plaintiffs Casperson, Metters, or Millette exhausted their administrative appeals. (Cmpl.)
4. Town of Cary Code Sections 34-301 through 34-305 of Article X Automated Traffic Control Systems was attached to Plaintiffs' Complaint as Exhibit A.
5. Section 34-305 states, "[a] notice of appeal shall be filled within 30 calendar days after the mailing date of the notification of the violation. The failure to give notice of appeal within this time period shall constitute a waiver of the right to contest the violation. Appeals shall be heard through a nonjudicial administrative hearing process by a panel established by the town."
6. Counsel for Plaintiffs asserted and clarified during the course of the April 25, 2011 hearing on this motion that the Complaint was not intended to assert, and did not assert, either a negligence claim or a claim for constitutional violations against the Defendant.
7. Counsel for Plaintiffs have asserted and clarified that Plaintiffs are attempting to state a claim that each Plaintiff's receipt of their Notice of Violation of Town of Cary Code Section 34-303 was "void and unenforceable in that they are beyond the scope of and violative of the Town of Cary's enabling authority under the General Statutes, its charter, or other law as applied to the Plaintiff and the Plaintiff class." (See Prayer for Relief, Cmpl. p. 5.)
8. During the hearing for this matter, attorneys for the Plaintiffs affirmed that neither Mr. Casperson nor Metters had appealed their Notice of Violation as allowed under Town of Cary Code, Section 34-305, but that they had just discovered and understood that Ms. Millette had appealed within the time allowed under Town of Cary Code, Section 34-305.

9. This Court finds that it has subject matter jurisdiction over Mr. Ceccarelli's claim and further finds that Plaintiff Ceccarelli has stated a claim upon which relief can be granted. As such Defendant's motion to dismiss Mr. Ceccarelli's claim is denied.
10. This Court finds that Mr. Casperson and Mr. Metters failed to exhaust their administrative remedies under Town of Cary Code, Section 34-305 and, as such, this Court lacks subject matter jurisdiction over their claims and their claims should be dismissed with prejudice.
11. This Court finds that it would be proper to dismiss Ms. Millette's claim without prejudice to allow her to re-file if she can show she did in fact appeal within the time allowed under Town of Cary Code, Section 34-305.

WHEREFORE the Court hereby enters the following Order:

1. That Defendant's Motion to Dismiss Plaintiff Ceccarelli's claim is hereby DENIED;
2. That Plaintiffs Casperson and Metters' claims are DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction; and
3. That Plaintiff Millette's claims are DISMISSED WITHOUT PREJUDICE, for lack of subject matter jurisdiction. Plaintiff Millette may re-file her claim within the time allowed if she can show that she has exhausted her administrative remedies under Town of Cary Code, Section 34-305.

This \_\_\_\_\_ day of May, 2011.

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The Honorable Carl R. Fox  
Superior Court Judge Presiding