

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

**BRIAN CECCARELLI and LORI
MILLETTE individually and as class
representatives,**

Plaintiffs,

v.

TOWN OF CARY,

Defendant.

**DEFENDANT TOWN OF CARY'S BRIEF
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

NOW COMES the Town of Cary ("Town"), by and through its attorneys, and hereby submits this brief in support of its Motion for Summary Judgment and its Rule 60 motion for reconsideration. The Town submits that there is no genuine issue of material fact preventing the entry of judgment for the Town, and that the only remaining issues in this case are statutory interpretation questions of law for the Court. The Town is entitled to judgment as a matter of law on all of Plaintiffs' claims, both individually and as class representatives.

I. Introduction:

Plaintiffs, individually and as class representatives, seek a declaratory judgment from the Court declaring that the application of the Town of Cary Code for the civil enforcement of Town Code § 34-303 by use of a traffic control photographic system [also referred to as "Red Light Camera" system or program] and the collection of civil fines is void and unenforceable because the Town's Red Light Camera program violates the applicable enabling statute and its own Town Charter. (Amended Complaint p. 5.) Defendant contends that the interpretation of the applicable enabling statute and its Codes and Charter are statutory questions of law for the Court. Since there are only questions of law remaining for the Court, the Town contends that as a matter of law it acted through its Town Code, as authorized by its Charter and the corresponding enabling authority and, therefore, it is entitled to summary judgment on all of Plaintiffs' claims.

II. Procedural History of the Case:

Original Plaintiffs Ceccarelli, Casperson, Metters, and Millette first filed a Complaint against the Town on November 30, 2010 in Wake County Superior Court. The Town filed a motion to dismiss for failure to state a cause of action, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Town also contended that the yellow light change interval duration times (“Yellow Times”) requirements pled by Plaintiff and contained in Session Law (SL) 2001-286 were changed by SL 2004-141 and were no longer applicable to the matter before the Court. The Town also moved to dismiss the Complaint for lack of personal jurisdiction for some plaintiffs for failure to exhaust their administrative remedies. The Town’s motion to dismiss was heard on April 25, 2011 and an Order regarding said hearing was executed by Judge Carl Fox on June 3, 2011 (See Judge Fox’s Order.) During the course of the hearing, Plaintiffs’ counsel clarified their position that the Complaint was not intended to assert, and did not assert, either a negligence claim or a claim for constitutional violations against the Town. (Judge Fox Order, ¶ 6.) The Order clarified that Plaintiffs’ Complaint alleged only claims that “each Plaintiff’s receipt of their Notice of Violation of the 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 Plaintiff class.’” (Judge Fox Order, ¶ 17.)

Thereafter on November 2, 2011 the Town filed a motion for summary judgment on Mr. Ceccarelli’s claims, at the time the only claims still pending before the Court. On December 2, 2011 Plaintiff Ceccarelli caused to be filed a motion to amend his Complaint and a motion for class certification. Plaintiff Ceccarelli also filed a motion to amend his Complaint to add Ms. Millette (whose original claim was dismissed without prejudice) back as a Plaintiff and to add a

third claim for relief and additional plaintiffs associated with said third claim. A hearing was held on or about December 12, 2011 in front of the Honorable Judge Ridgeway. At the hearing for the Town's motion for summary judgment, counsel for Plaintiff Ceccarelli proffered to the Court in opposition to the Town's motion and the Town's submission of a traffic engineering expert affidavit from Greg Fuller, P.E. in support of the Town's position that the Yellow Times shown on the Signal Plans of record complied with the MUTCD, that the Plaintiff would have expert testimony at the close of the discovery refuting the Town's position that the Town complied with the requirements set forth in the applicable enabling statute. Based at least in large part upon that proffered testimony, Judge Ridgeway denied the Town's motion for summary judgment.

The hearing on the remaining motions was continued to on or about January 10, 2012. Thereafter the Court granted in part and denied in part Plaintiff's motion to amend his complaint, allowing the amendment to add only the second claim for relief reinstating Ms. Millette as a Plaintiff. Thereafter on June 19, 2012 the Court granted Plaintiffs' motion for class action certification. Presently before the Court is the Town's (1) motion for reconsideration or relief from this Court's earlier order denying Defendant's motion for summary judgment on Ceccerelli's claims; and (2) motion for summary judgment on Plaintiff Millette's claims and all class claims. All parties consented to having these motions heard on December 19, 2012.

III. The Amended Complaint:

By leave of the Court, on April 26, 2012 Plaintiffs Brian Ceccarelli and Lori Millette, individually and as class representatives caused to be filed an Amended Complaint. Said Amended Complaint alleges the following common allegations against the Town;

- Pursuant to S.L. 2001-286 (as amended by S.L. 2003 -380), the Town of Cary adopted ordinance Sec. 34-303 entitled “offenses” (hereinafter “the Ordinance”) as part of Article X of the Cary Town Ordinances entitled “Automated Traffic Controls Systems” (hereinafter “Article X”) on May 26, 2005. (Plaintiffs’ Amended Complaint [“Cmpl.”] ¶ 3.);
- On March 11, 2004, the Town of Cary adopted ordinance Sec. 34-303 entitled “offenses” (hereinafter “the Ordinance”) as part of Article X of the Cary Town Ordinances entitled “Automated Traffic Control systems” (hereinafter “Article X”). (Cmpl. ¶ 4.)
- On April 27, 2006, the Town of Cary adopted ordinance TC -06-007 entitled “Ordinance Adopting Revisions to the Town Charter of the Town of Cary, North Carolina” (hereinafter “the Charter”). (Cmpl. ¶ 5.)
- Article VII, Section 8.15 of the Charter mandates that any traffic control photographic system operated by the Town of Cary meet the requirements established by the North Carolina Department of Transportation. Section 8.15(e) states:

The duration of the yellow light change interval at intersections where traffic control photographic systems are in use may be no less than the yellow light interval duration specified in the Design Manual developed by the Signals and Geometrics Section of the North Carolina Department of Transportation [hereinafter “the NCDOT”]. (Cmpl. ¶ 6.).
- The Ordinance makes it unlawful for a vehicle to cross the stop line into an intersection toward which a red light camera is in operation when the traffic

signal for that vehicle's direction of travel is emitting a steady red light. (Cmpl. ¶ 7.)

- *Any violation of the Ordinance is a civil violation for which a civil penalty of \$50.00 is assessed by the Town of Cary. (Cmpl. ¶ 8.)*

Additionally, Plaintiffs' Amended Complaint, in its First Claim for Relief asserts:

- *On November 6, 2009 at 09:27 PM Plaintiff Ceccarelli drove his vehicle east bound on Cary Towne Blvd Crossing its intersection with Convention Drive. (Cmpl. ¶ 11.)*
- *The duration of the yellow light change interval at the intersection of Cary Towne Blvd and Convention Drive was shorter than required by the Manual from the beginning of operation of the Automated Traffic Controls System at this intersection in February 2004 until the NCDOT Traffic Signal Plan was superseded on March 19, 2010. (Cmpl. ¶ 15.)*
- *The operation of the Automated Traffic Control system and the enforcement of the Ordinance by the Defendant with respect to this intersection was conducted in an arbitrary and capricious manner and in violation of the law from February 2004 until March 19, 2010. (Cmpl. ¶ 17.)*

Thereafter, Plaintiffs' Second Claim for Relief asserts as follows:

- *On May 7, 2010 at 05:18 PM Plaintiff Millette was traveling North on Kildaire Farm Road and turned left at the intersection of Kildaire Farm Road and Cary Parkway. (Cmpl. ¶ 24.)*
- *The left turn yellow light arrow durations are determined using the assumption that vehicles turning left will be traveling at 20-30 mph. (Cmpl. ¶ 26.)*

- *The Defendant uses the NCDOT's methodology and plans, which in the case of these left turns is arbitrary and capricious for the yellow light duration for left turning divers where there is a yellow turn arrow. (Cmpl. ¶ 32.)*

Additional allegations relevant to the certified class include in part:

- *There exists a class which includes the above-named Plaintiffs and all others similarly situated who were issued similar notices of violation and paid the civil penalty of \$50 and are subject to the Ordinance and the penalties imposed thereby. (Cmpl. ¶ 34.)*
- *The Town of Cary has and will unlawfully obtain the penalties from the named Plaintiff [sic] and the unnamed class members through the operation of its Ordinance. The Town of Cary is obligated to refund fully all of the penalties to the named Plaintiffs and unnamed class members with interest. The named Plaintiff [sic] and the unnamed class members are entitled to a refund of any penalties as in an action for money had and received or other action for return of unlawfully obtained or collected moneys. (Cmpl. ¶ 38.)*

Finally, Plaintiffs seek the following relief from this Court:

- *Enter a judgment declaring that the application of the Ordinance to these named Plaintiffs and the unnamed Plaintiff similarly situated and the penalties imposed thereunder are 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. (Cmpl. p. 5.)*

IV. Class Certification Order:

The Court's order certifying the Plaintiffs class was entered on June 19, 2012. Pertinent parts of the order that shed light on the causes of actions and claims before the Court are as follows:

- *Plaintiff Ceccarelli asserts that the traffic plan that he contends was inaccurate was used until March 2010, and that this inaccuracy caused the duration of the yellow light to be less than the interval specified by the N.C. Department of Transportation and/or the Town Charter, and therefore, the utilization of automated traffic control photographic systems by the Defendant at the intersection of Cary Towne Boulevard and Convention Center Drive was unlawful. (Order Granting Plaintiffs' Motion for Class Certification ["Class Cert. Order"] ¶ 5.)*
- *Plaintiffs, in their second claim for relief, claim that on May 7, 2010, Plaintiff Millette was traveling north on Kildaire Farm Road and turned left at the intersection of Kildaire Farm Road and Cary Parkway. This intersection has an automated traffic control photographic system installed by the Defendant. Plaintiff asserts that the posted speed limit for the relevant portion of Kildaire Farm was 45 mph. (Class Cert. Order ¶ 6.)*
- *Plaintiffs further assert that the duration of the left turn yellow light arrow for the above-described intersection was determined using the assumption that vehicles turning left would be traveling 20-30 mph. Plaintiff contend that this assumption is not consistent with sound engineering principles and that it is not consistent with the interval specified in the NCDOT Design Manual, and that therefore, the utilization of automated traffic control photographic system by the Defendant at*

the intersection of Kildaire Farm Road and Cary Parkway, and other similar intersections, was unlawful. (Class Cert. Order ¶ 8.)

The Court certified the following classes of Plaintiffs.

- *The class for the First Claim for Relief (Ceccarelli) shall be those persons who were assessed a civil penalty for violation of Cary Ord. § 34-303 at the intersection of Cary Towne Boulevard and Convention Drive from December 2, 2009 through March 2010. The inclusive dates are on or after the date that Ceccarelli gave notice of appeal of his citation until the yellow light interval duration at the intersection was changed. (Class Cert. Order p. 6, ¶ 2.)*
- *The class for the Second Claim for Relief shall be those persons who were assessed a civil penalty for violation of Cary Ord. § 34-303 between August 1, 2010 through the date of trial while making a left turn maneuver at the same type of intersection complained of by Plaintiff Millette, specifically:*
 - (i) Traveling westbound on Maynard Road & turning left onto Kildaire Farm Road;*
 - (ii) Traveling westbound on Cary Parkway & turning left onto Kildaire Farm Road;*
 - (iii) Traveling northbound on Kildaire Farm Road & turning left onto Cary Parkway;*
 - (iv) Traveling northbound on Cary Parkway & turning left onto High House Road; and*
 - (v) Traveling southbound on Walnut Street & turning left onto Meeting Street.*

The inclusive dates are August 1, 2010 through the date of trial. The inclusive date commences are on or after the date that Millette gave notice of appeal of her citation.

(Class Cert. Order pp. 6-7, ¶ 3.)

V. The Applicable Statutes Involved in this Case - The Enabling Statute and Town Ordinance Authorizing the Town to Implement its Red Light Camera Program:

The Town of Cary, pursuant to N.C. Gen. Stat. § 160A is a municipal corporation located in Wake County, North Carolina. The Town operated a traffic control photographic system during the relevant times mentioned in Plaintiff's Amended Complaint through August 18, 2012 (the date the Town ended its Red Light Camera program.) The Town did not profit from its Red Light Camera program and the clear proceeds were paid to the Wake County school fund under N.C. Gen. Stat. § 160A-300.2. Mr. Ceccarelli and Ms. Millette each received their civil citation for running a red light pursuant to the Red Light Camera program.

The enabling statute passed by the North Carolina General Assembly (and signed into law by the Governor) that authorized the operation of Cary's Red Light Camera program is N.C. Gen. Stat. § 160A-300.2, as amended by SL 2001-286, SL 2003-380, and SL 2004-141 [hereafter "the Enabling Statute"]. Pertinent sections of the Enabling Statute state:

(b) Any traffic control photographic system or any device which is part of that system, as described in subsection (a) of this section, installed on a street or highway which is part of the State highway system shall meet requirements established by the North Carolina Department of Transportation.

(d) Municipalities may adopt ordinances for the civil enforcement of G.S. 20-158 by means of a traffic control photographic system, as described in subsection (a) of this section¹.

¹ N.C. Gen. Stat. § 20-158. Vehicle control signs and signals states:

(a) The Department of Transportation, with reference to State highways... are hereby authorized to control vehicles:

(3) At intersections and other appropriate places, by erecting or installing steady-beam traffic signals and other traffic control devices, signs, or signals.

(b) Control of Vehicles at Intersections.-

(2)When a traffic signal is emitting a steady red circular light controlling traffic approaching an

Additionally Session Law 2004-141, enacted in 2004, amended the requirement for the yellow light duration (also referred to as “Yellow Time”) as stated in S.L. 2001-286. Session Law 2004-141 states in part:

The duration of the yellow light change interval at intersections where traffic control photographic systems are in use shall be no less than the yellow light change interval duration on the traffic signal plan of record signed and sealed by a licensed North Carolina Professional Engineer in accordance with Chapter 89C of the General Statutes, and shall be in full conformance with the requirements of the Manual on Uniform Traffic Control Devices.

(S.L. 2004-141 § 3) (emphasis added.)

The applicable local law(s) authorizing the Town’s Red Light Camera program, adopted by the State Legislature or General Assembly pursuant to the actual Enabling Statute relevant to this case (N.C. Gen. Stat. § 160A-300.2, as amended by S.L. 2001-286, S.L. 2003-380, and S.L. 2004-141), allow municipalities in Wake County, such as the Town of Cary, to enact ordinances for the civil enforcement of N.C. Gen. Stat. § 20-158. The Town’s corresponding ordinances are found in the Cary Code of Ordinances; Sections 34-301 *et. seq.* (“Code”). The Code, under § 34-303 (titled “Offense”), makes it unlawful for a vehicle to cross the stop line at a system location when the traffic signal for the vehicle’s direction is emitting a steady red light. Through the applicable Enabling Statute, the Code provides that “any violation of § 34-303 shall be deemed a noncriminal violation for which a civil penalty of \$50.00 shall be assessed.” Code § 34-304. Provisions under this section (i.e., § 34-301 *et. seq.*) of the Code allow for an appeals process upon receipt of the notification of a violation. Failure to appeal within thirty calendar days will result in the waiver of the right to contest the violation. Code § 34-305.

Additionally, upon its effective date of July 1, 2004, SL 2004-141 (as a local act), became part of the Town of Cary’s Charter as a matter of law. See N.C. Gen. Stat. § 160A-(1) *et*

intersection, an approaching an intersection, an approaching vehicle facing the red light shall come to a stop and shall not enter the intersection.

seq. (See also Sue Rowland Affidavit [“Aff.”] Exs. A-B.) Pursuant to N.C. Gen. Stat. § 160A-(1) et seq., a municipal charter consists of “the entire body of local acts currently in force applicable to a particular city...”

As authorized by its Charter and Section 34-301 *et seq.* of the Town Code, the Town utilized traffic control photographic systems for certain through and left turn movements at those intersections and directions which have been certified by this Court. All the intersections that are subject to this Court’s class certification order are located within the Town, but are in fact owned by the State of North Carolina. (Gene G. Murr, Jr., PE. Affidavit [“Murr Aff.”] ¶¶ 4, 15; Fuller Deposition [“Fuller Dep.”] p. 71:19, 75:25, 80:13; Greg Fuller, P.E. Affidavit dated November 1, 2011] [“Fuller 2011 Aff.”] ¶¶ 7-8.) Because the intersections in question are State owned intersections, the Enabling Statute requires that any traffic control photographic system, “shall meet requirements established by the North Carolina Department of Transportation.” N.C. Gen. Stat. § 160A-300.2, as enacted by SL 2001-286, and as amended by SL 2003-380, SL 2004-141 (and later amended by SL 2010-132).

V. NCDOT Owns the Intersections in Question and Is Responsible for Determining the Appropriate Yellow Times for the official NCDOT Signal Plans of Record:

Pursuant to N.C. Gen. Stat. § 20-158(a), the North Carolina Department of Transportation (“NCDOT”) is authorized by the State Legislature to control vehicles on State highways. Through this statutory power, NCDOT requires every signalized State owned intersection to have an official Signal Plan of Record which is kept by NCDOT. (Fuller November 2011 Affidavit [“Fuller 2011 Aff.”] ¶¶ 3, 6.) The NCDOT official Signal Plan of Record dictates, among other things, the Yellow Times for each intersection. (Id.) NCDOT is responsible for reviewing and approving NCDOT Signal Plans of Record for State owned

intersections. (Fuller 2011 Aff. ¶ 3.) Finally, NCDOT prohibits municipalities, including the Town of Cary, from deviating from the Yellow Times specified on the NCDOT Signal Plan of Record for State owned intersections that are, nonetheless, located within that municipality. (Fuller 2011 Aff. ¶ 13.)

The NCDOT Signals and Geometrics Section, beginning in 1995, produced NCDOT Traffic Management & Signal Systems Unit Design Manual (“Design Manual”). (Murr Affidavit “Aff.” ¶ 18.) The purpose of the Design Manual, according to its terms was to present “commonly used design practices. It also serves as a format to present new design standards and practices, and to ensure more uniformity in the design of traffic signal plans prepared for the Signals and Geometrics Section. (Murr Aff., Ex. M.) The Introduction section also states, “Given the dynamic climate of the engineering field, standards and practices covered within the Manual may change as time passes. This Manual will require adjustment, additions, and deletions to keep abreast of improved technology resulting from research and experience.” (Murr Aff. Ex. M.)

Additionally, the Institute of Transportation Engineers (“ITE”), an international educational and scientific association of transportation professional engineers, publishes practices and other publications about traffic signal engineers. (Fuller Affidavit dated December 10, 2012 [“Fuller 2011 Aff.”] ¶ 4.) The ITE has published various formulas as a guideline for use in determining yellow and red clearance times. See ITE Traffic Engineering Handbook (6th Ed.). This Handbook contains a formula for calculating Yellow Times that is used by traffic signal engineers across this country, including North Carolina. (Fuller 2012 Aff. ¶ 5; Fuller Dep. Ex I; Moon Dep. Ex. I,) The “ITE Formula” is:

$$Y = t + [v/(2a+2Gg)]$$

where:

Y = yellow clearance interval (sec)

t = reaction time (typically 1 sec.)

v = design speed (ft./sec.)

a = deceleration rate (typically 10 ft./sec.²)

g = acceleration due to gravity (32.2 ft./sec.²)

G = grade of approach (percent/100, downhill is negative grade)

ITE Handbook (6th Edition).²

In 2004, at the request of NCDOT, the North Carolina Section of ITE formed a task force ["Task Force"] to investigate and make recommendations for implementing a statewide practice for determining Yellow Times and all red clearance times that would be used at all North Carolina signaled intersections. The Task Force was compiled of dozens of licensed practicing traffic engineers from private engineering firms and from state and local traffic engineers. (Fuller 2012 Aff. ¶ 6; Moon Affidavit ["Aff."] ¶¶ 16 -18.) (A copy of the Task Force's recommendation is contained as Exhibit B to Fuller 2012 Affidavit.) Part of the Task Force's recommendation was for the continued use of 20 mph as a left turn design speed in the formula used for calculating dedicated left Yellow Times. (Ex B, Fuller 2012 Aff.)

After the Task Force came out with its recommendations, the ITS & Signals Unit of NCDOT adopted the recommendations, and they went into effect on or about August 1, 2005. (Fuller 2012 Aff. ¶ 9.) Thereafter the ITS & Signals Unit published its suggested formula for

² In 1991 the ITE Formula published guidance was :

$$y=t = \frac{v}{2a+2Gg}$$

where the driver perception/ reaction time was recommended to be 1 second. See *Determining Vehicle Change Intervals: A proposed Recommended Practice*, ITE 1985.

determining yellow change intervals and all-red times in Section 5.2.2, Change and Clearance Intervals of the Signals and Geometrics Section, Traffic Engineering and Safety Branch, NCDOT. (Id.)

The Yellow Change Interval formula in Section 5.2.2 is:

Yellow Change Interval

$$\text{Yellow interval} = t + \frac{v}{2a + 64.4g}$$

t = perception reaction time, typically 1.5 seconds
v = design speed*, in ft/s
a = deceleration rate, typically 11.2 ft/s²
g = grade

Round up to nearest 0.1 second.

Minimum yellow change interval is 3.0 seconds.

Additionally, relevant notes state:

Notes

- *Design speed is the speed limit unless a speed study determines that the 85th percentile speed is faster or intersection geometrics compel vehicles to traverse the intersection slower.
- **The purpose of a stakeholder discussion is to provide advance notification and involvement to stakeholders and provide an opportunity to consider possible countermeasures.
For most left turn lanes, assume a speed of 20 mph (32 kph) to 30 mph (48 kph). For locations with unusual conditions a higher or lower speed may be appropriate.
For separate left turn phases, calculate yellow and red intervals.
For left turns without a separate phase, calculate yellow and red times for both the through movement and the left turn movement. Use the highest yellow and enough red to equal the highest total time.

(Section 5.2.2., Ex. C, Fuller Aff.) This formula formed the basis for the engineering practice used by the licensed professional engineers who signed and sealed the Signal Plans of Record at issue in this case after July 2005. For any Signal Plan of Record from before 1995, it was the general practice to use the version of the ITE formula that was then in effect, using a 1 second

perception reaction time. See *Determining Vehicle Change Intervals: A proposed Recommended Practice*, ITE 1985.

VI. Mr. Ceccarelli and Ms. Millette receive Civil Citations for Violating Town Code 34-303.

On November 6, 2009 at approximately 9:27 P.M., Mr. Ceccarelli was traveling eastbound on Cary Towne Boulevard going towards the on ramp for Interstate 40. (Ceccarelli Deposition [“Ceccarelli Dep.”] p. 53. lines 5-9 and Ex. 2.) Mr. Ceccarelli had traveled on this section of the roadway hundreds of times and was familiar with this intersection and the yellow light durations at this intersection. (Ceccarelli Dep. pp. 53 -45.) At his deposition Mr. Ceccarelli testified that he first saw the light turn yellow when he was between 260 and 290 feet away from the intersection. (Ceccarelli Dep. p. 57, line 6-9.) There were no vehicles behind him and he was not distracted and was able to see the exact moment when the light went from green to yellow. (Ceccarelli Dep. pp. 57-56.) Ceccarelli did not do anything to attempt to slow down when he first saw the light. (Ceccarelli Dep. p. 58.) He testified that he believed he would have had to slam on the brakes in order to stop. (Id.) He also knew that if he made the decision to go through the intersection, there were no other vehicles around that would have interfered with him. (Id.) Mr. Ceccarelli made the decision not to stop, but to instead speed up and travel through the intersection at 50 mph. (Ceccarelli Dep. pp. 56-67.)

Mr. Ceccarelli believes that at the time he first saw the yellow light, he was at the exact spot in the road that traffic engineers call a Type I “dilemma zone.” (Ceccarelli Dep. p. 59:9-25, 60:1.) A true Type I dilemma zone is “a space in the roadway on an approach to an intersection where a driver in that space has no chance to get stopped before crossing the stop bar at the onset of a yellow and has no chance to proceed past the stop bar before the yellow ends and that is to stop or proceed according to their capabilities (Hummer Deposition “Dep.” p. 10:5-11.) As Mr.

Ceccarelli recognized at the time he gave his deposition, it is the rare driver that gets caught in a true Type 1 dilemma zone at the time the traffic signal first turns yellow.

One has to arrive at the intersection at the particular moment to experience a shortness. Generally speaking, 99.9 percent of time one is never in this particular predicament [being in a true Type I dilemma zone]...but I was in that precarious position where I didn't know do I have the time or do I not have the time.

(Ceccarelli Dep. p. 54.)

Mr. Ceccarelli received a citation for violation of Cary Town Code § 34-303. Mr. Ceccarelli paid his fifty dollar civil penalty and appealed his violation on December 2, 2009. An appeals panel affirmed his violation on January 20, 2010.

On May 7, 2010 Ms. Millette was traveling from a Harris Teeter toward her home, located in the Town of Cary. (Millette Deposition ["Millette Dep."] p. 9.) Her route of travel to the intersection in question was to travel on Kildaire Farm Road and turn left onto Cary Parkway. (Millette Dep. pp. 9-10.) She was traveling in generally rush hour traffic. (Millette Dep. p. 12.) She was familiar with that intersection and had made the same left turn maneuver hundreds of times. (Millette Dep. p. 12.) Ms. Millette testified that she went up to the light when it was flashing yellow. (Millette Dep. p. 11.) She stated she "slowed down and waited for the traffic to clear so I could proceed to turn left, and I recall seeing the lights flash, the camera and thinking I did not have enough time to get through that intersection without the light turning red and the cameras flashing." (Millette Dep. p. 11.) Ms. Millette does not recall how fast she was going, how far she was in the turning lane when she first saw the light turn yellow, or whether she was stopped at the intersection prior to turning. (Millette Dep. 16, 17, 19, 20.) Even though her civil citation clearly shows that the light was red prior to Ms. Millette entering the intersection, Ms. Millette testified that she believed the light was *in fact* yellow when she entered the intersection. (Millette Dep. 21, Ex 1-2.)

VII. Legal Standard for Summary Judgment:

Summary judgment is appropriate and should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. R. Civ. P. 56(c). The Plaintiffs have filed an action pursuant N.C. Gen. Stat. § 1-253 *et. seq.* seeking declaratory judgment. “Summary judgment may be appropriate in a declaratory judgment action, under the same rules applicable in other actions.” Geitner v. Mullins, 182 N.C. App. 585,589 (2007) (*citing Floyd v. Integon Gen. Ins. Corp.*, 152 N.C. App. 445, 448 (2002)). Furthermore, typically only questions of law are appropriate to be determined under the declaratory judgment act. Strickland v. Town of Aberdeen, 124 N.C. App 430, 432 (1996).

Although an inquiry by the Court into whether there is any issue of material fact should be considered in a light most favorable to the plaintiff, the Court should grant summary judgment if the Defendant can show “that an essential element of the non-moving party’s claim does not exist, or the non-moving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which could bar the claim.” Strickland, 124 N.C. App. at 434. The Defendant Town further contends that the remaining issues are ones of statutory interpretation, and those questions are questions of law for determination by the Court. Martin v. NCDHHS, 194 N.C. App. 716, 718 (2009).

VIII. Analysis:

1. The Town’s Enforcement of Town Code Section 34-301, *et. Seq.* is in Compliance with the State Legislature’s Enabling Statute and, thus Summary Judgment for the Town is Proper.

Plaintiffs Complaint, Amended Complaint, and position throughout this litigation have failed to recognize that SL 2001-286 was amended by SL 2004-141 in 2004 and that said amendment controls the Yellow Time requirements the Town must follow under the Enabling Statute. It should be well understood that The Town of Cary, as a municipality, is a creature of the North Carolina Legislature and it can only exercise “(1) the powers granted in express terms; (2) those necessary or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation...” Kennerly v. Dallas, 215 N.C. 532, 539 (1939). A municipality’s authority to enact ordinances is subject to the limitations imposed by the constitution and any applicable enabling statute. Zopfi v. City of Wilmington, 273 N.C. 430, 434 (1968). Plaintiffs point to an outdated enabling statute when they claim that the civil violation issued by the Town was in violation of “SL 2001-286 (as amended by SL 2003-380).” In reality, the Town did not violate the applicable Enabling Statute and, as such, this Court should enter judgment for the Town.

The applicable enabling statute in this case contains the 2004 SL 2004-141 amendments that changed the Yellow Time requirements to:

The duration of the yellow light change interval at intersections where traffic control photographic systems are in use shall be no less than the yellow light change interval duration on the traffic signal plan or record signed and sealed by a traffic engineer in accordance with Chapter 89C of the General Statutes, and shall be in full conformance with the requirements of the Manual of Uniform Traffic Control Devices [“MUTCD”]

(SL 2004-141 §3(e).) The effective date of this session law was July 1, 2004.

The State of North Carolina Legislature or General Assembly expressly conferred upon certain municipalities the power to install and operate traffic control photographic systems. N.C.

Gen. Stat. § 160A-300.1³ See Shavitz v. City of High Point, 177 N.C. App. 465, 466 (holding that since 1997 certain “municipalities were legislatively imbued with the authority” to adopt ordinances “for the civil enforcement of Section 20-158(b)(2).) Following the enactment of § 160A-300.1, the North Carolina General Assembly enacted § 160A-3002, pursuant to Session Law 2001-286 (“SL 2001-286”), authorizing the use of traffic control photographic systems in Wake County. Session Law 2001-286 was amended by Session Law 2003-380 (“SL 2003-380”), Session Law 2004-141 (“SL 2004-141”), and most recently Session Law 2010-132 (“SL 2010-132.”) Prior to the enactment of SL 2004-141, the duration of the yellow light change interval was required to be “no less than” the Yellow Times specified in the Design Manual developed by the Signals and Geometrics Section of the NCDOT. (See SL 2001-286, Section 3, enacting N.C. Gen. Stat. § 160A-300.2(e).) This is the outdated standard continuously relied on by the Plaintiffs. However, the 2004 Session Law, which is the law in effect at the time of Mr. Ceccarelli’s violation, required the Yellow Times to be “no less than the yellow light change interval duration on the traffic signal plan of record” and that it be in “full conformance with the MUTCD. (SL 2004-141(e).)

2. The Yellow Times at the Intersections in Question all Meet the Yellow Time Requirements in SL 2004-141.

As this Court is well aware, a municipality’s authority to enact or amend ordinances is subject to the limitations imposed upon it by the North Carolina Legislature through passage of an enabling statute. Kieger v. Winston-Salem Bd. of Adjustment, 281 N.C. 715, 720 (1972). If the Town’s Code and its enforcement of said Code in issuing and collecting civil penalties for

³ This section applies only to the cities of Albemarle, Charlotte, Durham, Fayetteville, Greensboro, Greenville, High Point, Locust, Lumberton, Newton, Rocky Mount, and Washington, to the towns of Chapel Hill, Cornelius, Huntersville, Matthews, Nags Head, Pineville, and Spring Lake, and the municipalities in Union County. N.C. Gen. Stat. § 160A-300.1(d).

violators is in compliance with the Enabling Statue, then the Town acted lawfully and this Court should enter judgment for the Town.

There is no dispute that the Yellow Times in the field were what was shown on the official NCDOT Signal Plans of Record for each of the intersections at issue. The applicable Yellow Times as shown on the official NCDOT Signal Plans of Record for relevant time periods for each of the intersections at issue in this lawsuit are as follows:

Intersection	Date of Signal Plan	Yellow Time
Cary Towne Blvd & Convention Drive	May 31, 1991	4 sec.
Westbound on Maynard Road & turning left onto Kildaire Farm Road	June 7, 2006	3 sec.
Westbound on Cary Parkway & turning left onto Kildaire Farm Road	June 23, 2010	3 sec.
Northbound on Kildaire Farm Road & turning left onto Cary Parkway	June 23, 2010	3 sec.
Northbound on Cary Parkway & turning left onto High House Road	October 5, 2006 February 17, 2011	3 sec. 3 sec.
Southbound on Walnut Street & turning left onto Meeting Street	October 26, 2009	3 sec.

(Murr Aff., Exs. A-E, K.) Exhibits F-J, and L of Mr. Murr's affidavit are the applicable Clearance Time Sheets that each engineer used in formulating the appropriate Yellow Time.

(Fuller Dep. pp. 71 – 73; Murr Aff. Exs F-J, L.)

While Plaintiffs may try to say otherwise, there is no genuine issue of material fact as to whether the Yellow Times on the above signal plans were in full conformance with the MUTCD. (See Fuller 2011 Aff.; Murr Aff.; Moon Aff; Marceau Aff; Hummer Dep.; Hummer Aff.; Fuller Aff.) Plaintiffs' sole expert who is a licensed engineer (licensed as of April 2012) who has no traffic engineering experience testified that he had no opinion as to whether or not any of the Yellow Times referenced were in full conformance with the MUTCD, in part because that is not what he was asked to do. (Hennings Dep. pp. 114:7-13, 122).

For all class members who received their civil citations before January 15, 2010, the relevant MUTCD was the 2003 MUTCD. (See <http://mutcd.fhwa.dot.gov> indicating the effective date of the 2009 MUTCD).

Section 4D.10 Yellow Change and Red Clearance Intervals of the 2003 MUTCD states⁴:

Standard:

A yellow signal indication shall be displayed following every CIRCULAR GREEN or GREEN ARROW signal indication.

⁴ The MUTCD 2003 uses the following relevant defined terms:

- *Standard* – a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All Standard statements are labeled, and the text appears in bold type...Standards are sometimes modified by Options.
- *Guidance* – a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate... Guidance statements are sometimes modified by Options.
- *Options* – a statement of practice that is a permissive condition and carries no requirement or recommendation. Option statements sometimes contain allowable modifications to a Standard or Guidance statement.
- *Support* – an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition.
- *Engineering Judgment* – the evaluation of available pertinent information, and the application of the appropriate principles, provisions, and practices as contained in this Manual and other sources, for the purpose of deciding upon the applicability, design, operation, or installation of a traffic control device. Engineering judgment shall be exercised by an engineer, or by an individual working under the supervision of an engineer, through the application of procedures and criteria established by the engineer. Documentation of engineering judgment is not required.
- *Yellow Change Interval* – the first interval following the green or flashing arrow interval during which the steady yellow signal indication is displayed.

The exclusive function of the yellow change interval shall be to warn traffic of an impending change in the right-of-way assignment.

The duration of a yellow change interval shall be predetermined.⁵

Guidance:

A yellow change interval should have a duration of approximately 3-6 seconds. The longer intervals should be reserved for use on approaches with higher speeds.

Option:

The yellow change interval may be followed by a red clearance interval to provide additional time before conflicting traffic movements, including pedestrians, are released.

(MUTCD, 2003 p. 4D8-4D-9)

All of the evidence in this case shows that the Yellow Times were in “full conformance with the requirements of the (MUTCD). (See Fuller 2011 Aff.; Murr Aff.; Moon Aff; Marceau Aff; Hummer Dep.; Hummer Aff.; Fuller Aff.; Hennings Aff. p. 117:1-6.) Each North Carolina engineer who signed and sealed the relevant official NCDOT Signal Plan of record was a North Carolina licensed engineer. Each used a Clearance Time Sheet to calculate and predetermine the appropriate yellow time for each signal and, thus the times were predetermined. While not a required standard, all relevant Yellow times also comply with the Guidance of being between 3-6 seconds. All traffic or traffic signal engineers who have looked at the relevant Signal Plans and Clearance Time Sheets in question universally hold the opinion that the Yellow Times in question were in full conformance with the requirements of the MUTCD. (Id.) (See also MUTCD, 2003; Ex Q, Murr Aff.)

It is anticipated that Plaintiffs may contend at the hearing on this matter that the Yellow Time at Mr. Ceccarelli’s intersection, the subject of Plaintiffs’ First Cause of Action, was not in

⁵ “Predetermined” is not a defined term. The Merriam-Webster Online Dictionary definition of “predetermine” is to determine beforehand. www.merriam-webster.com/dictionary/predetermined.

full conformance with the MUTCD. It is anticipated that the Plaintiffs will ask the Court to interpose Yellow Time requirements that are not contained in the Enabling Statute governing this case. The Court should refuse to do so under the well established rules of statutory interpretation. Marks v. Thompson, 14 N.C. App. 272, 274 (1972). The MUTCD 2003 has no requirement that the Yellow Time be calculated by using a certain formula, nor using certain values for perception/reaction time or stopping distance, nor approach speed or speed limit. See Baker v. Builders Transport, 1996 Ohio App. LEXIS 2141 (finding that a yellow signal with a Yellow Time between this traffic light was within the 3-6 seconds requirement of the MUTCD was within the standard of a reasonable engineer using accepted practices.) The MUTCD has no requirement that Signal Plans be updated based upon certain events. (NCDOT does have a policy as to when it should update an official NCDOT signal plan.⁶ But none of those factors apply to this case.) “When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and [the court] is without power to interpolate, or superimpose, provisions and limitations not contained therein.” Id. at 274.

It has long been well established that “[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” Yates v. Dowless, 93 N.C. App. 787, at 789, affirmed 325 NC 703 (1989). “Where the language of the statute is clear, the courts must give the statute its plain meaning.” Id. The primary “consideration in determining legislative intent is the words chosen by the legislature.” Parkdale

⁶ NCDOT’s policy states: *Plan Compliance with Current Practices: Federal and State design guidelines evolve and change as research provides recommended improvements to the practice of traffic engineering. Therefore prior to beginning traffic signal or roadway construction, the division traffic engineer should check the seal date of the traffic signal and electrical programming detail plans. If the plans are more than two years old or if traffic patterns have changed, the division traffic engineer should request the ITS and Signals Unit review the plans for compliance with current practices.* (Murr Aff., Ex. P.)

America, LLC v. Hinton, 200 NC App 275, 278 (2009). Additionally, “[i]n interpreting a municipal ordinance the basic rule is to ascertain and effectuate the intent of the legislative body.” Fort v County of Cumberland, 721 S.E.2d 350, **8 (N.C. App. 2012.) Only where the statutory language is ambiguous is judicial construction necessary to ascertain the legislative will.” Id. Where words of a statute are not defined, “the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used.” Id. at 279. Finally, the Court is to be guided by “the fundamental rule of statutory construction that statutes in pari material, and all parts thereof, should be construed together and compared with each other.” Martin, 194 N.C. App. at 719.

It was the North Carolina State Legislature who decided on, enacted and gave NCDOT the authority to control vehicles on State highways, which included erecting and installing traffic signals (N.C. Gen. Stat. § 20-158(a)) and enacted the Yellow Time requirements set forth in the applicable Enabling Statute (N.C. Gen. Stat. § 160A-302.2, as amended by SL 2001-286, SL 2003-380, and 2004-141.) This Court must “presume that the legislature acted with care and deliberation and with full knowledge of prior and existing law.” Yates, 93 N.C. App. at 788. If the State Legislature wanted to take authority away from NCDOT over controlling vehicular traffic on State highways or enact more demanding requirements, or require a specific formula or use of a specific engineering practice over another for Yellow Times where traffic control photographic systems were in use, it could have done so. In this case, the Legislature took out a more restrictive Yellow Time requirement and substituted a more general and lenient one. See State v. Green, 348 NC 588, 596 (1989) (holding that courts should consider earlier statutes on the same subject when determining legislative intent.)

As long as the Town acts pursuant to the authority vested to it by the North Carolina Legislature, as it did here, it acted lawfully and is entitled to summary judgment on all Plaintiffs claims, both individually and as class representatives, as a matter of law. Marks, 14 N.C. App. at 274. See also Yates, 93 N.C. App. at 788 (holding that it was error for the trial court to add additional requirements into the legislation). The Court should not write into the Enabling Statute requirements that do not exist. Yates, 93 N.C. App. at 788 (holding that it was error for the trial court to add additional requirements into a piece of legislation.)

For those certified class members who received their civil citations on or after January 10, 2010, the 2009 MUTCD would apply.

Section 4D.26 Yellow Change and Red Clearance Intervals

Standard:

A steady yellow signal indication shall be displayed following every CIRCULAR GREEN or GREEN ARROW signal indication and following every flashing YELLOW ARROW or flashing RED ARROW signal indication displayed as part of a steady mode operation. This requirement shall not apply when a CIRCULAR GREEN, a flashing YELLOW ARROW, or a flashing RED ARROW signal indication is followed immediately by a GREEN ARROW signal indication.

The exclusive function of the yellow change interval shall be to warn traffic of an impending change in the right-of-way assignment.

The duration of the yellow change interval shall be determined using engineering practices.

Support:

Guidance:

When indicated by the application of engineering practices, the yellow change interval should be followed by a red clearance interval to provide additional time before conflicting traffic movements, including pedestrians, are released.

Support:

Engineering practices for determining the duration of yellow change and red clearance intervals can be found in ITE's "Traffic Control Devices Handbook" and in ITE's "Manual of Traffic Signal Design" (see Section 1A.11).

As with the 2003 MUTCD, the 2009 MUTCD has no requirement that the Yellow Time be calculated by using a certain formula, nor using certain values for perception/reaction time or stopping distance, nor approach speed or speed limit. While the 2009 MUTCD standard does require the use of engineering practices when determining Yellow times, it does not specify what practice should be used.⁷

Additionally, with the exception of the 1991 Signal Plan, everyone in this case agrees that the Yellow Times on all other relevant plan were calculated using the engineering practices set forth in the NCSITE Task Force recommendation⁸. (See Ceccarelli Dep., George Dep., Shovlin Dep., Hummer Dep., Hummer Aff., Moon Aff, Marceau Aff., Fuller 2012 Aff Ex I.) Additionally, there is no question that the engineers who designed the Yellow Times in question all used engineering practices in making their Yellow Time decision; all used Clearance Time Sheets showing they used the traffic signal engineering practices recommended by the NCSITE Task Force and set out in Section 5.2.2., Change and Clearance Intervals of the Signals and Geometrics Section, Traffic Engineering and Safety Branch, NCDOT (“Design Manual.”) (See Fuller 2011 Aff.; Murr Aff.; Moon Aff; Marceau Aff; Hummer Dep.; Hummer Aff.; Fuller Aff.)

⁷ N.C. Gen. Stat. § 89C – 1 et seq., The North Carolina Engineering and Land Surveying Act, has the following definitions that the Court may find instructive. *Engineer* – *A person who, by reason of special knowledge and use of the mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design, acquired by engineering education and engineering experience, is qualified to practice engineering.* § 89C-3(2).

⁸ Plaintiffs contend that because the 1991 Signal Plan was calculated using a 35 mph speed limit when the lawful speed limit was actually 45 mph does not change the outcome. Plaintiffs misunderstand the North Carolina Statute that controls what is required to change in speed limit on a State owned road located within a municipality. See N.C. Gen. Stat. § 20-141. There is no evidence that at the time Mr. Peoples calculated the Yellow Times for the applicable 1991 Signal Plan that there was a posted speed limit sign on the roadway that would have lawfully increased the speed limit from 35 mph to 45 mph. (See Fuller Dep. pp 71-73 explaining how an NCDOT traffic signals engineer determines the legal speed limit when calculating clearance times.) Mr. Ceccarelli admitted that the section of the roadway at the intersection of Cary Towne Blvd and Convention Drive does not have a speed limit sign. (Ceccerelli Dep. pp. 67-68.) Such sign is required to legally raise the speed limit from 35 mph to 45 mph. (Spencer Affidavit [“Aff.”] ¶¶ 5- 9; see Granger Affidavit) (all indicating that there is no genuine issue of fact disputing that the roadway in question during the times relevant to this lawsuit on the approach of Cary Towne Blvd & Convention Drive was 35 mph.)

There is simply no evidence that any one of the NC professional licensed engineers whose name appears on these plans pulled the Yellow Time value out of a hat. They all used Clearance Time Sheets and used recognized engineering practices in determining those values. (Id.) (See also Hennings Dep. pp. 122-123, 131 testifying that use of the ITE formula and Section 5.5.5 of the Design Manual was the engineering practice used by North Carolina traffic engineers.) Finally, the very manual cited by the Enabling Statute in the 2009 edition explicitly refers to the ITE Yellow time formula and states that use of said formula constitutes an “engineering practice.” Thus how can there be any real dispute that the ITE Yellow Time formula and the recommended values therein do not constitute engineering practices.

The plain language of the Enabling Statute is clear. The Yellow Time requirements of the statute were met by the Town through enactment of its Town Code § 34-303 and through its civil enforcement of said ordinance in this case. As such, summary judgment should be entered in favor of the Town.

3. The Town of Cary’s Enforcement of Town Code § 34-303 Did Not Violate the Town’s Charter

Plaintiffs claim that the Town somehow acted in violation of its own Town Charter is absurd. First, while it is not a requirement of the Enabling Statute, or of the Town Charter or Town Code, the Signal Plans signed all comply with said Design Manual. However, even if they did not, there is no requirement in the applicable Enabling Statute or in the Town’s Charter that the Yellow Times in use at intersections where the Town of Cary operates a Red Light Camera Program be “no less than” the Yellow Times specified in the Design Manual developed by the Signals and Geometrics Section of the NCDOT.” (See outdated SL 2001-132 and compare with SL 2004-141.)

The Law is clear that upon enactment by the North Carolina Legislature of a local law that affects the Town of Cary, the local law becomes and is incorporated into the Town's Charter. As such, at all times relevant to Plaintiffs' Amended Complaint the old Yellow Time requirement contained in SL 2001-132 and that was a part of the then Town of Cary Town Charter was superseded by the new Yellow Time requirement contained in SL 2004-141. Once SL 2004-141 was passed and became effective, SL 2004-141 became part of the Town Charter and superseded reference to the old and outdated Session Law.

As a creature of the North Carolina Legislature, a municipality must comply with state legislation. A municipality may adopt ordinances as long as they comply with N.C. Gen. Stat. § 160A-174(b).

Section 160A-174(b) states in part:

A city ordinance shall be consistent with the Constitution and laws of North Carolina and the United States. An ordinance is not consistent with State or federal law when:

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulations." N.C. Gen. Stat. § 160A-174(b).

Sections 34-301 et. seq. of the Town Code is consistent with the Constitution and laws of North Carolina. The Town Code authorizes the Town to use a traffic control photographic program following the authority granted to it by the applicable Enabling Statute. (SL 2001-286, as amended by SL 2003-380, and SL 2004-141).

Plaintiffs may argue (and have argued in the past) that the written portion of the Town Charter, attached to Plaintiffs' original Complaint and Plaintiffs' Amended Complaint is the

complete Town Charter that was in force at the time the civil citations were issued. Attached as Exhibit B to Plaintiffs' Complaint was a document the Plaintiffs contended was the Town of Cary's Town Charter. Section 8.15(e) of Exhibit B was in written form as a Town document at the time of Ceccarelli's violation and referenced SL 2001-286, sec. 3(e). A Town may, but is not required to, reduce its Charter to writing and attempt to keep it updated as new local acts are enacted. See N.C. Gen. 160A-496. However, the Town's Charter as a matter of law, included SL 2004-141 once it came into effect, which superseded and replaced Section 8.15(e) of the written version of the Charter, and also included every other local act that was enacted by the North Carolina General Assembly that applied to the Town of Cary. (See N.C. Gen. Stat. § 160A-1; Sue Rowland Affidavit ["Aff.,"] certifying as Town Clerk what local acts comprised of the Town Charter.)

As understood by Ms. Rowland, Town of Cary Clerk, and as set out in North Carolina statutes, what makes up a municipal "charter" is statutory and is set forth in N.C. Gen. Stat. § 160A-1(1). A "charter" means the entire body of local acts currently in force applicable to a particular city, including articles or incorporation issued to a city by an administrative agency of the State, and any amendments thereto adopted...." *Id.* A comprehensive understanding of the above definition of "charter" requires an understanding of the term "local act." A "local act" means an act of the General Assembly applying to one or more specific cities by name, or to all cities within one or more specifically named counties. 'Local act' is interchangeable with the terms 'special act,' 'public-local act,' and 'private act,' "is used throughout this Chapter in reference to those terms, and shall mean a local act as defined in this subdivision without regard to the terminology employed in charters, local acts, or other portions of the General Statute." N.C. Gen. Stat. § 160A-1(5).

Clearly, SL 2001-286, enacting N.C. Gen. Stat. § 160A-300.2, and as amended by SL 2003-380, SL 2004-141, and SL 2010-132 are all local acts applicable to the Town of Cary. To the extent the Plaintiffs are concerned that Section 8.15(e) of the written document in Exhibit B cited to a superseded portion of the original Session Law (i.e. SL 2001-286), one must look to “the entire body of local acts currently in force” to determine what local acts constitutes a town charter as a matter of law. (See § 160A-1(1); Rowland Aff.) Once SL 2004-141 became effective, it became a local law by definition and became part of the Town of Cary’s official charter. *Id.* Thus, the Town’s enactment of Cary Code, and its enforcement of the civil penalties provided therein were in full conformance with its Charter.

4. In Any Event, this Court Must Not Allow Plaintiffs to Turn this Case into a Litmus Test on the Efficacy of Either the Formula or Values used to Determine the Appropriate Yellow Times that Appear on the Signal Plans in Question.

As this Court should be well aware, back in December 2011 the Town appeared before the Court and moved for summary judgment on Ceccarelli’s claim, which was the only claim pending before the Court at that time. At that time, the Town made many of the same arguments it is making presently before the Court. If the Court recalls, one – if not the main reason – the Court denied summary judgment was that Plaintiff maintained that it would present evidence that would contradict Mr. Fuller’s 2011 Affidavit in which he gave the expert opinion that all Yellow Times on the Signal Plans in question were in full conformance with the requirements of the MUTCD. (Fuller 2011 Aff.)

Mr. Ceccarelli, Dr. George, and Dr. Shoveling, none of whom are licensed engineers (or are qualified to give engineering standard of care opinions) have all given deposition testimony critical of the ITE Yellow Time formula and/or critical of the values used in these formulas.

(See Ceccarelli Dep., George Dep., Shovlin Dep.) Yet they do not dispute that use of the ITE Formula, and the values used therein, is the standard practice used by traffic signal engineers. Mr. Ceccarelli and Dr. Shovlin's paper, *Misapplied Physics in the International Standards that Set Yellow Light Durations Forces Drivers to Run Red Lights*, which has not been published by any recognized engineering journal and has not been peer reviewed, affirmatively recognized that the ITE Yellow Time formula is an "International Standard." Mr. Ceccarelli in his deposition admitted that the ITE Yellow Time formula is an international standard that is used "all over the world." (Ceccarelli Dep. pp. 34:8-25, 35:1.) Additionally Mr. Ceccarelli admitted that using 20 mph for the approach speed value in the ITE formula for determining Yellow Times for dedicated left turns is a traffic engineering practice used by many jurisdictions – including North Carolina, California, and Virginia. (Ceccarelli Dep. p. 43:1-20.) Dr. Shovlin testified he understood the traffic signal engineers in question did all meet the standards of care for engineers determining Yellow Times. (Shovlin Dep. 41:1-210.) He also admitted that he was not qualified to give any engineering opinion and did not review any of the Signal Plans involved in this case. (Shovlin Dep. pp. 14:23, 21:23, 40:4, 41:9.) Dr. George testified that she has no opinion as to whether or not the Yellow Times in question were in full conformance with the MUTCD. (George Aff. p. 103-1-24.) Nor does she have any opinion as to whether or not the Yellow Times were in conformance with the ITE guidelines. (George Dep. p. 89:1.) Thus Mr. Ceccarelli and Dr. Shovlin actually agree with the Town's position – that the Yellow Times at issue were calculated using engineering practices; while Dr. George has no opinion. As such, summary judgment for the Town on the issues before the Court is proper.

Opinions by Mr. Ceccarelli, Dr. Shovlin, Dr. George and/or Mr. Hennings that they have developed a better way to determine Yellow Times are not in any way relevant to the outcome of

this case. This case is not about alternative theories for determining Yellow Times. This case is about whether or not the Town of Cary acted pursuant to the Enabling Statute, its Charter, and/or its Town Code in its operation of its Red Light Camera System at the intersections in question during the times applicable to this lawsuit. See N.C. Gen. Stat. § 160A-300.2, as amended by SL 2001-286, SL 2003-380, and SL 2004-141.

Turning to Johnnie Hennings, P.E., the only professionally licensed engineer who Plaintiffs designated as an expert, his opinions are not relevant to the Court's determination in this case. Mr. Hennings admitted during his deposition that he has never practiced traffic signal engineering, he has never designed a signal plan, and-prior to this case – he had never given an opinion regarding traffic signal engineering. (Hennings Dep. pp. 12:23, 72:22-25, 80:19-25, 80:1.) He also admitted that he has never used the MUTCD to determine the appropriateness of traffic signal designs. (Hennings Dep. p. 79:-10-14.) Mr. Hennings testified that he was not asked to, and he did not analyze the Yellow Times at issue in this case to see if they complied with the requirements of the MUTCD. (Hennings Dep. p. 99:13-18.) He also had no opinion as to whether or not Mr. Ceccarelli or Ms. Millette could have stopped prior to entering the intersection on red. (Hennings dep. pp. 93:12-21, 95:1-9.) Yet Mr. Hennings agreed, based upon his research often being contacted in this case, that (1) the Yellow Time recommendations issued by the NCSITE Task Force and adopted by NCDOT (and based upon the ITE formual) was the engineering practice used in this state by traffic signal engineers and (2) that the use of 20 mph for the approach speed value in the Yellow Times formula for dedicated left turns was the engineering practice used by traffic engineers in this state. (Hennings Aff. pp. 131-132, 134-135.)

Mr. Hennings opined that he believed the ITE formula and the Yellow Time formula used by NCDOT was appropriate, but he had issue with the perception/reaction value used in those formulas. (Hennings dep. p. 154:14-25.) Mr. Hennings testified that during the course of his investigation he has come to be at odds with the guidelines used by traffic engineers and the guidelines promulgated by MUTCD. (Hennings dep. p. 152:6-8.) Mr. Hennings testified that he agreed with the use of the ITE formula (Hennings Dep. p. 154:14-25) and he also agrees with the practice of using 20 mph value for approach speed in the formula for dedicated left turns (Hennings Dep. p. 127:8-14.) Mr. Hennings disagrees with using a 1.5 second perception/reaction time value in the formula. (Hennings Dep. pp. 153:15-19, 154.) Yet earlier in his deposition Mr. Hennings admitted that there was a wide range of perception/reaction times used by practicing engineers, and that he has used 1.5 sec. perception/reaction time in his accident reconstruction practice. (Hennings Dep. 36:4-7, 37:18-22.) He testified that, “[a]nd for my industry, for an automobile accident, for day time, attentive driver, I’m not aware of any expert that routinely uses anything different than a second and a half.” (Hennings Dep. 36:4-7.) While Mr. Hennings believes traffic engineers should adopt a 2.5 second value for perception/reaction time component of the Yellow Time formula, he readily admits that the traffic engineer’s practice is to use 1.5 seconds for the value and that he is not aware of any traffic signal engineers who use his proposed 2.5 second perception/reaction time value. (Hennings Dep. p. 165:11-15, 172.) Finally, Mr. Hennings admits that if this Court adopts his opinions as to how the Yellow Times should be calculated for both through and dedicated left turn movements, these Yellow Times would often have values over the upper limit of the three to six second Guideline promulgated by both the 2003 and 2009 MUTCD. (Hennings Dep. pp. 180-183.) Mr. Hennings is at odds with the MUTCD on this issue, yet he has no understanding

of what the Enabling Statute authorizes or requires the Town of Cary to do when it operates its traffic control photographic system. (Hennings Dep. p. 158:13-17.)

As Plaintiff Ceccarelli has come to understand certain reasoning behind the Yellow Time formula and the values used therein, he has altered his criticisms of it and altered his theories of his case. Yet this Court should not allow him at this late hour to change to a theory not pled in this case or currently before the Court. (Rule 8, North Carolina R. Civ. P.) At the beginning of this litigation, Mr. Ceccarelli's main objection to the Yellow Time formula being used by North Carolina engineers was that the length of the yellow light did not give drivers enough time to stop. (See Exhibit D, *Isaac Newton v. Red Light Camera* (2011) to Plaintiff's Documents Filed in Opposition to Defendant's Motion for Summary Judgment.) However, the Yellow Time formula was not designed to allow enough time during the yellow for the vehicle who decides to stop to be able to stop while the light is still yellow. (If you decide to stop it does not matter if the light turns red before you get to the stop bar – you still stop without entering the intersection.) (Marceau Dep. & Aff.; Moon Dep. & Aff.; Hummer Dep. & Aff.)

Latter Mr. Ceccarelli objections to the ITE formula were that it does not give vehicles who are right at the breaking distance used in the formula, but who nonetheless decelerate and then decide to go through the intersection (versus deciding to stop) enough time to enter the intersection before it turns red. See Ceccarelli Dep. Ex 2, *Missapplied Physics in the International Standards that Set Yellow Light Durations Forces Drivers to Run Red Lights*. However, the physics in the formula works for how the formula is intended. (See Hummer Aff., Marceau Aff.; Fuller Aff.) The Yellow Time formula in use by traffic signal engineers all over North Carolina, and the country for that matter, was not designed to accommodate those drivers who are at the critical distance and decide to decelerate, but nonetheless go through the

intersection. (Id.) Those drivers should stop and their driving experience, over time, should tell them that that is the right choice to make. (Moon Aff.)

It is anticipated that Plaintiffs may argue that the ITE formula does not cover a high enough percentage of the driving population under all circumstances. (Hennings Dep. p. 142-143.) (Mr. Hennings opinion is that the Yellow Times used in the ITE formula and the ITE based formula contained in the Design Manual do not afford everyone – or even a very high percentage of people - in ALL circumstances enough time to enter the intersection before the yellow light turns red. (Hennings Dep. pp. 142-143.) The Court should recall, however, that there is no requirement in the Enabling Statute or the MUTCD that the Yellow Time accommodate a certain percentage of the driving public a certain percentage of time. The published exclusive function of the Yellow Time is not to allow a certain percentage of vehicles to pass into the intersection versus stopping – the sole purpose is to warn the driver that his right of way is about to end. (See MUTCD; see ITE Handbook (6th Ed.); see N.C. Gen. Stat. § 20-158(2a).)⁹ As stated above, if one was to adopt the formulas recommended by Plaintiffs or their experts, they would have Yellow Times that are outside of the Guidance set forth by both the 2003 and 2009 MUTCD¹⁰. Both the 2003 and 2009 editions of the MUTCD have Guidance recommendations that Yellow Times should be between 3 and 6 seconds. (See MUTCD 2003, 2009.) The Enabling Statute requires the Yellow Times to be in full conformance with, not at odds with, the MUTCD.

⁹ MUTCD 2003 and 2009 state, “the exclusive function of the yellow change interval shall be to warn traffic of an impending change in the right-of-way assignment.” N.C. Gen. Stat. § 20-158(2a) states, “[w]hen a traffic signal is emitting a steady yellow circular light on a traffic signal controlling traffic approaching an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow are warned that the related green light is being terminated or a red light will be immediately forthcoming.”

¹⁰ Recall “Guidance” is defined by both 2003 and 2009 MUTCD as “a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate.”

It is not the purpose of the ITE formula to accommodate all drivers in all circumstances all the time. (See Fuller 2012 Aff.; See Moon Aff.) But the Yellow Times shown on the Signal Plans in question comply with industry standards, following sound engineering practice, and most importantly works in most cases. (Fuller 2011 Aff.; Fuller Dep.; Fuller 2012 Aff.; Murr Aff.; Moon Dep., Moon Aff., Hummer Dep., Hummer Aff., Marceau Dep., Marceau Aff.) In Fact, the 2009 edition of MUTCD explicitly references the very ITE formula that forms the basis of the Yellow Time formula used by North Carolina practicing licensed traffic engineers. “Engineering practices for determining the duration of yellow change and red clearance intervals can be found in ITE’s “Traffic Control Devices Handbook” and in ITE’s Manual of Traffic Signal Design.” (Section 4D.26, MUTCD 2009.) The Yellow Times at issue in this case were calculated using the ITE Yellow Time formula; the Enabling Statute requires that the Yellow times be in full conformance with the MUTCD; and the MUTCD 2009 edition affirmatively states and gives as a support that the ITE formula is an “engineering practice” that can be used for determining Yellow Time values. (SL 2004-141, Section 4D.26 MUTCD 2009). There can be no doubt that the Town acted lawfully in issuing and collecting these civil citations by way of its Red Light Camera program for red light violations, and judgment is proper for the Town.

In contrast, all of the Town of Cary’s professional traffic engineers designated in this case agree that all of the Yellow Times on the applicable Signal Plans of Record are in full conformance with the requirements of the MUTCD. (See Moon Aff.; Hummer Dep.; Hummer Aff.; Marceau Aff.; see also Fuller 2011 Aff.; Murr Aff.) They all agree that use of the ITE formula or the use of the NCDOT ITE based formula is an accepted engineering practice. They also all agree that the use of 20 mph as the value of the approach speed for determining Yellow Times for dedicated left turn signals is also an accepted engineering practice, and they all agree

that use of 1 to 1.5 seconds of perception/reaction time is appropriate. (Id.) Clearly there is no competent evidence to challenge that the Town of Cary by utilizing Red Light Camera systems at the intersections in question was operating pursuant to the Enabling Statute, its Town Charter, and Town Code.

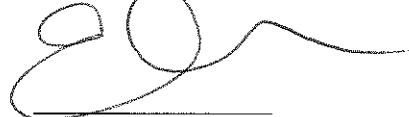
While Defendants set forth traffic engineering experts by way of both deposition testimony and affidavits to support and defend the engineering practices used by traffic signal engineers across this State and across the country, make no mistake: the efficacy of the engineering practices used is not before the Court. Defendants caution that the rules of statutory interpretation are crystal clear: one is not to “interpolate, or superimpose, provisions and limitations not contained therein.” Yates, 93 N.C. App. at 789. “It is always presumed that the legislature acted with care and deliberation and will full knowledge of prior and existing law.” Id.

IX. Conclusion:

Because there is simply no genuine issue of material fact that would prevent the Court from deciding this clear question of statutory law before it, summary judgment for the Town is proper and should be granted.

This 17 day of December 2012.

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CERTIFICATE OF SERVICE

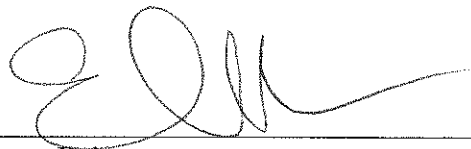
I hereby certify that a copy of the foregoing document was served upon all counsel of Record by FAX and by depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

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This 17 day of Dec, 2012.



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