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NO. COA11-361  
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

GALEN W. SEIDNER, JR., and Wife,  
KIM A. SEIDNER,  
Plaintiffs,

v.

BRUNSWICK County  
No. 09 CVS 2496

TOWN OF OAK ISLAND,  
Defendant.

Appeal by Defendant from orders entered 17 and 23 September 2010 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 13 September 2011.

*Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Plaintiffs-appellees.*

*Crossley McIntosh Collier Hanley & Edes, PLLC, by Brian E. Edes and Justin K. Humphries, for Defendant-appellant.*

HUNTER, JR., Robert N., Judge.

The Town of Oak Island (the "Town") appeals the trial court's 17 September 2010 order ("Summary Judgment Order") enjoining it from developing the end of a public street. The Town also appeals the trial court's 23 September 2010 order ("Sanctions Order") awarding attorney's fees, costs, and

expenses in favor of Plaintiffs and imposing a special "gatekeeper" restriction. The Town contends that the trial court erred by: (1) exercising jurisdiction before Plaintiffs exhausted their administrative remedies, (2) misinterpreting Plaintiffs' easement rights, (3) enjoining the Town from implementing its proposed developments, and (4) imposing sanctions against the Town. We affirm in part and vacate in part.

#### **I. Factual & Procedural Background**

In 1960, National Development Corporation created the Tranquil Harbor subdivision by filing a plat map with New Hanover County. The map depicts a large parcel of land in Oak Island (formerly Long Beach) subdivided into numerous streets and lots. Some of the subdivision streets, including N.W. 2nd Street, dead-end into the Intracoastal Waterway right of way (which borders the Tranquil Harbor subdivision to the north).

In August 1998, the North Carolina General Assembly enacted the Long Beach Act, which authorized the Town to "pass ordinances providing for the development and operation of parks on municipal streets . . . that dead-end on beaches, waterways, and at the ocean." *Prop. Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 181, 617 S.E.2d 715, 717 (2005)

(internal quotation marks omitted) (citation omitted). To effectuate this legislation, the Town "enacted an ordinance [(the "Ordinance")] designating as 'public parks' all street ends that 'dead-end into waterways in the Town of [Oak Island].'" *Id.* (citation omitted). A property rights group challenged the Ordinance and the Long Beach Act, asserting that the legislation violated the North Carolina Constitution. *Id.* On 13 July 2004, the Town repealed the Long Beach Act and amended § 22.6(a) of the Ordinance to provide the following:

the Town shall not make improvements within street rights-of-way that dead end into public trust areas other than the placement of traffic control devices . . . and customary right-of-way maintenance unless the Town Council had adopted an Ordinance that: (1) identifies the nature of the proposed use to be made within such right-of-way (2) describes any anticipated improvements to be made within such right-of-way; and that (3) specifies the manner in which the right-of-way shall be regulated to accommodate the improvements or use.

In September 2008, the Town filed an application with the North Carolina Department of Natural Resources ("DENR") for a Coastal Area Management Act ("CAMA") permit. The Town's application described its plan to develop the "N.W. 2nd Street end off of W. Yacht Drive at [the] IntraCoastal WaterWay." The proposed plan consisted of five parking spots—to be placed

adjacent to and on a portion of N.W. 2nd Street—a 10-by-20 foot “observation deck,” and a walkway leading from the deck down to the water. Gene Kudgus, the Town official who submitted the CAMA application, stated in his affidavit that the purpose of the walkway was to “negotiate a steep embankment to the existing bulkhead on the Intracoastal waterway.” Pursuant to CAMA regulations, DENR provided notice of the Town’s plan to owners of property located adjacent to the proposed development site. On 5 September 2008, DENR sent notice of the Town’s plan to adjacent property owners, Galen and Kim Seidner (“Plaintiffs”).

Plaintiffs acquired their lot on 29 March 2002 by general warranty deed. Plaintiffs’ deed describes their property as “BEING Lot 4, Block 199, Section 14, Tranquil Harbour, a section of Oak Island (formerly Long Beach), NC as shown on map recorded in Map Book 6, Page 34, Brunswick County Registry, said lot having metes, bounds and location as shown on said map.” Plaintiffs filed an objection to the Town’s plan with DENR on 12 September 2008 arguing, *inter alia*, that the Town’s planned development was precluded by previous court orders and, in addition, violated Plaintiffs’ easement rights.

On 14 October 2008, the Town added a provision to its Code of Ordinances specifically authorizing the Town “to regulate on-

street parking, vehicular and pedestrian traffic" in the area described as the "street end of NE 2nd Street and NW 2nd Street." The added provision was formulated to comply with the three substantive requirements of § 22.6(a) of the Ordinance. See *supra*. DENR subsequently approved the Town's CAMA permit application on 21 August 2009.

On 9 September 2009, Plaintiffs timely filed a request for a hearing to contest DENR's decision to grant the Town's permit. That same day, Plaintiffs undertook a parallel effort to challenge the Town's plan by filing a complaint in Brunswick County Superior Court. Plaintiffs' complaint alleged nine causes of action against the Town including, *inter alia*, preliminary and permanent injunctive relief, declaratory judgment, and attorney's fees, costs, and sanctions. On 21 September 2009, the Town filed a response with DENR in opposition to Plaintiffs' objection.

DENR denied Plaintiffs' request for a third party contested case hearing on 24 September 2009. In denying Plaintiffs' request, DENR explained that its approval of the Town's CAMA permit application was a determination based upon the applicable "administrative rules for coastal development" and was "not a grant of property rights, a determination of property rights, or

a taking of property rights." DENR further stated that it lacked jurisdiction to render such decisions and cited the superior court as "the proper forum for [Plaintiffs] to challenge the Town's actions" in this respect.

On 14 October 2009, the trial court granted Plaintiffs' motion for a preliminary injunction, precluding the Town from implementing its proposed improvements during the pendency of this litigation. Nearly one year later, on 17 September 2010, Judge Ola Lewis entered an order granting Plaintiffs' motion for summary judgment as to their claim for injunctive relief and declaratory judgment relief, permanently enjoining the Town "from taking any action to thwart, mitigate, preclude, prohibit, diminish, reduce, violate, or otherwise restrict or reduce [] Plaintiffs' appurtenant easement rights in and . . . arising under their Deed and Plat Map." This order rendered moot Plaintiffs' remaining claims for property damages, nuisance, and inverse condemnation. In a separate order entered 23 September 2010, Judge Lewis awarded Plaintiffs attorney's fees, costs, and expenses. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 11, Judge Lewis also imposed a special "gatekeeper" sanction against the Town, requiring the Town to obtain written certification by a North Carolina real property attorney before it may pursue

further improvements on any subdivision street within the Town's municipal limits. On 15 October 2010, the Town timely filed its notice of appeal from both orders.

## **II. Jurisdiction**

The trial court's orders adjudicated Plaintiffs' first (injunctive relief), second (declaratory judgment relief), sixth (attorney's fees under N.C. Gen. Stat. § 6-21.5), and ninth (sanctions pursuant to Rule 11) claims for relief. By adjudicating these claims, the court granted the Town's motion to dismiss as to Plaintiffs' remaining claims for mootness. Furthermore, Plaintiffs voluntarily dismissed their claim against the Town for punitive damages. Thus, the Town appeals from a final judgment of the superior court and jurisdiction lies with this Court pursuant to North Carolina General Statutes § 7A-27(b) (2009).

## **III. Analysis**

### **1. The Trial Court's Jurisdiction**

As a threshold matter, the Town contends that the trial court erred by exercising jurisdiction over a permit matter that was properly within the authority of an administrative agency. The Town asserts that Plaintiffs failed to exhaust their

administrative remedies and, therefore, the trial court was without authority to adjudicate this matter.

Any party may raise the issue of subject matter jurisdiction at any time. See *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal. *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

In order to challenge the issuance of a CAMA permit, the party seeking relief must follow the administrative procedures established by the legislature. See *Barris v. Long Beach*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 704 S.E.2d 285, 288 (2010). North Carolina General Statutes, § 113A-123(a) sets forth the proper procedure for challenging the issuance of a CAMA permit:

Any person directly affected by any final decision or order of [DENR] under this Part may appeal such decision or order to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of Chapter 150B of the General Statutes. Pending final disposition of any appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Part.

N.C. Gen. Stat. § 113A-123(a) (2009).

The Town relies on this Court's recent decision in *Barris*. In *Barris*, analogous to the case at bar, the Town argued that



the matter was prematurely before the trial court. *Barris*, \_\_\_ N.C. App. at \_\_\_, 704 S.E.2d at 288. This Court agreed with the Town's position because the trial court enjoined the Town from implementing its proposed plan *before* DENR had the opportunity to review the Town's CAMA permit application. *Id.* at \_\_\_, 704 S.E.2d at 289. Specifically, we stated:

The statute [] demonstrates a preference for administrative agencies that possess specific knowledge in their fields of expertise addressing these types of issues initially. Therefore, the trial court committed error in exercising authority over an issue that should have been examined first by DENR. Thus, appellees did not follow the proper protocol in challenging the Town's CAMA permit application and as a result, failed to exhaust their administrative remedies.

*Id.*

Here, unlike in *Barris*, Plaintiffs afforded DENR the opportunity to exercise its expertise prior to seeking judicial review. DENR examined the Town's CAMA permit application and issued its decision to grant the permit *before* Plaintiffs filed suit in the superior court. Furthermore, Plaintiffs attempted to preserve their rights prior to filing suit by objecting to DENR's issuance of the permit and then filing a request for a third party contested case hearing with DENR.

Moreover, Plaintiffs were not required to appeal DENR's decision to deny Plaintiffs' request for a hearing in order to exhaust their administrative remedies. It is well established that exhaustion of administrative remedies is not required where doing so would be futile or inadequate. *Honig v. Doe*, 484 U.S. 305, 327, 98 L. Ed. 2d 686, 709 (1988) (bypass of administrative process permitted "where exhaustion would be futile or inadequate"). "The burden of showing inadequacy [of the administrative remedy] is on the party claiming inadequacy, who must include such allegations in the complaint." *Jackson v. N.C. Dep't of Human Res.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 904 (1998). As this Court stated in *Huang v. N.C. State Univ.*:

The remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim. For example, if a party seeks monetary damages and the agency is powerless to grant such relief, the administrative remedy is inadequate. In determining the adequacy of administrative remedies, the complaint should be carefully scrutinized to ensure that the claim for relief is not inserted for the sole purpose of avoiding the exhaustion rule.

107 N.C. App. 710, 715, 421 S.E.2d 812, 815-16 (1992) (internal quotation marks omitted) (citations omitted).

Plaintiffs' complaint is replete with allegations

indicating that an appeal of DENR's decision would have been futile. Plaintiffs point out that both DENR and the Town itself have admitted that the superior court was the appropriate venue for adjudication of their property rights. In a letter to DENR, dated 21 September 2009, the Town acknowledged that the superior court "is the appropriate forum to determine whether the granting of this permit constitutes a taking." DENR also recognized that it was not the appropriate forum for an adjudication of Plaintiffs' property rights in rendering its decision to deny Plaintiffs' request for a contested case hearing:

[DENR] in permitting the park is only making a statement that the proposed development meets the provisions of the CAMA and the [Coastal Resources Commission's] administrative rules for coastal development. A CAMA permit is not a grant of property rights, a determination of property rights, or a taking of property rights . . . . If in fact there is a [dispute here between [Plaintiffs] and the Town over property rights such as obstruction of access from a dedicated street, the proper forum for [Plaintiffs] to challenge the Town's action is in the Superior Court rather than through a contested case at [the Office of Administrative Hearings], which is without jurisdiction to make decisions in such matters.

Plaintiffs sought in their complaint, *inter alia*, declaratory and injunctive relief. DENR has no authority with respect to these matters. Therefore, this Court holds that the superior court was the proper venue for adjudication of Plaintiffs' property rights and that any administrative appeal of DENR's decision would have been inadequate. Accordingly, we hold that the trial court did not err in exercising subject matter jurisdiction.

## **2. The Trial Court's Summary Judgment Order**

Having established that this matter was properly before the trial court, we turn to the Town's contention that the trial court erred in interpreting Plaintiffs' easement rights. The Town argues the trial court misinterpreted Plaintiffs' rights and, as a result, improperly enjoined the Town from implementing its proposed developments.

Summary judgment is appropriately 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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v.*

*Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). "The rule is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). In reviewing the trial court's grant of a summary judgment motion, this Court must examine the entire record, viewing all evidence in the light most favorable to the non-moving party. *Id.*

Our Supreme Court has described appurtenant easement rights arising by reference to a plat map as follows:

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks, and playgrounds, a purchaser of a lot or lots acquires the right to have the streets . . . kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets . . . are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets . . . may not be extinguished, altered or diminished except

by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Thus, a street . . . may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated.

*Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (internal citations omitted).

Plaintiffs' deed refers to a plat map depicting Tranquil Harbor subdivision. The map shows Plaintiffs' lot and N.W. 2nd Street, situated immediately adjacent to Plaintiffs' lot, as within the Tranquil Harbor subdivision. These facts establish that Plaintiffs are the owners of dedicated and appurtenant easement rights in and to all of the N.W. 2nd Street area from their property. Plaintiffs' easement rights are in fact identical to the rights held by the plaintiffs in *Barris*, \_\_\_ N.C. App. \_\_\_, 704 S.E.2d 285, and in *Scronce v. Town of Long Beach*, No. COA98-756 (N.C. App. May 4, 1999) (unpublished). The Town should be well aware of these rulings because it was the defendant in both cases. See *id.* In light of these recent decisions, in addition to our Supreme Court's articulation of the applicable law regarding appurtenant easement rights arising by reference to a subdivision plat map in *Cleveland Realty*, see *supra*, it is obvious that the trial court correctly determined that the Plaintiffs are owners of appurtenant easements rights.

It is equally obvious that the Town's proposed developments would infringe upon Plaintiffs' easement rights. The addition of parking spaces, an observation deck, and a walkway leading down to the beach will invite the public to use *this* particular area to access the beach. Even assuming the public already uses the area at the end of N.W. 2nd Street to park and walk down to the beach, the Town's plan will inevitably increase vehicular and pedestrian traffic, congesting the area and diminishing the value of Plaintiffs' easement. Plaintiffs' right to unimpeded ingress and egress to and from their property was in part an inducement in purchasing their lot, and the Town shall not disrupt or diminish said right through its proposed development without just compensation.

The Town contends that this Court's decisions preclude only developments that constitute a park and/or physically block vehicular traffic. The Town is correct in determining that these characteristics would render the Town's plan impermissible. See *Wooten v. Town of Topsail Beach*, 127 N.C. App. 739, 493 S.E.2d 285 (1997), *disc. review denied*, 348 N.C. 78, 505 S.E.2d 888 (1998), (holding that where land is dedicated to the town as a street, it cannot be used as a park); *Scronce v. Town of Long Beach*, No. COA98-756 (N.C. App. May 4, 1999)

(unpublished) (enjoining the Town's attempt to build a "mini-park" at the end of a dedicated street because the project would block off a portion of the street and was inconsistent with the purpose for which the street was dedicated). However, a finding that the Town's construction would constitute a park—or that it would physically block the roadway—is not dispositive. The relevant inquiry is whether the Town's plan would extinguish, alter, or diminish Plaintiffs' easement rights.

Plaintiffs purchased their lot as depicted on the plat map referenced in their deed. The plat map vests Plaintiffs with an easement that is unimpeded by the Town's proposed developments. This Court will not permit the Town to diminish the value of Plaintiffs' bargained-for property simply by obtaining a CAMA permit from the DENR, an administrative agency that is without authority to adjudicate property rights.

The Town further contends it possesses the municipal authority to carry out its plan. We note the Town possesses authority to legislate for the health, safety, or welfare of its citizens. See N.C. Gen. Stat. § 160A-174(a) (2009) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city,



and may define and abate nuisances.”). However, a municipal government’s actions under § 160A-174 must be “consistent with the Constitution and laws of North Carolina and of the United States.” N.C. Gen. Stat. § 160A-174(b) (2009). As this Court stated in *Wooten*:

[i]f property is dedicated for a particular purpose, it cannot be diverted from that purpose by the state or municipality, except under the power of eminent domain. This principle means that [w]here the owner of land has dedicated [the land] for a street or alley, the municipality cannot appropriate it to other uses or purposes.

*Wooten*, 127 N.C. App. at 741, 493 S.E.2d at 287 (quotation marks omitted) (alteration in original).

The Town asserts that it took legitimate action in amending its Code of Ordinances to include § 22.6, which specifically authorizes the Town to “regulate on-street parking, vehicular and pedestrian traffic.” The Town cites this Court’s decision in *March v. Town of Kill Devil Hills*, 125 N.C. App. 151, 479 S.E.2d 252 (1997), as support for its position. In *March*, the plaintiffs were subdivision lot owners with easement rights analogous to Plaintiffs’ rights in the case at bar. *Id.* at 152, 479 S.E.2d at 252. The plaintiffs challenged the defendant town’s placement of forty-four parking spaces on a dedicated street within the subdivision pursuant to an ordinance

authorizing the defendant to regulate parking. *Id.* This Court held that the defendant's actions were a legitimate exercise of the town's governmental discretion; however, this Court also stated that "in order to constitute misuser [sic] or diversion, the use made of the dedicated property must be inconsistent with the purposes of the dedication or substantially interfere with it." *March*, 125 N.C. App. at 154, 479 S.E.2d at 253-54 (quotation marks omitted) (citation omitted).

The case at bar is distinguishable from *March*. The Town's proposed development is not consistent with N.W. 2nd Street's dedication as a public street. The street end on which the Town seeks to build has been dedicated as a public street by virtue of a plat map depicting said street as part of the Tranquil Harbor subdivision. We cannot agree with the Town's assertion that its park-like structures—an observation deck, a walkway, and accompanying parking spaces—will serve to prohibit, regulate, divert, control, and limit pedestrian and vehicular traffic on N.W. 2nd street. These structures, like a park, will increase both vehicular and pedestrian traffic in the designated area. The Town's proposed developments are not consistent with its authority to regulate public streets pursuant to the Town's Ordinance. Accordingly, we hold the trial court correctly

interpreted Plaintiffs' easement rights and did not err in enjoining the Town from carrying out its proposed developments. The Town's assignment of error is overruled.

### **3. The Trial Court's Sanctions Order**

The Town also contends the trial court erred by (1) awarding attorney's fees, costs, and expenses in favor of Plaintiffs under N.C. Gen. Stat. § 6.21-5 and/or Rule 11 of the North Carolina Rules of Civil Procedure and (2) imposing a "gatekeeper" restriction against the Town pursuant to Rule 11.

North Carolina General Statutes, section 1A-1, Rule 11(a) applies to "[e]very pleading, motion, and other paper of a party." N.C. Gen. Stat. § 1A-1, Rule 11(a) (2009). Furthermore, "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper and that the pleading, motion, or other paper "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.*

This Court exercises *de novo* review of the question of whether to impose Rule 11 sanctions. *Turner v. Duke University,*

325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). If we determine that the sanctions were warranted, we must review the actual sanctions imposed under an abuse of discretion standard. *Id.* There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. See N.C. Gen. Stat. § 1-A1, Rule 11(a) (2009); *Bryson v. Sullivan*, 330 N.C. 644, 654, 412 S.E.2d 327, 331-32 (1992). Because we find the Town violated the improper purpose prong, we find it unnecessary to address the others. See *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) ("Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11.").

This Court has described an improper purpose as "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) (Supp. 1992)). We have also stated that "a party 'will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay.'" *Brown*, 124 N.C. App. at 382, 477 S.E.2d at 238 (emphasis added) (citation omitted). An objective standard is

used to determine the existence of an improper purpose. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713.

In the case *sub judice*, this Court's careful review of the record indicates that there was competent evidence to support the trial court's determination that the Town maintained its legal position for the improper purpose of intimidating Plaintiffs and unnecessarily increasing Plaintiffs' costs of litigation. The Town is well aware of Plaintiffs' easement rights, in light of its participation in both the *Barris* and *Scronce* adjudications. Notwithstanding this Court's prior orders, the Town continues to strong-arm property owners, such as Plaintiffs in this case, by obtaining a CAMA permit in an effort to develop property that is not theirs to develop.

The Town relies on this court's ruling in *Barris* in assigning error to the trial court's entry of sanctions pursuant to Rule 11. However, unlike in the case at bar, the *Barris* plaintiffs had failed to exhaust their administrative remedies, see discussion *supra* part III(1), rendering sanctions against the Town inappropriate.

We hold the trial court did not abuse its discretion in awarding attorney's fees, costs, and expenses in favor of Plaintiffs. Plaintiffs would not have incurred these expenses

but for the Town's stubborn persistence in attempting to develop coastal property under the guise of a CAMA permit and an ordinance permitting regulation of the Town's streets. Accordingly, we affirm this portion of the trial court's Sanctions Order.

This Court, however, cannot uphold the trial court's imposition of a gatekeeper sanction. A gatekeeper restriction is reserved for rare instances in which a party repeatedly abuses the judicial system with actions that are frivolous and unsupported by law or fact. *See Dalenko v. Collier*, 191 N.C. App. 713, 719, 664 S.E.2d 425, 429 (2008). While it is true that the Town has recently litigated this precise issue before this Court in *Barris* and in *Scronce*, the instant case involves new plaintiffs challenging a new project plan in a new location. In light of this Court's discussions in *Wooten* and *Scronce* concerning whether proposed developments constituted a park, or blocked the roadway, *see* discussion *supra* Part III(2), we cannot conclude that the Town's asserted legal position, however tenuous, was frivolous. We therefore vacate this portion of the trial court's Sanctions Order.

#### **IV. Conclusion**

For the foregoing reasons, we affirm the trial court's

Summary Judgment Order. In addition, we affirm the portion of the trial court's Sanctions Order awarding attorney's fees, costs, and expenses in favor of Plaintiffs, but vacate the portion of the Sanctions Order imposing a gatekeeper restriction.

Affirmed in part. Vacated in part.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).