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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

GENE SYLVESTER EAGLE-ODEN and ANNA GLUSHKO, **Plaintiffs,** **v.** **STEVE QIAN and USA FANTER CORP., LTD.,** **Defendants.**	**CIVIL ACTION NO. 16–0106** **ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER came before the Court on February 7, 2018 at 1:30 p.m. in Courtroom 202A for a motion hearing. Attorney Tiberius Mocanu represented Plaintiffs Gene Sylvester Eagle-Oden and Anna Glushko (collectively "Plaintiffs"). Attorney Charity Hodson represented Defendants Steve Qian ("Qian") and USA Fanter Corp., Ltd. ("Fanter") (collectively "Defendants"). The Court heard arguments on Defendants' motion to dismiss Plaintiffs' statutory claims under the Saipan Zoning Law, 10 CMC §§ 3511 *et seq.* ("SZL").

II. BACKGROUND

The events forming the basis of the present suit date to roughly 2002 when Qian acquired a leasehold interest in Lot 380 F–1, Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4. Around 2004, Qian started operating his business, Fanter, on Lot 380 F–1. In 2008, the SZL came into effect and zoned the area in and around Lot 380 F–1, Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4 as village residential. However, the SZL created a scheme in Article 12, titled "Nonconformities and Public

Nuisances," allowing existing nonconforming uses to continue under certain conditions. *See* SZL § 1201. In 2012, Defendants applied for a Nonconforming Structure and Use Permit ("NSUP") under SZL § 1208, covering Lot 380 F–1, with the Zoning Board. Defendants' application was approved because Defendants were able to carry their burden under SZL § 1202 to show that the nonconforming use predated February 1, 2008. Specifically, the Zoning Administrator found: "This auto repair shop, construction office and farm pre-existed in this location since December 2004 and is classified as a nonconforming use which requires no expansion." Further, the NSUP for Lot 380 F–1 provided that the scope of the nonconforming use is: "Vehicle Repair, General & General Construction Contractor."

Over time, the scale and scope of Defendants' operations allegedly dramatically increased beyond the scope of the existing NSUP. Therefore, on June 2, 2016, Plaintiffs notified the Zoning Board by a letter, addressed to the Zoning Administrator, detailing numerous alleged violations of the SZL. Presumably, Plaintiffs hoped that the Zoning Board would investigate and prosecute the alleged violations of the SZL. However, as of the February 7, 2018 hearing, the Zoning Board and the Zoning Administrator have not taken any action on Plaintiffs' letter.

At roughly the same time, on June 4, 2016, Plaintiffs filed their original complaint in the Court alleging that Defendants are liable by virtue of private nuisance and assault. Within their private nuisance theory, Plaintiffs alleged that Defendants have expanded their operations well beyond the scope of the existing NSUP in violation of the SZL, for purposes of demonstrating the per se unreasonableness of Defendants' alleged commercial activities.

Plaintiffs further moved for entry of a preliminary injunction, which was subsequently denied on the grounds that a ruling in Plaintiffs' favor would impermissibly alter the status quo. *See Eagle-Oden v. Qian*, Civ. No. 16–0106 (NMI Super. Ct. Aug. 22, 2017) (Order Denying Plaintiffs' Application for a Preliminary Injunction). During the proceedings on tbe preliminary injunction, the

parties and the Court raised the issue of whether Plaintiffs had properly invoked jurisdiction under 2 CMC §§ 7254(d)(1)–(2). The Court was concerned whether Plaintiffs had given the Zoning Board 90 days to take action before filing suit.[1] While the Court briefly discussed the jurisdictional question as it related to the determination of the preliminary injunction, the Court did not definitively address the full contours of the issue. *Id.* at 5–7. Moreover, due to the ambiguity of Plaintiffs' original complaint, Defendants did not fully brief its argument on the applicability of 2 CMC §§ 7254(d)(1)–(2) to this case.

In the aftermath of the denial of the preliminary injunction, Plaintiffs amended their complaint so as to explicitly add the statutory claims under the SZL, affirmatively invoking 2 CMC §§ 7254(d)(1)–(2) as a basis for jurisdiction.[2] Plaintiffs augmented their original complaint so as to pursue both public nuisance and private nuisance as a basis for enjoining Defendants from operating in their present manner. On December 28, 2017, Defendants responded to Plaintiffs addition of the SZL claims, counts 10–27, with a motion to dismiss claiming that the Court lacks jurisdiction to hear said claims and that Plaintiffs fail to state a claim upon which relief can be granted. More specifically, Defendants argued that dismissal of the SZL counts is proper for at least three reasons: (1) the plain meaning of 2 CMC §§ 7254(d)(1)–(2) makes clear that its grant of jurisdiction does not apply to the SZL; (2) even if the Court were to rule that 2 CMC §§ 7254(d)(1)–(2) can serve as a basis for jurisdiction, Plaintiffs claims are nonetheless barred because they failed to give the Zoning Board proper notice; and (3) the SZL itself does not provide a private right of action, instead the Zoning Board has the exclusive right to determine SZL violations. At this stage, the Court is tasked with determining the meaning and interplay, if any, between 2 CMC

[1] Plaintiffs admit that they only waited two days before filing suit. The original notice to the Zoning Board was transmitted on June 2, 2016. This case was filed on June 4, 2016.

[2] Plaintiffs' amended complaint was filed on October 30, 2017.

§§ 7254(d)(1)–(2) and the SZL. Moreover, the Court is faced with the question whether a party alleging an SZL violation can invoke 2 CMC §§ 7254(d)(1)–(2) as the basis for jurisdiction.

III. LEGAL STANDARD

NMI R. CIV. P. 12(b)(1) provides for dismissal of an action when a court lacks subject matter jurisdiction.

Relatedly, a NMI R. CIV. P. 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a NMI R. CIV. P. 12(b)(6) motion to dismiss, a "complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *In re Adoption of Magofna*, 1 NMI 449, 454 (1990) (citations omitted). This standard ensures that a pleading party pleads enough direct and indirect allegations to provide "fair notice of the nature of the action." *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 19 (citing *Magofna*, 1 NMI at 454). In deciding a motion to dismiss under NMI R. CIV. P. 12(b)(6), the court must assume as true all factual allegations in the challenged pleading and construe them in a light most favorable to the non-moving party. *Cepeda v. Hefner*, 3 NMI 121, 127–28 (1992) (citations omitted); *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 490 (1992) (citation omitted).

IV. DISCUSSION

At this stage, the Court addresses Defendants' three main arguments that Plaintiffs' SZL claims are improper. In doing so, the Court addresses a number of interlocking questions: (A) whether the plain meaning of 2 CMC §§ 7254(d)(1)–(2) includes actions claiming SZL violations; (B) whether Plaintiffs filing of the original complaint within two days of providing the Zoning

Board with notice makes Plaintiffs' SZL claims improper; and (C) whether the SZL mandates that Plaintiffs exhaust an agency level process before bringing suit.

A. Scope of the Zoning Code's Private Rights of Action – 2 CMC §§ 7254(d)(1)–(2).

The Court first addresses the question whether the express language of the Zoning Code, 2 CMC §§ 7201 *et seq.*, in particular 2 CMC §§ 7254(d)(1)–(2), prohibits SZL claims from being brought under it. A court is obligated to apply the plain meaning of a statute because the enactments of the legislature must be given affect. *See Commonwealth v. Guiao*, 2017 MP 2 ¶ 12 (Slip Op. Mar. 20, 2017) (citing *Commonwealth v. Kaipat*, 4 NMI 300, 304 (1995)); *see also Govendo v. Micronesian Garment Mfg.*, 2 NMI 270, 284 (1991) (citing *Commonwealth v. Hasinto*, 1 NMI 377 (1991)). The provisions of the Zoning Code at issue, 2 CMC §§ 7254(d)(1)–(2), provide:

> (1) Notwithstanding any other remedies available, any person damaged or aggrieved as a result of a violation of *this chapter* has a cause of action against the landowner or lessee who committed the violation. An award shall include damages and the costs of litigation including reasonable attorney's fees.
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> (2) Any person who is aware of a violation of *this chapter* may bring an action in an appropriate court of the Commonwealth to secure compliance with this chapter. However, such action shall not be brought until the complaining person has first given written notice of the violation to the Zoning Board, and the Zoning Board has refused to take action on the written notice of violation. The failure of the Zoning Board to act on the written notice within 90 days of the Zoning Board's receipt of such notice shall be deemed a refusal by the Zoning Board to take action. A person who substantially prevails on the merits of his cause of action shall receive his costs of litigation including attorney's fees.

(emphasis added).[3]

1. Connection Between the Zoning Code and the SZL.

First, when assessing whether 2 CMC §§ 7254(d)(1)–(2) contemplates SZL claims it is necessary to analyze the interplay, if any, between the Zoning Code and the SZL because when a

[3] The original language of Public Law 6–32 used the term "this Act" instead of "this chapter." The change in language was made by the Law Revision Commission by virtue of its mandate to codify the act in light of the structure of the Commonwealth Code. Yet, the original language "this Act" is the operative language.

court endeavors to interpret a statute it looks to the whole statutory framework. *See John Hancock Mut. Life Ins. Co. v. Harris Trust Sav. Bank*, 510 U.S. 86, 94–95 (1993) (citations omitted). Moreover, a court should not interpret a statute in a way that renders other provisions superfluous or unnecessary. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (citation omitted). Essentially, a court should always attempt to avoid absurd interpretations, which eviscerate the intentions of the legislature.

Here, Defendants implicitly argue that the Zoning Code and its private rights of action, 2 CMC §§ 7254(d)(1)–(2), are separate and distinct from the SZL. Defendants ask the Court to read the two acts as completely separate from each other. More specifically, Defendants ask the Court to hold that the legislature's use of "this chapter"[4] in 2 CMC §§ 7254(d)(1)–(2) necessarily confines private claims to Zoning Code violations arising under that chapter of Title 2. Defendants highlight that the SZL is not even contained in the same title of the Commonwealth Code, Title 10 versus Title 2, let alone the same chapter within Title 2. Defendants contend that a plain reading of 2 CMC §§ 7254(d)(1)–(2) indicates that SZL claims cannot invoke 2 CMC §§ 7254(d)(1)–(2) as the basis for the Court's jurisdiction.

Plaintiffs respond Defendants' bifurcation of the Zoning Code and the SZL is inappropriate and has the effect of eviscerating the statutory structure put in place by the legislature. Plaintiffs maintain that the legislative history of the Zoning Code and the SZL makes clear that the acts were always intended to operate in conjunction with one another. Plaintiffs contend that the SZL is a follow-on piece of legislation, which is inextricably linked to the Zoning Code because without the Zoning Code the SZL would not exist. Further, without the SZL the Zoning Code itself, especially 2 CMC §§ 7254(d)(1)–(2), is rendered completely superfluous because the SZL provides the substantive zoning provisions. For example, if SZL claims can not be brought under 2 CMC §§

[4] *See supra* note 3.

7254(d)(1)–(2) then those provisions are completely inoperative because the Zoning Code does not provide any basis for a violation. Plaintiffs highlight that the Zoning Code created the statutory foundation upon which to build a statutory zoning framework. The Zoning Code can best be described as the concrete foundation upon which the house, the SZL, is built. A house without a foundation cannot stand and a foundation without a house is just a pointless hole in the ground.

The Zoning Code, containing 2 CMC §§ 7254(d)(1)–(2), was passed into law as Public Law 6–32. The purpose of Public Law 6–32 was to create a statutory zoning framework upon which specific land use and zoning provisions could be enacted. *See* 2 CMC § 7211(c) ("The purposes of this chapter are to meet the needs identified in subsections (a) through (c) of this section, and to that end to establish and provide for a Commonwealth Zoning Board and professional staff to prepare for review and adoption by the legislature, and to administer, subsequent to enactment, a land use and zoning system that protects the interests of both present and future land owners and the general public."). Public Law 6–32 further created the Zoning Board and a Zoning Administrator to assist in developing and enforcing substantive zoning provisions. Public Law 6–32 created the foundation upon which to build a zoning system for the Commonwealth. 2 CMC §§ 7254(d)(1)–(2) was included to provide private rights of actions, which would apply to the envisioned follow-on legislation. Public Law 6-32 was subsequently amended a number of times. These amendments further outline that the Zoning Board and the Zoning Administrator were tasked with developing follow-on legislation, which would provide substantive zoning provisions. *See* 2 CMC § 7221 (specifically tasking the Zoning Board with developing the plan, which would become the SZL).

Eventually, the SZL was passed thereby supplying the substantive zoning provisions, which were explicitly contemplated by the Zoning Code from its inception and by its subsequent amendments. The SZL built the proverbial house on the foundation laid by the Zoning Code. While there is little doubt that these two acts were developed parallel to each other, Defendants ask the

Court to interpret 2 CMC §§ 7254(d)(1)–(2) to mean that only Zoning Code violations can be brought when in reality the Zoning Code contains no substantive zoning provisions because the SZL was explicitly designed to fill in the substance of the act. Bifurcation of the Zoning Code and the SZL is impossible because both acts repeatedly incorporate provisions from the other. These two acts were developed as one comprehensive legislative framework and it would defeat the express mandate of the legislature for the Court to interpret 2 CMC §§ 7254(d)(1)–(2) to mean that it does not apply to the SZL.

The only reason the SZL is not contained in the same chapter as the Zoning Code is because the SZL was developed as a local law versus as a public law. It is self evident that zoning is tied to the land and the SZL was developed to cover Saipan, but provide flexibility so that if the first or second senatorial districts ever wanted to institute their own zoning statute they would be able to do so. The Zoning Code provided the framework upon, which to build a suitable zoning framework, taking into account the unique political and legislative framework of the islands. Defendants' reading would sap the Zoning Code and the SZL of their power. Moreover, bifurcation would ignore the plain statutory mandate of both the Zoning Code and the SZL—each senatorial district gets to pass a local zoning law building off the provisions of the Zoning Code. Each follow-on local law is invariably a part of the original act because without the Zoning Code no local law would come into existence. Therefore, it is not against the plain meaning of 2 CMC §§ 7254(d)(1)–(2) to say that a private action brought under the SZL is pursuant to the underlying act.

Moreover, Defendants' reading would impermissibly render 2 CMC §§ 7254(d)(1)–(2) inoperative and therefore superfluous because there is nothing to violate in the Zoning Code. As previously highlighted, the Zoning Code provides the framework upon which the SZL is built. Without the SZL the private cause of action mechanism is superfluous and without the private right

of action the SZL is unenforceable in any case, like the present suit, where the Zoning Board and the Zoning Administrator abdicates their duty to enforce the SZL.

Finally, even if the Court were to accept Defendants' interpretation, 2 CMC §§ 7254(d)(1)–(2)'s applicability to SZL claims is established by the fact that the SZL itself expressly incorporates the substance of the provisions. *See* SZL §§ 1410–12. The SZL is a later-in-time piece of legislation, which expressly incorporates the Zoning Code's framework. While the Court will more fully address the specifics of the SZL's express terms below, the Court finds it prudent to highlight that even if the Court were to adopt Defendants' narrow interpretation of 2 CMC §§ 7254(d)(1)–(2) their argument would nonetheless fail because the SZL as its own act of the legislature incorporates the text of 2 CMC §§ 7254(d)(1)–(2). However, the Court is satisfied for the above-mentioned reasons that Defendants' focus on "this chapter" is in error because it ignores the numerous provisions of the Zoning Code that indicate that the SZL is an inextricable part of the Zoning Code. Therefore, a violation of the SZL is actually a violation of the Zoning Code because they are part of the same legislative scheme.

2. Inapplicability of *Govendo v. Micronesian Garment Mfg.*, 2 NMI at 270.

The Court also considers it prudent to address Defendants' argument that *Govendo* mandates that the Court bifurcate the Zoning Code and the SZL because they are two distinct acts, which do not overlap. Defendants contend that *Govendo* makes clear that the Court cannot interpret "this chapter" to include other acts and/or regulations. *See* 2 NMI at 283–87.

In *Govendo*, the NMI Supreme Court held that the plaintiff had failed to state a claim upon which relief could be granted because the plaintiff claimed violations of regulatory duties not statutory duties. *Id.* Specifically, the plaintiff claimed that Costal Resources Management had flagrantly violated its own regulations, which were instituted pursuant to the Coastal Resources Management Act of 1983, 2 CMC §§ 1501 *et seq. See Id.* at 272–78. The NMI Supreme Court

determined that when the legislature creates a private cause of action, which includes the language "this Act" it necessarily confines claims to statutory claims. *See Id.* at 283–87. Alleged regulatory violations, like the ones claimed by the plaintiff in *Govendo*, could not be bootstrapped under the private cause of action designed for statutory claims. *Id.*

Defendants claim that the Court is presented with essentially the same facts here because 2 CMC §§ 7254(d)(1)–(2) uses "this Act" which they argue under *Govendo* means that claims are restricted to the strict confines of the Zoning Code. Defendants contend that this situation is just like *Govendo* in that Plaintiffs are stretching 2 CMC §§ 7254(d)(1)–(2) to allow their SZL claims to proceed even though doing so is improper.

While *Govendo* is somewhat analogous to the present case, Defendants' argument misses a critical difference between *Govendo* and this case; Plaintiffs are bringing a statutory claim and not a regulatory claim. In *Govendo*, the NMI Supreme Court found that follow-on regulations could not be considered a part of the act, but the NMI Supreme Court intimated that if the claim had been statutory in nature and connected to the legislative scheme at issue then the claim could have survived as a matter of law. *Id.* Here, as previously discussed, Plaintiffs have brought suit claiming that the SZL, a follow-on and contemplated part of the Zoning Code, has been repeatedly violated. Unlike *Govendo*, there is a well-defined statutory tie between the Zoning Code and the SZL. As previously discussed, the only reason the two acts are technically separate is that the Zoning Code is a public law applying to the whole Commonwealth and the SZL was a specific local law. Defendants ask the Court to extend *Govendo* to say that follow-on local laws, which are explicitly mentioned in the overarching legislative framework, are not sufficiently connected to be within the plain meaning of the act. Such a ruling would unreasonably undermine the intent of the legislature and would impermissibly ignore the unique legislative framework of the Commonwealth.

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3. Conclusion as to Zoning Code's Private Rights of Action.

Overall, after reviewing the text of the Zoning Code it is evident that that 2 CMC §§ 7254(d)(1)–(2) expressly contemplates SZL claims. To arrive at Defendants' interpretation the Court would have to adopt an unreasonably esoteric reading, which would have the effect of rendering the Zoning Code inoperative. The Court does not read the Zoning Code with an eye towards circumventing the purpose of the act; instead, the Court looks to apply the plain meaning such that the entire structure of the legislative framework is harmonized.

B. Plaintiffs' Compliance with 2 CMC § 7254(d)(2)'s Notice Requirement.

The Court also addresses whether Plaintiffs' SZL claims are barred for failure to comply with 2 CMC § 7254(d)(2)'s notice requirement. 2 CMC § 7254(d)(2) provides that:

> Any person who is aware of a violation of this chapter may bring an action in an appropriate court of the Commonwealth to secure compliance with this chapter. However, such action shall not be brought until the complaining person has first given written notice of the violation to the Zoning Board, and the Zoning Board has refused to take action on the written notice of violation. *The failure of the Zoning Board to act on the written notice within 90 days of the Zoning Board's receipt of such notice shall be deemed a refusal by the Zoning Board to take action.* A person who substantially prevails on the merits of his cause of action shall receive his costs of litigation including attorney's fees.

Defendants argue that even if the Court finds that 2 CMC §§ 7254(d)(1)–(2) applies to the SZL, Plaintiffs' claims still fail as a matter of law because Plaintiffs failed to observe the 90 day waiting requirement. Defendants note that Plaintiffs filed their original complaint a mere 2 days after providing the Zoning Board with notice. Defendants contend that Plaintiffs couched their SZL claims as private nuisance claims in order to circumvent the 90 day requirement, which is further evidenced by the fact that Plaintiffs eventually amended their complaint to explicitly invoke 2 CMC § 7254(d)(2). Defendants maintain that Plaintiffs can not end run the 90 day requirement expressly required by 2 CMC § 7254(d)(2).

Plaintiffs respond that Defendants' own recitation of the timeline of events show that they complied with 2 CMC § 7254(d)(2)'s 90 day waiting period. Plaintiffs agree that if they had filed their original complaint affirmatively claiming SZL violations pursuant to 2 CMC § 7254(d)(2) their claims would have to have been dismissed for failure to satisfy all the statutory conditions to file suit. Yet, Plaintiffs' original complaint merely claimed private nuisance and did not rely on 2 CMC § 7254(d)(2) for jurisdiction. Then, well after the required 90 days had elapsed, Plaintiffs amended their complaint to add the SZL violations, claiming jurisdiction under 2 CMC § 7254(d)(1) and alternatively under 2 CMC § 7254(d)(2). Plaintiffs maintain that as of the date the SZL claims were actually filed the 90 day waiting period had long since elapsed and therefore jurisdiction under 2 CMC § 7254(d)(2) would be appropriate.

Here, it is apparent that Defendants' argument fails for at least two reasons. First, Plaintiffs are correct that they technically did not bring their SZL claims until the amendment of their complaint, which was well after 2 CMC § 7254(d)(2)'s 90 day waiting period had elapsed. The original complaint did not rely on 2 CMC § 7254(d)(2) to vest the Court with jurisdiction; instead Plaintiffs relied on tort principles, which are well within the Court's general jurisdiction. *See* 1 CMC § 3202. The correct date to measure the 90 day period is the date when Plaintiffs' complaint relied on 2 CMC § 7254(d)(2) for jurisdiction, which is October 30, 2017, the date of the amended complaint. October 30, 2017 is more than 90 days after June 2, 2016 so 2 CMC § 7254(d)(2)'s 90 day waiting period was more than satisfied in this case.

The confusion over the date of the SZL claims stems from the fact Plaintiffs originally sought a preliminary injunction, which would bar Defendants from operating in their current manner pending the outcome of the suit. When the Court was reviewing that application one of the central questions was the likelihood of success on the merits. Whether or not Defendants were bringing separate SZL claims was significant to answering that question because the likelihood of

success as to the SZL violations was significantly more likely than the private nuisance claims, which are notoriously difficult to prevail on. At that earlier stage, it was much less clear whether Plaintiffs had satisfied the 90 day waiting period, which is why the Court raised the issue at the preliminary injunction hearing. However, Plaintiffs subsequently mooted those issues by amending their complaint to include SZL claims under both 2 CMC § 7254(d)(1) and 2 CMC § 7254(d)(2) theories well after the 90 day waiting period.

Second, Defendants' argument fails because it presupposes that Plaintiffs' SZL claims rely exclusively on 2 CMC § 7254(d)(2). Reviewing the amended complaint, it is evident that Plaintiffs are claiming jurisdiction under 2 CMC § 7254(d)(1) and in the alternative under 2 CMC § 7254(d)(2). 2 CMC § 7254(d)(1) lacks a 90 day waiting period, so even if Plaintiffs ran afoul of 2 CMC § 7254(d)(2) the substance of their SZL claims would still be allowed to proceed to trial, albeit with the added requirement that Plaintiffs demonstrate damage as a result of the alleged violations of the SZL.

While it is undoubtedly true that Plaintiffs original complaint and application for a preliminary injunction was a bit odd because it failed to explicitly include the most likely causes of action to afford Plaintiffs relief, the alleged SZL violations, the decision to withhold those counts does not adversely impact the viability of those claims.[5] As currently constructed, Plaintiffs' complaint comports with 2 CMC § 7254(d)(2)'s 90 day waiting period because the SZL counts relying on 2 CMC § 7254(d)(2) were filed more than 90 days after notice was provided to the Zoning Board. Defendants' argument that Plaintiffs failed to satisfy 2 CMC § 7254(d)(2)'s 90 day waiting period fails for the aforementioned reasons.

[5] Under its private nuisance theory Plaintiffs will have the heavy burden of establishing that the allegedly harmful conduct has proximately and concretely damaged them. Conversely, under at least one of the SZL theories the Plaintiffs do not have to establish damages at all, but merely have to establish that certain conditions exist. Therefore, the Court thought it prudent to raise the issue of whether Plaintiffs were indeed planning to raise the simplest and most likely theory for them to prevail on the merits.

C. SZL's Claims Procedures Under Article 14 – "Hearings, Appeals, and Other Procedures."

The Court also addresses the issue of whether the SZL's own terms expressly bar application of 2 CMC §§ 7254(d)(1)–(2) to SZL claims. More specifically, the Court is faced with the question whether the exhaustive agency level dispute procedure contained in Article 14 of the SZL, titled "Hearings, Appeals and Other Procedures" ("SZL Article 14"), necessarily excludes application of 2 CMC §§ 7254(d)(1)–(2).

SZL Article 14 "addresses procedures for hearings and appeals before the Board and to the courts. . . ." *See* SZL § 1401. SZL Article 14 outlines in considerable detail the framework for bringing an alleged violation to the Zoning Board and the process by which actions are adjudicated at the agency level, including appeals under the Commonwealth Administrative Procedure Act. *See* SZL §§ 1402–08. Further, aside from the agency level process, SZL Article 14 includes a number of provisions detailing possible court actions, which provide:

> **Section 1410 Court Actions**
>
> (a) *In the case of a violation*, the Board, the Administrator, or *any person who would be damaged by such violation may institute appropriate court action for damages or for injunctive relief*, including an order that would cause a structure or use to be suspended, permanently stopped, vacated or removed.
>
> (b) In the enforcement of this Law in the courts, the Administrator shall exercise all the powers authorized by law to ensure compliance with and abate any violation of this Law.
>
> (c) The Attorney General or the Board's counsel shall enforce this Law in the courts, except in cases involving small claims, in which the Administrator or his designee may enforce the Law in the courts.
>
> **Section 1411 Criminal and Civil Penalties**
>
> *See the Zoning Code (2 CMC §7254).*
>
> **Section 1412 Remedies by Private Action**
>
> *See the Zoning Code (2 CMC §7201 et seq.).*

SZL §§ 1410–12 (emphasis added).

Defendants argue that SZL Article 14's own terms necessarily exclude a private right of action unless the Zoning Board through the Zoning Administrator has already determined that a violation has occurred. *See* SZL § 1410. Defendants maintain that SZL Article 14 provides an administrative process, which is the exclusive statutory avenue created to pursue SZL violations. *See* SZL §§ 1402–08. Defendants contend that the Zoning Administrator is exclusively empowered to interpret and enforce the SZL. *See* SZL §§ 204, 1201, 1203, 1209, etc. The Court only enters the equation when a violation has been determined because SZL § 1410 discusses enforcing the Zoning Administrator's determination of a violation through court action.

Further, Defendants claim that SZL §§ 1411–12 is a mere cross reference to the Zoning Code and does not incorporate 2 CMC §§ 7254(d)(1)–(2) into the SZL dispute resolution process. Defendants admit that SZL §§ 1411–12 refers to the Zoning Code, but nonetheless argue that the comprehensive scheme laid out in SZL Article 14 as well as the rest of the SZL necessarily excludes application of 2 CMC §§ 7254(d)(1)–(2) to create private rights of action for SZL claims. Moreover, Defendants argue that the use of the term "see" is more akin to a cross reference and not a whole cloth incorporation of the Zoning Code.

Plaintiffs counter that Defendants' reading of the SZL is not supported because the legislature would not include sections explicitly citing the Zoning Code's private rights of action if it did not intend to grant a private right of action under the SZL. Plaintiffs do not contest that the administrative process under the SZL is robust and that the Zoning Board and the Zoning Administrator have expansive powers under the SZL. The parties diverge over whether the administrative process is the only avenue available to an injured party. Plaintiffs contend that SZL §§ 1410–12 establish that SZL violations can be pursued at the agency level and/or in the Superior Court. Plaintiffs contend that the agency can always step in, but that a private right of action is

especially appropriate when, like here, the Zoning Board and the Zoning Administrator have totally failed to act on alleged violations of the SZL.

Plaintiffs also highlight that the SZL is filled with numerous provisions that contain the use of "see" for the purpose of incorporating other provisions of the SZL. Plaintiffs maintain that if "see" if a mere cross-reference then numerous parts of the SZL would be rendered ineffective because only through incorporation would the provisions make sense.

Here, it is apparent that Plaintiffs' reading of the SZL prevails over Defendants. As the Court previously discussed, the Court should not render provisions of the statute as mere surplusage because to do so is improper. *See Colautti*, 439 U.S. at 392 (citation omitted). To read SZL §§ 1411–12 as mere cross-references would render the provisions totally unnecessary and superfluous. Moreover, if SZL §§ 1411–12 does not incorporate the Zoning Code, especially 2 CMC §§ 7254(d)(1)–(2), then the Zoning Code itself would for the most part be rendered inoperative. As previously discussed, Defendants argue that 2 CMC §§ 7254(d)(1)–(2) only applies to Zoning Code claims. However, from even a cursory review of the Zoning Code it is apparent that there are no substantive provisions to violate in the Zoning Code. Under Defendants' interpretation of the Zoning Code, 2 CMC §§ 7254(d)(1)–(2) provides a mechanism for remedying violations when, using their interpretation, there is nothing to violate in the first place. In reality, the Zoning Code provides the foundation upon which the SZL is built. The inverse of Defendants' argument is true, SZL §§ 1410–12 expressly envision and incorporate the Zoning Code's provisions, including the right to bring a private action alleging violations of the SZL.

Further, the repeated use of "see" throughout the SZL in a manner that suggests incorporation by reference supports the Court's interpretation—the SZL's own terms envision application of Zoning Code provisions such as 2 CMC §§ 7254(d)(1)–(2). While Defendants are correct that other provisions of the Commonwealth Code use more explicit language indicating

incorporation, that does not change the fact that in the case of the SZL it is apparent that "see" was meant to mean incorporation. The Commonwealth Code is littered with terminology inconsistencies and therefore when the Court endeavors to apply the plain meaning of the statute at issue the Court must look to how different provisions of that particular act fit together. Here, after reviewing the SZL it is evident that "see" was intended to connote whole cloth incorporation. Therefore, the Court must give effect to the text of the act and find that SZL §§ 1410–12 incorporates 2 CMC §§ 7254(d)(1)–(2) into the SZL. Defendants' argument that Plaintiffs have failed to exhaust a mandatory agency process pursuant to SZL Article 14 fails for the foregoing reasons.

V. CONCLUSION

After reviewing the arguments and submissions of the parties as well as the relevant law it is evident that Defendants' motion to dismiss Plaintiffs' SZL claims should be **DENIED**. Defendants' novel and esoteric reading of the Zoning Code and the SZL is not sufficiently supported. After a review of the text and the legislative history of the Zoning Code and the SZL it is apparent that these legislative frameworks were designed to work in conjunction with each other, not wholly independent as Defendants contend. To adopt Defendants' reading of the Zoning Code and the SZL would eviscerate the intention of the framers to provide private rights of action when there are alleged zoning violations. Moreover, barring Plaintiffs from bringing suit under the SZL would make the SZL unenforceable even when, as here, the Zoning Board has wholly abdicated its enforcement role.

IT IS SO ORDERED this 23rd day of February, 2018.

/s/
ROBERTO C. NARAJA
Presiding Judge