



(Application)); (Tr. at 18, Apr. 10, 2012 (Tr. I)). The Road is critical infrastructure for the surrounding community, as it provides the only means of ingress and egress for 240 homes and contains a water utility system servicing 1666 customers. (Tr. I at 25-27, 31.) Unfortunately, it is also highly vulnerable to flooding and damage from storm-induced erosion due to its close proximity to the ocean. Id. at 52. Because such erosion could cause the collapse of the Road and the impairment of the water pipes, the Town seeks permission to build the wall in order to prevent erosion of the soil under the Road. (Appl. for State Assent; Tr. I at 25.) For its part, Hang Ten is concerned that the planned location of the proposed wall—directly abutting the Ocean Mist—would cause storm surges to deflect off the wall and into the Ocean Mist, thereby undermining its foundation. (Tr. I at 65-66.) Moreover, Hang Ten contends that the proposed wall would exacerbate the Road’s vulnerability by intensifying Matunuck Beach’s current rate of erosion. Id.

Before considering the Town’s Application, the CRMC determined, as a threshold matter, that construction of the proposed wall is a prohibited activity under the agency’s regulatory framework, known as the Coastal Resources Management Program (CRMP). (Tr. I at 17; Decision at 1.) Consequently, the CRMC determined that, in order to construct the proposed wall, the Town would require a special exception pursuant to § 130 of the CRMP (§ 130). (Tr. I at 17.) The special exception provision of the CRMP permits “alterations and activities that do not conform with a Council goal for the areas affected” only when several criteria are satisfied. R.I. Admin. Code 16-2-1:130(A). First, an applicant must demonstrate that “[t]he proposed activity serves a compelling public purpose,” that “[t]here is no reasonable alternative means of, or location for, serving the compelling public purpose,” and that “[a]ll reasonable steps [have been] taken to minimize environmental impacts and/or use conflicts.” Id. Additionally, the

applicant must provide public notice and the CRMC must hold a public hearing in accordance with the provisions of the Rhode Island Administrative Procedures Act. Id. at § 16-2-1:130 (B). Finally, in granting a special exception, the CRMC “shall apply conditions as necessary to promote the objectives of the [CRMP].” Id. at § 16-2-1:130(C).

As required under § 42-35-9 and § 130(B) of the CRMP, the full Council held a duly noticed hearing on April 10, 2012, to consider whether to grant a special exception permitting the Town to build the proposed wall. (Decision at 1.) At the hearing, members of the public made comments, and the Town’s manager and two engineers gave testimony. Concluding that the Town had not taken all reasonable steps to minimize the proposed wall’s environmental impacts on Matunuck Beach, and finding that the Town had failed to sufficiently consider reasonable alternative means of protecting the Road and water lines, the CRMC voted seven to two to deny the Town’s Application. (Tr. I at 167-69, 172.)

Thereafter, on April 18, 2012, the Town petitioned the CRMC to reconsider its denial of the Application. (Town of South Kingstown, Mot. of Recons.) As grounds for reconsideration, the Town claimed that an additional ten to twenty feet of beach had eroded in front of the Road since the Town initially filed its Application to construct the wall and that, as a result, one more sizable storm could cause the road to collapse. Id. The CRMC acquiesced and held a second hearing on May 8, 2012, at which it took public comment and heard testimony from the CRMC’s executive director. (Decision at 1; Tr. at 2-3, May 8, 2012 (Tr. II).) Upon reconsideration, the CRMC concluded that the proposed wall satisfied the special exception criteria and, accordingly, voted six to four to grant the Town’s Application. The CRMC filed its final Decision on June 26, 2012. (Tr. II at 72; Decision at 5.)

Hang Ten timely filed a complaint pursuant to § 42-35-15(b) asking this Court to reverse

the CRMC's Decision approving the proposed wall. In response, the Town maintains that this Court must affirm the CRMC's findings that it satisfied all of the criteria for obtaining a special exception pursuant to § 130 because such findings were supported by reliable, probative and substantial evidence on the record.

## II

### Standard of Review

When reviewing the decisions of an administrative agency such as the CRMC, this Court “sits as an appellate court with a limited scope of review.” Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). Appellate review of agency actions is governed by the Rhode Island Administrative Procedures Act, which permits this Court to affirm, remand, or modify an agency's decision “if substantial rights of the appellant have been prejudiced” because the agency's decision was:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the agency;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error or law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 42-35-15(g).

When examining the certified record, this Court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Sec. 42-35-15(g). Accordingly, “[i]n the event competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.” R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994). The Court, therefore, “is confined to a determination of whether there is any legally competent evidence to support the agency's decision.” Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). This standard is

permissive in that the Court “must affirm the decision of the agency unless its findings are ‘clearly erroneous.’” Guarino v. Dep’t of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (quoting § 42-35-15(g)(5)). Accordingly, this Court defers to those factual findings made by the agency that are “supported by legally competent evidence.” Arnold v. R.I. Dep’t of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003).

### III

#### Analysis

Hang Ten asserts on appeal that the Town has failed to establish two of the criteria necessary for obtaining a special exception pursuant to § 130.<sup>2</sup> In particular, Hang Ten maintains that the Town failed to present sufficiently reliable, probative or substantial evidence to show that “[t]here is no reasonable alternative” to building the proposed wall that would protect the Road’s infrastructure. R.I. Admin. Code 16-2-1:130(A)(3). Hang Ten also argues that the Town’s evidence failed to establish that the Town has taken “[a]ll reasonable steps . . . to minimize environmental impacts and/or use conflicts” arising from the construction of the proposed wall. Id. at § 16-2-1:130(A)(2). In response, the Town maintains that the CRMC properly granted it a special exception to build the proposed wall because there was, in fact, reliable, probative, and substantial evidence on the record to support the CRMC’s conclusion that the Town had satisfied all of the special exception criteria of § 130.

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<sup>2</sup> Hang Ten does not contest that the Town has satisfied the first criterion under § 130(A), which requires that “[t]he proposed activity serves a compelling public purpose.” R.I. Admin. Code 16-2-1:130(A)(1). Moreover, Hang Ten does not dispute either that the proper public notice and hearing requirements were satisfied or that the CRMC has imposed “conditions as necessary” on the Town’s proposal “to promote the objectives of the [CRMP]” Id. at § 16-2-1:130(B), (C).

## A

### **Reasonable Alternative Means of Serving a Compelling Public Purpose**

In support of its argument that the Town failed to demonstrate that there is “no reasonable alternative means of” protecting the Road, Hang Ten maintains that the evidence in the record reveals several reasonable alternatives to the proposed wall. R.I. Admin. Code 16-2-1:130(A)(3). Specifically, Hang Ten asserts that the Town failed to give sufficient consideration to alternative solutions such as relocating the Road, renourishing the beach in front of the Road, implementing “soft” erosion control methods like sandbags, or building a temporary, removable structure. The Town, however, argues that the testimony of CRMC Executive Director Grover Fugate (Mr. Fugate) and the Town Manager Steven Alfred (Mr. Alfred) provided sufficient evidence to support the CRMC’s finding that the Town had satisfied this criterion.

The CRMC’s enabling statute does not define, nor has our Supreme Court considered, what alternatives would qualify as “reasonable alternative means” under the CRMP’s special exception provisions. The CRMP, however, offers some guidance in its regulations pertaining to the construction of hard shoreline protection facilities, such as the Town’s proposed wall. These regulations require applicants to first consider at least “the relocation of the [infrastructure to be protected] and nonstructural shoreline protection methods.” R.I. Admin. Code 16-2-300.7(B)(3).

The CRMC ultimately concluded that the Town had considered relocating the Road but that no potential relocation position was a reasonable option for protecting it. (Decision at 3, 5.) In support of this conclusion, the CRMC cited the testimony of Mr. Alfred, who explained that the Town considered, but ultimately rejected, four options for relocating the Road as an alternative to building the wall because each option would either be susceptible to the same erosion to which the Road is currently subject, would require the taking of several parcels of

private property by eminent domain and the relocation of a residential community's septic system, would cause traffic and parking congestion, or would require construction in a sensitive wetland environment. (Decision at 3; Tr. I at 29-31, 36.) Evidence before the CRMC also showed that the Town had considered elevating the portion of the Road most at risk to erosion, but that this solution would not be "practical due to engineering, environmental and fiscal issues and limitations." (Mr. Alfred, Letter at 10, Jan. 11, 2012.)

Moreover, the CRMC found that the Town had adequately considered "nonstructural shoreline protection methods," but that such measures would be ineffective and therefore not reasonable alternatives to protecting the Road's infrastructure. R.I. Admin. Code 16-2-300.7(B)(3); see also Decision at 3. Specifically, the CRMC found that because the erosion threat to the Road is imminent, the Town is unable at this point in time to implement any solution besides the wall quickly enough to protect the Road and its water pipes. (Decision at 3.) Supporting this finding is Mr. Alfred's testimony in which he explained that Matunuck Beach is eroding alarmingly fast, as it had eroded between fifteen and twenty feet in front of the Road during the nine months prior to the Town filing its Application to build the wall. (Tr. I at 32.) Additionally, the CRMC cited Mr. Alfred's and Mr. Fugate's testimony that, given both the fast pace of erosion and the lag time of eighteen to thirty-six months for implementing nonstructural alternatives, the wall is the fastest and most viable solution because the alternatives could not be implemented fast enough "to deal with the [imminent] storm threat to the road." (Tr. II at 37-38, 46; Decision at 3.) Mr. Alfred and Mr. Fugate also testified that, even if there was enough time to renourish the beach in front of the Road, such a solution would not obviate the need for the wall, as beach renourishment would be only "a supplement to a more long-term solution," such as a seawall. (Tr. I at 153, 159); see also Tr. II at 34.

Hang Ten points to no evidence to contradict Mr. Alfred or Mr. Fugate's testimony that there are no reasonable alternatives to building the wall given the complications of relocating the Road and the time constraints the Town faces from the fast pace of erosion at Matunuck Beach. Consequently, "a reasonable mind" could accept the Town's testimonial evidence "as adequate to support" the conclusion that there is no reasonable alternative to building the wall that would protect the Road from erosion. Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981) (defining the "substantial evidence" standard of § 42-35-15(g)). The Court concludes, therefore, that the CRMC's finding with regard to the reasonable alternative criterion of § 130 was not "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" and affirms the CRMC's determination on this issue. Sec. 42-35-15(g).

## **B**

### **Reasonable Steps to Minimize Environmental Impacts and Use Conflicts**

Next, Hang Ten contends that the Town failed to demonstrate, as required by § 130, that it took "all reasonable steps . . . to minimize environmental impacts and/or use conflicts" from the proposed wall. Specifically, Hang Ten claims that there is ample evidence on the record showing that the wall would harm the natural environment of Matunuck Beach by increasing erosion, yet the Town has taken no steps to prevent or mitigate this likely effect of the wall. In support of this claim, Hang Ten cites the CRMC staff report, which concluded that the wall would "result in the loss of the beach, associated marine habitat and recreational opportunities . . . including public shoreline access." (CRMC Staff Report at 2, Mar. 16, 2012.) The report goes on to explain that the wall will have such a devastating impact on the beach because the wall "will be exposed [to wave action from the ocean] either during construction or shortly thereafter due to recent erosion," and that "once exposed [the wall] will redirect and amplify

wave energy along the shore resulting in greater erosion.” Id. The Town, however, maintains that it took all reasonable steps to minimize adverse environmental impacts and use conflicts by hiring professional engineers to design the proposed wall “using best practices.”

“Far from granting broad discretion to the Council, [the CRMC’s enabling] statute specifically directs the Council to be guided by this single overriding criterion: “preservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated.”” Milardo v. Coastal Res. Mgmt. Council of R.I., 434 A.2d 266, 271 (R.I. 1981) (quoting G.L. 1956 § 46-23-1(a)(2)). As such, the CRMC may grant a special exception only when the applicant has demonstrated that, inter alia, all reasonable steps have been taken “to minimize environmental impacts and/or use conflicts.” R.I. Admin. Code 16-2-1:130(A)(2).

As support for its finding that the Town took all reasonable steps to minimize the proposed wall’s environmental impacts and use conflicts, the CRMC’s Decision cites three sources of evidence. First, the CRMC claims that its staff report “ultimately concluded that [the proposed wall] satisfies the criteria for issuance of a special exception.”<sup>3</sup> (Decision at 2.) Second, the CRMC stated that it found credible “the testimony of Mr. Alfred [opining] that reasonable steps have been taken to minimize environmental impacts and/or use conflicts.” Id. at 3. Lastly, the CRMC cited the testimony of the Town’s professional engineers. Id. None of this evidence, however, is sufficiently probative to support the CRMC’s finding on the environmental impacts and use conflicts issue.

Although the CRMC staff report does state that “it is the opinion of Staff that the

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<sup>3</sup> The Council failed to specify in what document, exactly, the staff had expressed this conclusion. See Decision at 2. Based on the whole record, however, it appears that the CRMC was referring to the March 16, 2012 staff report.

proposed [wall] meets the criteria for a special exception,” this report fails entirely to explain what, if any, steps the Town took to minimize environmental impacts and use conflicts. (CRMC Staff Report at 4, Mar. 16, 2012.) Instead, in direct contradiction of this conclusory statement, the report explained that “the proposed structure will exacerbate erosion problems, . . . amplify the forces of wave action, . . . [and] result in the loss of the beach, associated marine habitat and the recreational opportunities provided by the beach.” Id. at 2. Thus, far from offering evidentiary support that the Town’s proposal will minimize environmental impacts and use conflicts, the CRMC staff report merely states an unsubstantiated conclusion and is, therefore, of no probative value on this issue. See Wood v. Ford, 525 A.2d 901, 903 (R.I. 1987) (holding that “[a]n administrative agency may not base a finding or determination on information that is not legally probative”); Kelly v. Zoning Bd. of Review of Providence, 94 R.I. 298, 303, 180 A.2d 319, 321, 322 (1962) (holding that “a bare statement of a conclusion without supporting evidence” does not constitute “legal evidence upon which the decision of the board can reasonably rest”).

Furthermore, despite the CRMC’s citation to his testimony as support for its finding on this issue, Mr. Alfred never testified that the Town had satisfied § 130’s environmental impacts and use conflicts requirement. Rather, during his examination of Mr. Alfred, the Town’s counsel asked about each of the special exception requirements except for this one, instead “skip[ping] over” it until the Town’s engineer testified. (Tr. I at 35.)

Finally, despite the CRMC’s statement to the contrary, it is not clear from the testimony of the Town’s two professional engineers that the Town did, in fact, take all reasonable steps to minimize the environmental impacts and use conflicts that would be caused by the proposed wall. Town engineer Rick St. Jean (Mr. St. Jean) testified on direct examination that, “because

[the wall] is being driven landward of the existing” concrete blocks and concrete wall along the Road, the proposed wall would have no impact on either the environmental health of or public access to Matunuck Beach. (Tr. I at 45-48.) On cross-examination, however, Mr. St. Jean contradicted this testimony by opining that, if left unchecked, the natural erosion of the beach would eventually expose the wall to wave energy, and that the wall would then worsen and intensify the effects of erosion on the beach. *Id.* at 63, 66. He further admitted that in designing the wall for the Town, he had not considered measures to renourish the beach in order to prevent the wall from becoming exposed to wave energy. *Id.* at 61-62. Moreover, the Town’s other engineer, Robert Fairbanks (Mr. Fairbanks), also contradicted Mr. St. Jean’s direct examination testimony when he testified that “during a storm event . . . we would lose [sediment] material from out in front of that wall,” and that the wall would exacerbate the natural erosion of the beach when it becomes exposed to wave action. *Id.* at 140, 148-49.

Based on the foregoing, this Court concludes that the CRMC’s finding that the Town had taken all reasonable steps to mitigate environmental impacts and use conflicts was arbitrary and capricious because it was not supported by reliable record evidence. *See* § 42-35-15(g). By citing the staff report and Mr. Alfred’s testimony as evidence in support of this finding, the CRMC ““offered an explanation for its decision that runs counter to the evidence before the agency”” because neither the staff report nor Mr. Alfred’s testimony actually demonstrated in any way that this criterion was satisfied. Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Furthermore, although Mr. St. Jean’s direct testimony supports the CRMC’s finding that all reasonable steps had been taken, the CRMC failed to explain why it credited his one statement to that effect and disregarded his and Mr. Fairbanks’ statements to the

contrary. See Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968) (finding an agency decision that failed to explain “how evidentiary conflicts were resolved” to have been arbitrary).

In furtherance of its statutory responsibility to weigh the evidence and reach findings of fact, the CRMC has the discretion to credit some evidence while disregarding other evidence. In doing so, however, the CRMC must, at a minimum, “mak[e] findings of fact and . . . appl[y] legal principles in such a manner that a judicial body might review [its] decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved. . . .” Thorpe v. Zoning Bd. of Review of N. Kingstown, 492 A.2d 1236, 1237 (R.I. 1985). Otherwise, “judicial review . . . is impossible.” Id. The Court concludes that the CRMC failed to satisfy “these minimal requirements” when it failed entirely to resolve the evidentiary conflicts contained in the record regarding the environmental impacts and use conflicts that the proposed wall would cause. Id. Consequently, this Court remands this matter to the CRMC “to clarify and complete [its] decision” on the issue of the environmental impacts and use conflicts of the proposed wall. May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-40, 267 A.2d 400, 403 (1970) (explaining that resolving evidentiary conflicts is a “minimal requirement” of an agency acting in an adjudicatory capacity and the failure to do so makes judicial review impossible and warrants remand); see also Hooper, 104 R.I. at 44, 241 A.2d at 816 (holding that failure to explain “the grounds upon which an ultimate conclusion is predicated” is grounds for remand).

## IV

### Conclusion

After a review of the entire record, this Court concludes that the CRMC's finding on the issue of no reasonable alternative means was supported by reliable, probative and substantial evidence on the record. Because this finding was neither arbitrary nor capricious and neither affected by error of law nor characterized by an abuse of discretion, Hang Ten's substantial rights have not been prejudiced on this ground. Accordingly, the Court affirms the CRMC's finding that the Town sufficiently demonstrated no reasonable alternative means, other than the proposed wall, to serve the compelling public purpose of maintaining the infrastructure of the Road. However, the Court reverses the CRMC's finding that the Town took all reasonable steps to minimize environmental impacts and use conflicts arising from the construction of the proposed wall because the Court finds that the CRMC's determination on this issue was arbitrary and capricious. For the reasons stated, this issue is remanded to the CRMC for the purpose of affording it an opportunity to clarify and complete its Decision in accordance with this opinion. Counsel shall submit an appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** **Hang Ten, LLC v. State of Rhode Island Coastal Resources Management Council, et al.**

**CASE NO:** **PC-2012-3873**

**COURT:** **Providence County Superior Court**

**DATE DECISION FILED:** **March 13, 2014**

**JUSTICE/MAGISTRATE:** **Nugent, J.**

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