

permission to construct a concrete and steel sheet pile wall¹ along a 202-foot stretch of the Road in the Town, just west of the Ocean Mist. (Town Appl. for State Assent, Aug. 30, 2011 (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 sought permission to build the wall in order to prevent erosion of the soil under the Road. (Application; Tr. I at 25.) For its part, Hang Ten was 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 maintained that the proposed wall would exacerbate the Road’s vulnerability by intensifying Matunuck Beach’s current rate of erosion. Id.

Ultimately, on June 26, 2012, the CRMC approved the Town’s application to build the wall (the June 2012 Decision). (Br. of Defs./Appellants, Ex. A.) Hang Ten appealed, and this Court affirmed the June 2012 Decision, in part, and reversed and remanded, in part. See Hang Ten I at *1. This Court found that while the CRMC’s finding on the issue of no reasonable alternative was sufficiently supported by the record, the agency’s finding that the Town took all reasonable steps to minimize the environmental impacts and use conflicts of the wall was

¹ Steel sheet piles are long structural sections with a vertical interlocking system that creates a continuous wall used to retain either soil or water.

arbitrary and capricious.² Id. at *4, 6. Accordingly, this Court remanded the matter to the CRMC “for the purpose of affording it an opportunity to clarify and complete its Decision” on that issue. Id. at *6.

On June 24, 2014, the CRMC held a hearing on the issue of the environmental impacts and use conflicts of the proposed wall. (Tr. at 15-16, June 24, 2014 (Tr. II)). Given that the CRMC’s membership had changed since the June 2012 Decision, the CRMC properly considered the issue de novo.³ (Br. of Defs./Appellants, Ex. C, Findings of Fact and Decision Pursuant to Superior Court Remand) (hereinafter, Decision). Town Manager Stephen Alfred and engineer Richard St. Jean testified that the environmental impacts of the Town’s proposal would be minimal. (Tr. II at 32, 55.) Engineer Russell Morgan testified in support of Hang Ten’s contention that certain alternatives to the wall would have less of an environmental impact. Id. at 81-84. Ultimately, on September 29, 2014, the CRMC again approved the Town’s application. Id. Hang Ten then filed a timely complaint pursuant to § 42-35-15, asking this Court to reverse the CRMC’s decision.

² Section 130 of the Coastal Resources Management Program 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). 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.

³ The Rhode Island Supreme Court has held that ““where there has been a change in the composition of a board of review made subsequent to the rendering of a decision which this [C]ourt remands for clarification, completion and/or supplementation of the record on which the decision was based, a hearing de novo on the application for relief is a jurisdictional condition precedent to a valid decision.”” Town of Burrillville v. Pascoag Apartment Assocs., 950 A.2d 435, 443 n.9 (R.I. 2008) (quoting Coderre v. Zoning Bd. of Review of Pawtucket, 103 R.I. 575, 577–78, 239 A.2d 729, 730 (1968)).

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 Soc. Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (quoting § 42-35-15(g)(5)). As such, 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). Additionally, Courts typically “accord an agency’s decision considerable deference when that decision involves a technical question within the field of the agency’s expertise.” R.I. Higher Educ. Assistance Auth. v. Sec’y, U.S. Dep’t of Educ., 929 F.2d 844, 857 (1st Cir. 1991).

III

Analysis

Hang Ten argues that the record fails to support the CRMC’s finding that the Town took reasonable steps to minimize the environmental impact and/or use conflicts of the wall. In its previous decision remanding the case to the CRMC, this Court noted that the evidence previously relied on by the Town on this issue amounted to unsupported conclusory statements that were contradicted by other record evidence. See Hang Ten I, at *5. Specifically, the Court noted that the CMRC’s Staff Report stated 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. (quoting CRMC Staff Report at 2, Mar. 16, 2012).

At the June 24, 2014 hearing, the Town presented new evidence that since the June 2012 Decision, the Town purchased two abutting lots seaward of the proposed wall. (Tr. II at 50.) At the hearing, Town Manager Stephen Alfred testified that the purchase of these lots allows the Town to expand public access to the beach and provide “annual replenishment of the sand between the revetment and sheet pile wall.” Id. at 55. Additionally, the CRMC credited the testimony of engineer Richard St. Jean, the head engineer of St. Jean Engineering, LLC, the company that the Town contracted with to design the wall. (Decision, Findings of Fact, ¶¶ 5-6, 17.) Mr. St. Jean testified that the yearly replenishment of sand would minimize the

environmental impact to the beach since “it will basically restore it to the condition that it is today, like we didn’t do anything.” (Tr. II at 32). Notably, even Hang Ten’s expert, engineer Russell Morgan, admitted that this yearly replenishment would minimize the wall’s environmental impact. Id. at 93-94. Mr. Morgan explained that vertical sea walls deflect wave energy causing erosion around the structure. Id. at 78-79. However, Mr. Morgan conceded that yearly replacement of the sand would minimize this effect. Id. at 93-94.

Thus, the evidence presented by the Town at the June 24, 2014 hearing directly addresses this Court’s concerns regarding the findings in the CRMC Staff Report—i.e., that the wall would result in the loss of public access to the beach and increase erosion. The new evidence of record demonstrates that with the purchase of the two seaward lots and the commitment to yearly sand replenishment, the Town has presented legally competent evidence that its plan will actually increase public access and minimize erosion concerns.⁴ See Foster-Glocester Reg’l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1012 (R.I. 2004) (“Legally competent evidence is defined as ‘such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.’”) (quoting R.I. Temps, Inc. v. Dep’t of Labor and Training, Bd. of Review, 749 A.2d 1121, 1125 (R.I. 2000) (per curiam)).

Nonetheless, Hang Ten contends that the CRMC’s finding that the wall minimizes use conflicts remains unsupported by the record because “no effort was made to include a return or other protective feature to protect against the Sea Wall’s destruction of the Ocean Mist.” (Pl./Appellant Br. at 4.) As an initial matter, in its previous Decision, this Court already determined that the CRMC’s finding with respect to the reasonable alternative criterion of § 130

⁴ Mr. Alfred testified that the Town agreed that public access to the beach and annual replenishment of the sand would both be conditions of the CRMC’s assent. (Tr. II at 55).

was adequately supported by the record. Hang Ten I at *3-4. Moreover, the CRMC's Decision credited the testimony of Mr. St. Jean and statements by CRMC executive director Grover Fugate that the alternatives proposed by Hang Ten would result in the loss of public access to the beach and worsen the environmental impact. (Decision, Findings of Fact, ¶¶ 6, 14.) For example, Mr. Fugate explained at the hearing that creating a "return" to the ocean around Ocean Mist would "create a pocket in there of refraction that will actually be more damaging from storms out in the southeast . . . than the current situation right now." (Tr. II at 47). Mr. Fugate further explained that Hang Ten's proposal of rebuilding an existing wall was not a better alternative since the existing wall "would still allow for overtopping . . . and potentially then eroding the roadbed." Id. The Court notes that the CRMC may rely on its own expert staff and is authorized to engage its own experts. See G.L. 1956 § 46-23-14 ("The council shall be authorized to engage its own expert and outside consultants, and the council shall be empowered to use that testimony in making its decisions."). The CRMC also stated that it did not find credible the testimony of Hang Ten's expert, Mr. Morgan, that "restoring the remnants of an historical wall at the site would be the better option for minimizing environmental impacts in the area." (Decision, Findings of Fact, ¶ 11.)

In essence, Hang Ten simply disagrees with the evidence presented by the Town and the CRMC's decision to credit that evidence. See Tierney v. Dep't of Human Servs., 793 A.2d 210, 213 (R.I. 2002) ("This Court does not substitute its judgment for that of the agency concerning the credibility of witnesses or the weight of the evidence concerning questions of fact."). However, in reviewing the agency's decision, this Court "does not weigh the evidence upon which findings of fact are based but merely reviews the record in order to determine whether there is legally competent evidence to support the administrative decision." Bunch v. Bd. of

Review, R.I. Dep't of Emp't & Training, 690 A.2d 335, 337 (R.I. 1997); see also Tierney, 793 A.2d at 213. The CRMC's finding that the Town took all reasonable steps to minimize the environmental impact and/or use conflicts is supported by competent evidence. As such, this Court is required to uphold the agency's decision. See R.I. Pub. Telecomms. Auth., 650 A.2d at 485.

IV

Conclusion

After a review of the entire record, this Court concludes that the CRMC's finding on the issue of the environmental impact of the wall 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 Decision. Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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

CASE NO: **PC-2014-4986**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **May 8, 2015**

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

ATTORNEYS:

For Plaintiff: **William R. Landry, Esq.**
Stephen J. Reid, Jr., Esq.

For Defendant: **Michael A. Ursillo, Esq.**
Brian A. Goldman, Esq.