STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

Tim Fox
Attorney General

1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

TO: The Montana Board of Environmental Review

FROM: Sarah Clerget, Board Attorney

RE: Review of a hearing examiner's proposed decision

DATE: January 18, 2018

The purpose of this memo is to assist BER when reviewing a hearing examiner's proposed decision in a contested case proceeding. As the Board's February 9, 2018 meeting is the first time most current members of BER will be called upon to conduct such a review, this memo is intended to serve as a reminder of the procedure to be employed by, and the options available to the Board.

The record before the Board consists of a written record and an opportunity for the parties to make oral arguments to the Board. While this memo is applicable to all proposed orders submitted to BER for review and decision, the Board's materials on the action item for the *Payne Logging* matter[1] at the upcoming meeting serve as a useful example of what is included for the Board's consideration when a case is up for review. Pursuant to the contested cases provisions of the Montana Administrative Procedures Act (MAPA), Mont. Code Ann. § 2-4-601 *et. seq.*, hearing examiner Andres Haladay issued *Findings of Fact, Conclusions of Law and Proposed Order on Summary Judgment* (Proposed Order) on September 8, 2017. On October 2, 2017, Payne timely-filed Exceptions to the Proposed Order (Exceptions). On October 16, 2017, DEQ filed a Response brief to those Exceptions (Response); Payne then filed a final Reply brief (Reply) in support of its Exceptions on October 24, 2017. All four documents—the Proposed Order, Exceptions, Response, and Reply—are included the Board's materials for the February 9 meeting. The *Payne Logging* matter represents a typical case, but some matters may not include all of these documents.

In addition to the written materials, at the meeting where BER will consider the proposed decision the parties can make oral arguments to the Board. In the *Payne Logging* matter, time has been set aside during the Board's meeting on February 9, 2018 for such

[1] In the Matter of Termination by DEQ of the Applications by Payne Logging, Inc. Requesting to Move Boundaries of the Payne Logging Facility in Libby, Lincoln County, Montana, BER 2015-08 JV.

arguments from Payne and DEQ. This is the parties' opportunity to make arguments to the Board, and the Board's opportunity to ask questions of the parties.

Based on the written record and the oral arguments before the Board, it must decide, by seconded motion, what to do with hearing examiner Haladay's Proposed Order. MAPA provides BER with the following options:

> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

Mont. Code Ann. § 2-4-621(3).

In other words, BER has three options regarding what action to take upon review of a hearing examiner's proposed order:

(1) Accept the proposed order in its entirety and adopt it as the Board's final order;

(2) Accept the findings of fact in the proposed order, but modify the conclusions of law or interpretations of administrative rules; or

(3) Reject the proposed order, review the entire record that was before the hearing examiner, find that the Proposed Order is not supported by substantial evidence, and modify the findings of fact and conclusions of law in the proposed order accordingly. This could mean a modified order granting summary judgment, an order denying summary judgment and ordering a hearing, or some combination of the two.

When choosing among these three options, the Board should keep certain legal standards in mind. Regarding options (2) and (3), the agency may "correct a hearing examiner's incorrect conclusions of law" in a final order, without having to review the entire factual record. *Mont. Dept. Transp. v. Mont. Dept. Labor and Indus.*, 2016 MT 282, ¶ 23 (herein, *MDOT*); Mont. Code Ann. § 2-4-621(3). However, the agency is more constrained with regard to modifying findings of fact. The agency cannot discard a hearing examiner's factual findings. *Mayer v. Bd. of Psychologists,* 2014 MT 85, ¶¶ 7,

27-29. "Under MAPA, an agency may reject a hearing officer's findings of fact only if, upon review of the complete record, the agency first determines that the findings were not based upon competent substantial evidence." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 25 ((internal quotations marks omitted; citing *Moran v. Shotgun Willies*, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995), Mont. Code Ann. § 2-4-621(3)). "In reviewing findings of fact, the question is not whether there is evidence to support *different* findings, but whether competent substantial evidence supports the findings actually made." *Mayer*, ¶ 27 (citing *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21 (emphasis supplied in *Knowles*)).

In other words, "[w]hen an agency has utilized a hearing examiner rather than personally hearing and observing the evidence, the agency may not reject or modify the examiner's findings of fact unless they are clearly erroneous." *MDOT*, ¶ 13. "An agency abuses its discretion if it modifies the findings of a hearing officer without first determining that the findings were not supported by substantial evidence." *Stricker*, ¶ 25. "[A]n agency's rejection or modification of a hearing officer's findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence." *Id*. (internal citations omitted). With regard to whether substantial credible evidence supports the factual findings, *Stricker* explained:

> Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance. The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence.

Stricker, ¶ 26 (internal citations and quotations omitted); *see also Mayer*, ¶ 27 (quoting Black's Law Dictionary 635, 636, 639, 640 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009)).

Once a decision is made, BER may utilize the Board Secretary or Board Attorney to assist in drafting the final order memoralizing the Board's substantive decision, for the signature of the Board Chair. If the decision is dispositive (ending the case), then the aggrieved party may appeal to state District Court for review. If the Board's decision is not dispositive, the Board can decide to retain jurisdiction of this matter or assign it to a hearings examiner for further proceedings.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: TERMINATION BY DEQ OF THE APPLICATION BY PAYNE LOGGING, INC. REQUESTING TO MOVE BOUNDARIES OF THE PAYNE LOGGING FACILITY IN LIBBY, LINCOLN COUNTY, MONTANA.	**CASE NO. BER 2015-08 JV**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER ON SUMMARY JUDGMENT

INTRODUCTION

On October 23, 2015, the Montana Department of Environmental Quality (DEQ) received a Notice of Appeal and Request for Hearing from Payne Logging, Inc. (Payne Logging). The parties cross-moved for summary judgment. This matter is fully-briefed and ready for disposition. DEQ's Motion for Summary Judgment is granted and Payne Logging's Motion for Summary Judgment is denied.

FINDINGS OF FACT

1. Robert Payne owns Payne Logging.

2. Payne Logging (Payne) has owned a licensed as a motor vehicle recycling and disposal facility (MVRDF) since 2013.

3. On November 21, 2014, the Lincoln County Environmental Health Department (LEHD) conducted an inspection of Payne Logging's MVRDF.

4. On July 20, 2015, DEQ received a "Motor Vehicle Wrecking Facility Application For License" from Payne Logging.

5. DEQ uses the same "Application For License" form for all MVRDF licenses.

6. The Parties agree that Payne Logging's Application requested a MVRDF with different boundaries than Payne Logging's existing licensed facility at the time.

7. On or about July 30, 2015, DEQ notified adjacent property owners of Payne Logging's application.

8. On July 30, 2015, DEQ sent a letter to the Lincoln County Commissioners.

9. This letter informed the Commissioners:

> The Montana Department of Environmental Quality (DEQ), Motor Vehicle Recycling & Disposal Program (MVRDP), has received an application to modify the license of a Motor Vehicle Wrecking Facility (MVWF) within your jurisdiction. As required by the Motor Vehicle Recycling & Disposal Act, 75-10-516, MCA, this letter is to notify you of the receipt by DEQ of such application.
> …
> Mr. Payne has requested that he be approved to reconfigure the boundaries of his licensed 3.15 acre MVWF. The proposed boundary change will result in the removal of some areas of his property from motor vehicle recycling activities and adding new areas for those activities.

10. The letter continued:

> Pursuant to Section 75-10-516(2), MCA, provides that, **within 30 days of receipt of this notification,** the governing body of the County may: (a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community, and (b) adopt a resolution in **support of** or in **opposition to** the location of the proposed facility and to transmit a copy of the resolution to DEQ. DEQ may **not** grant a MVWF license or modify and [sic] existing license that the governing body of the local jurisdiction has opposed under this section of law.

(emphasis in original)

11. The certified mail receipt indicates the Lincoln County Commission received DEQ's letter on August 3, 2015.

12. On September 2, the Lincoln County Commission adopted Resolution 947 titled "Payne Logging, Inc. Motor Vehicle Recycling & Disposal Act Permit."

13. Resolution 947 stated:

> Whereas, Payne Logging, Inc. applied through Montana Department of Environmental Quality (DEQ) to modify their existing Motor Vehicle Wrecking Facility License.
> …
> Whereas, Section 75-10-516(2), MCA, provides that, within 30 day of receipt of the notification, the governing body of the County may: (a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community, and (b) adopt a resolution in support of or in opposition to the location of the proposed facility.
> ….
> Whereas, the County Commissioners held a public hearing on August 28, 2015 and there was unanimous opposition and no proponents…
> ….
> Therefore be it resolved that, the County Commissioners oppose the Motor Vehicle Wrecking Facility application submitted by Payne Logging, Inc. to modify existing License #376.
>
> Be it further resolved that, the County Commissioners will be in opposition to any modifications until the current license is brought into full compliance with ARM 17.50.202 and all other Motor Vehicle Recycling & Disposal Program statutes.

14. Robert Payne asserts he did not have notice of the Lincoln County Commission's hearing on his Application.

15. The Lincoln County Commission sent Resolution 947 to DEQ.

16. On September 24, 2015, DEQ notified Payne Logging:

> On September 2, 2015, the Lincoln County Commissioners opposed any change to your current license under Resolution 947, (enclosed), until full compliance with the motor vehicle recycling regulations are achieved regarding your original application. The MVRDP has terminated the application requesting to move the boundaries of your facility due to the denial on the county level.

17. Payne subsequently appealed DEQ's decision to the Board of Environmental Review.

CONCLUSION OF LAW

1. This matter is governed by the Montana Administrative Procedure act, Contested Cases, Mont. Code Ann. Tit. 2, ch. 4, pt. 6, and Mont. Admin. R.

17.4.101 which incorporates the Attorney General's Model Rules for contested cases, Mont. Admin. R. 1.3.211 through 1.3.225, and by Mont. Code Ann. Title 75, Chapter 10, Part 5.

2. "The Montana Rules of Civil Procedure do not apply to administrative hearings." *Citizens Awareness Network v. Mont. Bd. of Envt'l. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 61, 227 P.3d 583, 588. However, "they may still serve as guidance for the agency and the parties." *Id*.

3. Pursuant to the Montana Administrative Procedure Act ("MAPA"), "[i]n a contested case, all parties must be afforded an opportunity for hearing after reasonable notice." Mont. Code Ann. § 2-4-601(1).

4. However, under MAPA, an evidentiary hearing is not required when there are no material facts in dispute. *In re Peila*, 249 Mont. 272, 281, 815 P.2d 139, 144-45 (1991). Where material facts are not in dispute, and a party has had reasonable opportunity to be heard, summary judgment is appropriate in a MAPA contested case. *Id*.

5. "Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3)." *Sullivan v. Cherewick*, 2017 MT 38, ¶ 9. "Once the moving party has met its burden, the opposing party must present material and substantial evidence to raise a genuine issue of material fact." *Id*. A party opposing summary judgment is entitled to all reasonable inferences from the offered evidence, but cannot rely on conclusory statements, speculative assertions or mere denials. *Id*.

6. The Parties have received reasonable notice of their cross-motions for summary judgment and respective dispositive arguments. They have each had a reasonable opportunity to be heard.

The Board Has Jurisdiction Over this Matter.

7. DEQ has argued that the Board of Environmental Review does not have jurisdiction to consider this matter.

8. An administrative agency only has those powers specifically conferred by the legislature. *Auto Parts of Bozeman v. Emp't Rels. Div. Uninsured Employers' Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193. "An administrative agency may not assume jurisdiction without express delegation by the legislature." *Id*.

9. Mont. Code Ann. § 75-10-516 provides, in part:

> (2) Within 30 days of receipt of the notification in subsection (1)(b), the governing body of the county may:
>
> (a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community; and
>
> (b) adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department.
>
> (3) The department may not grant a license to a facility that a governing body has opposed under subsection (2)(b).

10. Mont. Code Ann. § 75-10-515 provides: "A decision by the department to issue, deny, or revoke a motor vehicle wrecking facility or graveyard license may be appealed to the board within 30 days after receipt of official notice of the department's decision."

11. The issue, as presented by DEQ is: whether Payne is even permitted to appeal DEQ's decision to not grant Payne's application, once Lincoln County passed Resolution 947.

12. DEQ argues that it did not "deny" Payne's application, but rather was forced to "not grant the license" once it received Resolution 947 from the Lincoln County Commission.

13. The plain language of Mont. Code Ann. § 75-10-516(3) provides that DEQ was prohibited from granting Payne's license once Lincoln County passed a resolution in opposition.

14. The practical effect of not granting Payne's Application is that DEQ denied Payne's Application for a motor vehicle wrecking facility license.

15. Therefore, DEQ's September 2, 2015 letter to Payne constituted a denial of a motor vehicle wrecking facility license.

16. Payne was permitted to appeal DEQ's denial, pursuant to Mont. Code Ann. § 75-10-515.

17. The Board of Environmental Review has jurisdiction over Payne's appeal.

Mont. Code Ann. § 75-10-516 Applied to Payne's Application.

18. At the outset, Payne argues his Application was not subject to review under Mont. Code Ann. § 75-10-516, and DEQ's denial based on the statute was erroneous.

19. Payne's argument is two-fold: (1) the legislative intent was to only apply Mont. Code Ann. § 75-10-516 to new facilities, and (2) his application was merely to modify an existing license.

20. As a threshold matter, Payne's argument fails because the plain language of Mont. Code Ann. § 75-10-516(1) establishes that this statute applies any time "an application for a motor vehicle wrecking facility or motor vehicle graveyard is filed with the department." There is no language that limits this statute to *new* facilities. Payne's interpretation would insert an additional word "new" into the statute; a word expressly omitted by the legislature. The role of a judicial body "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."

Mont. Code Ann. § 1-2-101. For this reason alone, Payne's argument fails and Mont. Code Ann. § 75-10-516 is the proper statute to evaluate his application.

21. Even if Payne's legislative intent argument were considered, it does not support his argument.

22. The sponsor of SB 706, which codified Mont. Code Ann. § 75-10-516, explained the purpose was to allow the county and local residents have a say in whether motor vehicle wrecking facilities are compatible uses in the proposed areas. Prior to the enactment of SB 706, the decision was left entirely to DEQ (then DHES), leaving the locality without a say, other than countywide zoning.

23. The sponsor of the bill noted the conflict with residential subdivisions:

> A lovely subdivision was put in with county lake homes, private roads from off a paved county road, a little lake, and these people went through everything just right, and put in a really nice subdivision. A fellow got a junk of land real cheap up behind the subdivision, and decided to put in a vehicle wrecking yard…He was able to go through the [DEQ] process, and there was nothing that our Commissioners nor the folks living in the neighborhood could do.

24. Under questioning from State Senators, Jon Dillard, representing DHES (now DEQ) explained that under SB 706, if an existing facility "wanted to expand they would have to go through the process in the bill."

25. Requiring Payne to submit his application to the Lincoln County Commission comports with this legislative intent.

26. During the enactment of Mont. Code Ann. § 75-10-516, the sponsor stated his belief that counties "should have the vote if they need a new site for a wrecking facility."

27. Payne argues that this interpretation exempts him from Mont. Code Ann. § 75-10-516, because he was merely applying to modify the boundaries of an existing – not new – facility.

28. This argument ignores the nature of Payne's application and the intent of SB 706 to allow local governments to review the locations of wrecking facilities for compatibility with surrounding land uses.

29. Payne concedes he was not merely seeking to modify his facility within the four corners of its current location. Just the opposite, Payne's Statement of Undisputed facts states that the goal of his application was to change "the delimitated boundary location of the facility without increasing the acreage of the facility." In other words, Payne sought a license to site a motor vehicle wrecking facility on at least some land that had not been previously used for the purposes of his existing facility.

30. On its face, Payne's application sought a license to site a new facility.

31. However, regardless whether this is characterized as an application for a "new" facility, or whether characterized as expansion, there is no dispute that Payne's application sought to use land that had never been approved by either Lincoln County or DEQ, for the purposes of a motor vehicle wrecking facility. This is either a new facility or expansion of an existing facility. Subjecting Payne's application to Mont. Code Ann. § 75-10-516 comports with the legislative intent.

32. Moreover, accepting Payne's argument would lead to absurd results and frustrate the legislative intent. Under Payne's argument, an owner of an existing motor vehicle wrecking facility can constantly move the boundaries or site of an existing facility, with no recourse to or input by the local government. Facility operators who previously had to get county approval could move their facility to locations with incompatible land uses, by only going through DEQ. This type of behavior and lack of local review is exactly what SB 706 was intended to prevent.

33. Based on the foregoing, even if legislative intent were considered Payne's application is subject to review under Mont. Code Ann. § 75-10-516.

34. Payne's argument that his license was merely a modification to comply with shielding, misconstrues both the application and Mont. Code Ann. § 75-10-504.

35. While Payne may have been attempting to comply with shielding requirements, he has already conceded that his application went beyond mere shielding: he expressly requested to add new land to the boundaries of his motor vehicle wrecking facility. This is a request separate and distinct from shielding.

36. Moreover, Mont. Code Ann. § 75-10-504 does not apply to circumstances where a party seeks to add new land or change the site of an existing facility. That statute provides:

> A motor vehicle wrecking facility or graveyard site established or proposed on or after July 1, 1973, may not be approved for use or licensed if the proposed facility cannot be shielded from public view on the date it is initially established or proposed to the department for licensure. The prohibition concerning approval of a new motor vehicle wrecking facility or graveyard site does not apply to a facility site that was licensed as such at any time within the 18 months immediately preceding the date an application is made for licensure of such site.

37. This statute concerns the approval or licensing of a facility that cannot be shielded from public view. The first sentence is a prohibition on licensure for facilities that cannot be properly shielded, either on the date of proposal or the date of establishment. The second sentence exempts from this prohibition facilities that were licensed within 18 months immediately preceding an application.

38. Payne seeks to take the second sentence of this statute out of context to allow him to apply for any site changes or other modifications to his license, without having to submit to the review process in Mont. Code Ann. § 75-10-516. Read in its proper context, Mont. Code Ann. § 75-10-504 applies to shielding questions alone. Payne's application – by his own admission – sought to change the boundaries and use new land for a motor vehicle wrecking facility.

39. Based on the foregoing, Mont. Code Ann. § 75-10-504 does not operate to exempt Payne from going through the review process of Mont. Code Ann. § 75-10-516. His request, which included siting his facility on new land, is "an application for a motor vehicle wrecking facility" subject to Mont. Code Ann. § 75-10-516.

Lincoln County Resolution 947 Required Denial of Payne's Application.

40. The plain language of Mont. Code Ann. § 75-10-516 sets forth the requirements when someone submits an application for a motor vehicle wrecking facility.

41. First, when DEQ receives an application for a motor vehicle wrecking facility, DEQ is required to notify "the governing body of the county in which the proposed facility is to be located." Mont. Code Ann. § 75-10-516(1)(b).

42. Second, within 30 days of the county receiving notification, the county may, "(a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community; and (b) adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department." Mont. Code Ann. § 75-10-516(2).

43. Third, DEQ "may not grant a license to a facility" that the county has opposed." Mont. Code Ann. § 75-10-516(3).

44. Finally, in making its decision to grant or deny a license application, the department is required to consider "the effect of the proposed facility on adjoining landowners and land uses." Mont. Code Ann. § 75-10-516(4).

45. Applying these criteria, on July 20, 2015, DEQ received Payne's application for a motor vehicle wrecking facility. Pursuant to Mont. Code Ann. §75-10-516(1)(b), DEQ notified the Lincoln County Commission on July 30, 2015.

46. Subsequently, Lincoln County transmitted Resolution 947 to DEQ. The resolution stated that the Lincoln County Commission held a hearing on August 28, 2015 for the purpose of determining whether Payne's proposed facility would significantly affect the quality of life of adjoining landowners and the surrounding community, and whether to adopt a resolution of support or opposition to the location of the proposed facility.

47. Resolution 947 further stated that the Commission heard unanimous opposition to Payne's application.

48. Resolution 947 stated the County Commissioners' opposition to Payne's application.

49. Facially, Resolution 947, and the subsequent transmittal to DEQ, satisfies the requirement that Lincoln County "adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department." Mont. Code Ann. § 75-10-516(2)(b).

50. Upon receipt of Resolution 947, DEQ was bound by the explicit language of Mont. Code Ann. § 75-10-516(3) "[t]he department may not grant a license to a facility that a governing body has opposed under subsection 2(b)." DEQ had no choice but to deny Payne's application. Had DEQ granted Payne's application, it would have been an express violation of Mont. Code Ann. § 75-10-516(3).

51. The last provision of Mont. Code Ann. § 75-10-516 is not applicable as DEQ had no discretion to "grant or deny" Payne's license once it received Resolution 947 opposing the application. Mont. Code Ann. § 75-10-516(3), -(4).

52. In sum, DEQ's denial of Payne's application was a correct application of Mont. Code Ann. § 75-10-516.

Payne has Failed to Establish an Ambiguity or Statutory Conflict.

53. In recognition that the plain language of Mont. Code Ann. § 75-10-516 required DEQ to deny Payne's application, Payne argues that the statutory scheme of and legislative intent behind Mont. Code Ann. § Title 75, Chapter 10, Part 5, require additional considerations beyond those set forth in Mont. Code Ann. § 75-10-516.

54. "The intention of the legislature in enacting all statutes must first be determined from the plain meaning of the words in the statute." *Carlson v. City of Bozeman*, 2001 MT 46, ¶ 15, 304 Mont. 277, 20 P.3d 792. The role of a court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. §1-2-101. If the statutory language "is clear, and unambiguous then no further interpretation is required." *Engellant v. Engellant (In re Estate of Engellant)*, 2017 MT 100, ¶ 11, 387 Mont. 313. Only where a statute is ambiguous and subject to more than one reasonable interpretation will a judicial body delve into legislative history." *Carlson*, ¶ 15.

55. An "act must be read together, and where possible, full effect given to all statutes involved." *Id*. The goals behind construing a statute as a whole are to avoid conflicts and absurd results. *Id*; *Engellant*, ¶ 11.

56. As noted above, the plain language of Mont. Code Ann. § 75-10-516(3) is clear and unambiguous: DEQ cannot grant an application for a motor vehicle wrecking facility when the local government has adopted a resolution in opposition and transmitted that resolution to DEQ. Mont. Code Ann. § 75-10-516(2)(b), -(3). As a result, no further interpretation is necessary to determine the plain legislative intent behind this statute. Payne's arguments regarding legislative intent fail for this reason alone.

57. Even if Payne's legislative intent argument was considered, it does not support his position.

58. During the Senate Local Government Hearing on SB 706, the Montana Association of Counties explained the legal effect of the bill:

> [I]f the county adopted a resolution opposing the citing of the wrecking facility then the [DEQ] would be barred from proceeding with the issuance of a license.

59. Based on the legislative history, the legislative intent was not only to allow counties a say in the facility siting process, but to give counties the ability to bar DEQ from issuing a license for a motor vehicle wrecking facility. Therefore, even if the legislative intent is considered, upon receipt of Resolution 947 DEQ was forced to deny Payne's application.

60. Payne has also failed to establish any conflict among the statutes within Mont. Code Ann. Title 75, Chapter 10, Part 5.

61. Payne's reliance on Mont. Code Ann. § 75-10-504 is misplaced for the same reasons as discussed above. That statute speaks to prohibitions on the issuance of licenses based on shielding decisions. Payne concedes his application was a boundary change, in encompass new land.

62. Moreover, Payne's argument would lead to absurd results. Under Payne's argument, as long as an existing facility operator claims that their application involves shielding, they can avoid review by the county government. This would encourage gamesmanship: like here, an existing facility owner could apply to site their facility on new land, claim that shielding is involved, and prevent the county government from exercising any review power, otherwise provided for in Mont. Code Ann. § 75-10-516.

63. This would be an absurd result, conflict with the plain language of Mont. Code Ann. § 75-10-516, and frustrate the legislative intent.

64. Payne has failed to establish that the statutory scheme, when read as a whole, establishes either an ambiguity or a conflict.

Payne Cannot Challenge Resolution 947 in this Forum.

65. Payne also argues that DEQ cannot rely on Resolution 947 as a basis to deny Payne's application because Lincoln County did not comply with statutory and notice requirements in adopting Resolution 947.

66. As a threshold matter, this argument presupposes that DEQ (and the Board of Environmental Review) has both the obligation and authority to review the substantive and procedural actions of Lincoln County. Beyond review for statutory compliance, such a review would include determining whether Lincoln County met constitutional due process and open meeting requirements in the adoption of Resolution 947. It would also require DEQ (and the Board of Environmental Review) to review any Lincoln-County specific notice and participation laws, in order to determine whether Lincoln County complied with its own internal procedures.

67. Payne has not identified authority that would require or authorize DEQ or the Board of Environmental review to engage in such a broad review of a local government entity, exercise control over a local government, or authority to set aside Resolution 947.

68. The Montana Supreme Court prohibits agencies from addressing the type of constitutional due process and open meeting questions Payne asserts. Administrative agencies lack the necessary judicial power to resolve such constitutional questions. *Francetich v. State Compensation Mut. Ins. Fund*, 252 Mont. 215, 217, 827 P.2d 1279, 1281 (1992). "Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers." *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-136, 664 P.2d 316, 318 (1983).

69. Furthermore, the scope of review Payne advocates for raises concerns regarding separation of powers. DEQ and the Board of Environmental Review are agencies of the executive branch. Mont. Const. Art. VI. Lincoln County is a separate constitutional actor, established by Mont. Const. Art. XI. Payne has not presented authority for DEQ or the Board of Environmental Review to set aside Resolution 947, passed by a separate constitutional actor.

70. There is the added concern that MAPA exempts local governments, like Lincoln County, from the definition of "agency." Mont. Code Ann. § 2-4-102(2)(b). Under MAPA, contested cases determine legal right between an "agency" and a party. Mont. Code Ann. § 2-4-102(4). Payne is improperly asking the Board of Environmental Review to determine the legality of Lincoln County's Resolution 947 without the presence of Lincoln County.

71. As a result, Payne has failed to establish that the Board of Environmental Review can exercise any power of review, or authority to set aside Resolution 947.

72. Even if one assumed that the Board could somehow review the actions of Lincoln County, Payne has not established the invalidity of Lincoln County's actions.

73. As a threshold matter, Resolution 947 is presumptively valid. Montana law contains numerous "disputable presumptions." Mont. Code Ann. § 26-1-602. One such presumption is that an "official duty has been regularly performed." Mont. Code Ann. § 26-1-602(15). Another is that the "ordinary course of business has been followed." Mont. Code Ann. § 26-1-602(20). Another is that the "law has been obeyed." Mont. Code Ann. § 26-1-602(33).

74. Each of these presumptions, taken individually or together, serves to create a disputable presumption that Resolution 947 is presumptively valid. This is

further buttressed by the fact that Payne has never presented evidence of any judicial ruling setting aside or invalidating Resolution 947.

75. Aside from legal arguments, Payne only relies on one piece of evidence to invalidate Resolution 947: his self-serving claim that he never received notice of the Lincoln County Commissioners' hearing on his application.

76. The undersigned concludes that this claim is insufficient to rebut the presumption that Resolution 947 is a valid resolution.

77. Finally, Payne spends a great deal of time analyzing the content of Resolution 947 and arguing that it does not pass muster under Mont. Code Ann. § 75-10-516(2)(a). Payne misreads the controlling statute. Mont. Code Ann. § 75-10-516(2) states: "The department may not grant a license to a facility that a governing body has opposed *under subsection (2)(b)*." (emphasis added). Subsection 2(b) only requires a county to "adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department." Mont. Code Ann. § 75-10-516(2)(b).

78. Lincoln County adopted Resolution 947, expressly opposing Payne's application, and transmitted a copy of that resolution to DEQ. This is all that was required. Payne's analysis of whether the Resolution sufficiently addressed the subject matter set forth in Mont. Code Ann. § 75-10-516(2)(a) is beside the point.

79. In sum, neither DEQ nor the Board of Environmental Review have the authority or power to review or invalidate the actions of Lincoln County in passing Resolution 947. Even if these agencies had this power, Payne has failed to rebut the presumption that Resolution 947 is valid or establish Resolution 947's invalidity as a matter of law.

Payne's Due Process Argument Cannot be Addressed by the Board.

80. Payne also argues that even if Mont. Code Ann. § 75-10-516 required DEQ to deny Payne's application, then the statutory process violates constitutional due process and MAPA.

81. Although couched in terms of two separate arguments, Payne's argument is one and the same: a claim that application of Mont. Code Ann. § 75-10-516 violates procedural due process. One purpose of MAPA is to "establish general uniformity and due process safeguards "in agency rulemaking, legislative review of rules, and contested case proceedings." Mont. Code Ann. § 2-4-101. As a result, whether phrased as a violation of due process or a violation of MAPA, Payne's argument boils down to a due process challenge to application of Mont. Code Ann. § 75-10-516.

82. Payne's argument is essentially that it cannot meaningfully challenge DEQ's decision to deny its license application because Mont. Code Ann. § 75-10-516(3) dictated the outcome when Lincoln County passed Resolution 947 in opposition to the application: "there is no appeal possible under MCA Section 75-10-515 of a DEQ decision in every instance where a county has opposed an application under Section 75-10-516(2), regardless of the lawfulness of the County's actions."

83. Payne's position is an overstatement. Payne has an appeal in such circumstances, but it would require a successful challenge to the County's action or actions. Such a challenge could be brought, in a district court, through actions for declaratory relief, judicial review, open meeting laws or injunctive relief, to state a few. Should a party be successful in such a challenge, DEQ would be unable to rely on Mont. Code Ann. § 75-10-516(3) and an appeal under Mont. Code Ann. § 75-10-515 could be successful.

84. Payne recognizes the constitutional question cannot be addressed by the Board of Environmental Review. Administrative agencies lack the necessary judicial power to resolve such constitutional questions. *Francetich v. State Compensation Mut. Ins. Fund*, 252 Mont. 215, 217, 827 P.2d 1279, 1281 (1992). "Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers." *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-136, 664 P.2d 316, 318 (1983).

85. Therefore, the substance of Payne's due process challenge cannot be considered or addressed. Nonetheless, Payne's constitutional challenge is deemed preserved if Payne pursues judicial review.

PROPOSED ORDER

1. Payne Logging's Motion for Summary Judgment is DENIED.
2. DEQ's MOTION for Summary Judgment is GRANTED.
3. Payne Logging's Appeal is dismissed with prejudice.

DATED this 8 day of September, 2017.

/s/ Andres Haladay
ANDRES HALADAY
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Findings of Fact Conclusions of Law and Proposed Order on Summary Judgment to be mailed to:

Ms. Lindsay Ford
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

Brad Jones
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Mr. Ed Thamke, Bureau Chief
Waste & Underground Tank Management Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

James E. Brown
30 South Ewing St.
Helena, MT 59601

DATED: 9/8/17 /s/ Andres Haladay

James E. Brown
THE JAMES BROWN LAW OFFICE, PLLC
30 South Ewing Street, Suite 100
Helena, MT 59601
Telephone: (406) 449-7444
Facsimile: (406) 443-2478
Email: thunderdomelaw@gmail.com

Attorney for Payne Logging, Inc.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: TERMINATION BY DEQ OF THE APPLICATION BY PAYNE LOGGING, INC. REQUESTING TO MOVE BOUNDARIES OF THE PAYNE LOGGING FACILITY IN LIBBY, LINCOLN COUNTY, MONTANA	Cause No. BER 2015-08 JV **PAYNE LOGGING'S LIST OF EXCEPTIONS TO HEARING EXAMINER'S PROPOSAL FOR DECISION**

COMES NOW PAYNE LOGGING, INC., (Payne Logging) by and through its undersigned attorney, and hereby files its list of exceptions to the Hearing Examiner's Proposal for Decision of September 8, 2017. As expressly stated in the Hearing Examiner's Proposed Order, the Hearing Examiner proposes to grant summary judgment to the Department on Payne's Petition.

BACKGROUND

On or about October 23, 2015, Payne filed a Notice of Appeal and Request for Hearing relating to the DEQ's, i.e. the Department's, denial of Payne Logging's application to modify the boundaries of an existing wrecking facility. The facility is located in Lincoln County, Montana.

Mr. Payne's appeal now comes back for the second time to the Board. In December of last year, the Board reversed and remanded the previous Hearing Examiner's, Mr. Reed's, proposal for decision 'for further proceedings'.

On remand, both the Department and Mr. Payne filed cross-motions for summary judgment on Mr. Payne's appeal. The substitute hearing examiner, Mr. Haladay, granted summary judgment in favor of the Department while simultaneously denying Payne's Motion for Summary Judgment. Payne now files his list of exceptions to Examiner Haladay's proposal for decision.

LEGAL STANDARD

Summary judgment is only appropriate when there is no genuine issue of material fact at issue and the moving party, Defendants in the present instance, is entitled to judgment as a matter of law. *See*, Matthews v. Glacier Gen. Assurance Co. (1979), 184 Mont. 368, 379, 603 P.2d 232, 238. On appeal from a summary judgment order, all reasonable inferences from the factual record must be drawn in favor of the non-moving party. Clark v. Eagle Sys. (1996), 279 Mont. 279, 283, 927 P.2d 995, 997. Further, summary judgment is an extreme remedy, which should never take the place of a trial. *See*, *Id.* at 283.

What is more, the proposed order may be reversed or modified if the order is made upon unlawful procedure, affected by an error of law, clearly erroneous, or is arbitrary and capricious. *See, e.g.* MCA section 2-4-704(2)(a). The proposed order may also be reversed or modified if findings of fact, upon issues essential the decision, were not made although requested. *See, e.g.* MCA section 2-4-704(2)(b).

1. **The Hearing Examiner erred as a matter of law in failing to make findings of fact essential to the decision even though those findings were requested by Payne and were cited in support of Payne's argument that his application should not have been sent to Lincoln County for the Count's approval in the first instance.**

MCA Section 2-4-704(2)(b) authorizes the Board to reverse or modify the proposed decision if findings of fact, upon issues essential to the decision, were not made although requested.

As that authority is applied to the present proceeding, the Hearing Examiner's proposed order on summary judgment must be reversed because the Hearing Examiner failed to make findings requested by Payne, which such findings are essential to the merits of the Hearing Examiner's proposal for decision. *See*, Payne Brief in Support of Payne Motion for Summary Judgment at pp. 2-3. These omitted findings being:

- Mr. Payne has owned and operated a wrecking facility in Libby, Montana since 2013. The application for that new facility was originally approved by Lincoln County.
- On or about November 21, 2014, the Lincoln County Environmental Health Department (LEHD) conducted an inspection of Mr. Payne's facility. The LEHD informed Mr. Payne that he needed to remedy three issues at the facility in order to renew his Wrecking Yard License No. 376.
- One of the issues identified by the LEHD was the purported need for Mr. Payne to better shield junk vehicles from public view. *See*, LEHD Documentation and Compliance Plan attached as Exhibit "1" to Payne's summary judgment brief.
- Mr. Payne attempted to adequately shield his vehicles from public view as requested by LEHD. However, after another site visit by LEHD, LEHD worked with Mr. Payne to develop a compliance plan on shielding.
- The compliance plan, if approved, would address the shielding requirement by changing the delineated boundary location of the facility without increasing the acreage of the facility. More specifically, the boundary application, if approved, would adjust the currently approved facility boundary so as not to include Mr. Payne's home and shop area. There would be no change as to the amount of real property space that would be utilized.

- Per the directive of the LEHD, Mr. Payne filed an application to modify the boundary of his existing facility as that boundary was and is delineated in his license with MVRDP in order to better shield his vehicles from public view[1]. On February 3, 2015, Jennifer Nelson, SIT, recommended in writing that License No. 376 be issued for 2015. *See*, Exhibit "1" to Payne's opening brief on summary judgment.

- On September 2, 2015, Lincoln County adopted Resolution #947, which such Resolution expressly states that the County Commissioners oppose the Motor Vehicle Wrecking Facility Applications submitted by Payne Logging, Inc. to modify existing License #376. Further, such Resolution states that the County Commissioners will oppose any modifications until the current license is brought into full compliance with ARM 17.50.202, which such regulation requires proper shielding of vehicles.

As noted, the Hearing Examiner erred in not including these uncontested findings because they are essential to Payne's argument on summary judgment that Payne's application to modify his existing license to better shield junk vehicles should not have been sent to Lincoln County in the first instance.

As outlined in subheader "C" of Payne's opening brief in support of summary judgment, Payne was and is not applying to license a 'new' facility. Rather, the uncontested facts show that Payne was applying to modify the boundaries of his existing facility – a facility that had been licensed within the 18 months immediately preceding the date of the challenged application -- in order to meet the LEHD's request that he better shield his vehicles from public view. *See*, Payne Affidavit attached as Exh. "2" to Payne's opening brief on summary judgment.

The approval or disapproval of an application to modify an existing license in order to comply with shielding requirements is controlled by MCA Section 75-10-504, not MCA Section 75-10-516. And it was further error on the part of the Hearing Examiner to not so conclude.

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[1] Payne takes particular issue with the Hearing Examiner's finding of fact number 6. That finding does not reflect the factual reality that Payne filed an application to modify the boundaries of his existing licensed facility in order to better shield his facility from public view as the same was requested by the Department. Payne was not seeking approval of a 'new' facility.

That former statute specifically provides that the prohibition concerning approval of a new motor vehicle wrecking facility site for reasons due to shielding does not apply to a facility site that was licensed as such at any time within the 18 months immediately preceding the date an application is made for licensure of such site. And, make no mistake, as is made perfectly clear by Lincoln County on the face of Resolution # 947, Payne's application was opposed by the County on shielding grounds.

It is uncontested that Payne Logging had an existing license to operate at the time Mr. Payne and Payne Logging filed, at DEQ's request, an application with the DEQ to modify the boundary of its existing wrecking yard. *See*, DEQ's Resp. to Request for Admission No. 2 (April 28, 2016), attached to Payne's opening brief on summary judgment as Exhibit "8". Thus, Mr. Payne fits within the parameters of MCA Section 75-10-504 as Mr. Payne had a licensed facility within the 18-month period prior to the date his application was made to change the boundaries of his existing facility in order to meet the Department's shielding request. And, as such, contrary to what the Hearing Examiner determines on summary judgment, Mr. Payne's application should never have been subject to the county approval process set forth in MCA Section 75-10-516 because Mr. Payne was seeking to modify his existing license in order to comply with shielding requirements.

And as the uncontested facts show, in response to the DEQ's request that Payne submit a plan to come into compliance with DEQ's request for better facility shielding, Payne submitted the same. Payne applied to modify the existing license to accommodate the terms of the compliance plan, i.e. to shift the boundary location without increasing the acreage of the facility. This is and was an action that would, if approved, effectively hide junk vehicles from public view as requested by DEQ. A Google Earth photo showing the present boundary and the desired

boundary is attached to Payne's summary judgment brief as Exhibit "9." Under the controlling statute, Mr. Payne's boundary change application should have been approved by the Department immediately once the Department, as it did, determined that the application complied with the terms of the Department's own compliance plan for shielding.

The Hearing Examiner attempts to get around the clear language of MCA Section 75-10-505 by asserting that Payne is misreading the scope of that statute by attempting to include language that is not there. *See*, Proposed Order at p. 9. But, if one actually reads the clear terms of the statute, one will quickly see that it is the Hearing Examiner who is the one asserting language into the statute that is not there. Specifically, the Hearing Examiner reads the statute to include a nonexistent exemption to the statute – i.e. that the statute does not apply to a boundary change application even when the application is clearly submitted for no other purpose than to comply with DEQ's shielding requirement. *See*, Id. The Hearing Examiner's attempt to read language into this statute in order to award the Department summary judgment is another clear error of law, which such error, in turn, requires reversal of the proposed decision.

The reality for the Board and all parties involved is that the words of MCA Section 75-10-504 read as they do and those words control the outcome of the present proceeding. The statute specifically states that "the prohibition concerning approval of a new motor vehicle wrecking facility or graveyard site does not apply to a facility site that was licensed as such at any time within the 18 months immediately preceding the date an application is made for licensure of such site." As the record reflects, Payne Logging, Inc. was a facility that was licensed within 18 months preceding the date Payne Logging submitted its application to modify its existing boundary in order to comply with the shielding requirements. Therefore, under the clear terms of this statute, the Department both erred in sending Payne's application to the

County in the first instance and in denying Payne's boundary change/shielding application in the second instance.

As a result of the multiple errors committed by the Hearing Examiner cited above, summary judgment on Payne's Petition should be granted in Payne's favor. And the Board should order the Department to reinstate Mr. Payne's application so that it may be processed (and granted) according to the correct legal process, i.e. through the Department – not Lincoln County.

2. **If MCA Section 75-10-516 is the controlling statute[2] for this matter, the Hearing Examiner erred in any event by granting summary judgment in favor of the Department, and not in favor of Payne, because there is no genuine issue of material fact as to Lincoln County's failure to provide Payne notice of the County's 'public hearing' on his Application. Notice to the applicant of the County's hearing on the applicant's application is required in order to meet the "public hearing" requirement set forth in MCA Section 75-10-516(2), which such public hearing requirement must be satisfied in order for the County's 'opposition' resolution to be valid and binding upon the Department.**

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[2] During the oral argument held on this matter by the full Board of Environmental Review on December 9, 2016, Board Member Tweeten expressed his concern about this statutory structure in that "the way the statute is crafted may in fact violate MAPA, and may also be a violation of the due process clause." *See*, December 9, 2016 Transcript of Proceedings at p. 52. More specifically, Board Member Tweeten was concerned that the statutory scheme provided no meaningful remedy for Payne should the County Commissioners have acted in violation of the due process clause and/or in violation of the statutory scheme the Department asserts is controlling, namely MCA Section 75-10-516. *See*, Id. at pp. 55-56.
It is Payne's contention that the statutory process set forth in MCA Section 75-10-516 allowing counties to participate in the DEQ application approval process also violates constitutional due process because it allows for the revocation of or denial of the modification of a previously issued license by the Department without providing an adequate legal mechanism or judicial forum for challenging the process (i.e. the county process) that was used to make that denial decision. However, because it is a legal truism that only courts of law, and not administrative bodies, can determine the constitutionality of a statute, Payne reserves the right to advance this argument to a District Court should this matter proceed to involving the same. *See*, Johnson v. Robison, 415 U.S. 361 (1974); *see, also*, Richardson v. Board of Dentistry, 913 S.W.2d 446 (Tenn. 1995).

The Hearing Examiner determines, in part, that the Department should be awarded summary judgment because, pursuant to the requirements of MCA Section 75-10-516[3] Lincoln County enacted Resolution #947, which such Resolution 'opposed' Payne's application to modify existing License #376. Based on the County's enactment of Resolution #947, the Hearing Examiner determines as a matter of law that (1) MCA Section 75-10-516 is the controlling statute for purposes of disposing of Payne's appeal and (2) that MCA Section 75-10-516(3) required the Department to do what it did -- to deny Payne's Application regardless of the lawfulness of the County's actions in adopting Resolution #947. *See*, Proposed Order at pp. 10-11.

The Hearing Examiner supports his proposed legal outcome by making the following findings of fact. The Hearing Examiner finds that (1) the County held a hearing on Payne's application; (2) the County passed Resolution #947 and (3) the County forwarded that Resolution to the Department. *See*, Findings of Fact numbers 12, 13, and 15. As a result of these findings, the Hearing Examiner then determines that the statutory requirements imposed upon the County as set forth in MCA Section 75-10-516(2) were satisfied by the County's actions. And, as a result, the Hearing Examiner concludes that, based on a plain reading of MCA section 75-10-516(3), the enactment of 'Lincoln County Resolution 947 required denial of Payne's Application". *See,* Proposed Order at p. 10.

In referencing and analyzing the substantive requirements imposed by MCA Section 75-10-516(2) upon Lincoln County when acting on Payne's Application, the Hearing Examiner implicitly recognizes and concedes that the Department's denial decision is only lawful and

[3] As noted above, Payne asserts MCA Section 75-10-516 is not the controlling statute in this matter. And, as such, by addressing the Hearing Examiner's reasoning and argument as to this statute, Payne does not concede his argument that MCA Section 75-10-504 is the controlling statute.

enforceable if the County first complied with the plain and clear statutory requirements set forth in MCA Section 75-10-516(2). Under the clear terms of that statutory provision, in order for the County's opposition resolution to be valid, the County must "conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community . . .". *See*, MCA Section 75-10-516(2).

Applying the clear terms of that statutory provision to the facts as found by the Hearing Examiner in this case demonstrates conclusively that the Hearing Examiner erred as a matter of law in not awarding summary judgment to Payne. This is because the Hearing Examiner's own findings doom his Proposed Order.

It is uncontested that the Hearing Examiner determined, as a factual matter, that Payne was never provided notice by the County of the hearing held by the County on September 2, 2015 on Payne's application. *See*, Proposed Order, FOF # 14, at p. 3[4]. Based on this finding that Payne was not provided notice of the County hearing held on Payne's application and which such hearing was conducted pursuant to MCA Section 75-10-516(2), the Hearing Examiner erred by failing, in turn, to conclude, as a matter of law, that the County's Resolution is not valid and

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[4] In the two years this matter has been in the contested case process, the Department has never come forth with any evidence showing that Payne was provided any kind of notice of the County's September 2, 2015 hearing on his application. Therefore, the Department failed to meet its burden on summary judgment to show there was a genuine issue of material fact that precluded the Hearing Examiner from entering summary judgment in favor of Payne on his Petition filed pursuant to MCA 75-10-515. Further, the fact that the Department failed to meet its burden on summary judgment to show that the County did provide notice to Payne of the September 2, 2015 hearing held on Payne's application also undermines the Hearing Examiner's diatribe on Resolution # 947 being presumptively valid. *See*, Proposed Order at pp. 15-16. The Hearing Examiner erred in determining that Resolution #947 is presumptively valid as well. This is because (1) the Department never made this argument and, thus, the Hearing Examiner is basing his decision on arguments never raised on summary judgment and (2) the Hearing Examiner improperly shifted the burden of proof on the question of notice to Payne on the Department's summary judgment motion. On its summary judgment, it was the Department's burden to prove, as a matter of law, that proper notice was given to Payne – not the other way around. Obviously, in light of the Hearing Examiner having to resort to legal presumptions in order to award summary judgment to the Department, the Department did not meet its burden to establish there were no questions of fact as to whether Payne received proper notice, and that the Department was and is entitled to judgment as a matter of law. *See*, Mont. R. Civ. P. R. 56(c)(3).

binding upon the Department. This is because the County failed to hold a public hearing, as the same is clearly required by the above-referenced statute, on Payne's application.

As noted, the Board may only adopt the Hearing Examiner's Proposed Order on summary judgment if it determines there is no genuine issue of material fact and that the Department is entitled to judgment as a matter of law. *See*, Mont. R. Civ. P. R. 56(c)(3). Here, the Board must reject the proposed order because the Department has failed to prove it is entitled to judgment as a matter of law on Payne's appeal. That is, the Department has failed to meet its legal burden on summary judgment to show that Lincoln County held a 'public hearing' on Payne's application.

On the other hand, based on the Hearing Examiner's findings, the Board must modify the proposed order in order to grant Payne summary judgment on his Petition. This is due to the fact that the Department's denial decision of September 24, 2015 is itself a clear product of an error of law in that the decision solely relies upon an unlawful resolution promulgated by Lincoln County. To state this position another way, as is alleged in Payne's October 2015 Notice of Appeal, Lincoln County's Resolution No. 947 is itself void and unenforceable by the Department because the County failed to meet the statutory requirements set forth in MCA Section 75-10-516(2)(a) for the County to hold a 'public hearing' on Payne's application.

3. **Also, Payne Logging takes exception to the Hearing Examiner's legal conclusion that neither the Hearing Examiner nor the Department is and was required to determine whether Lincoln County met its statutory obligations to hold a public hearing and to make a specific finding that Mr. Payne's proposed boundary relocation for his existing facility would or will "significantly affect the quality of life of adjoining landowners and the surrounding community" in order for the County's opposition resolution to be lawful and enforceable by the Department under MCA Section 75-10-516(3). The clear language of MCA Sections 75-10-515 and 75-10-516(2) both authorizes and requires such a review and determination.**

The previous Hearing Examiner (Mr. Reed) determined, as a matter of law, that Lincoln County was not, despite what Payne asserts MCA Section 75-10-516(2)(a) reads on its face, legally required to make a finding that Mr. Payne's proposed boundary change location "will significantly affect the quality of life of adjoining landowners and the surrounding community" in order for the County's Resolution opposing Mr. Payne's facility to be valid and legally enforceable by the Department. *See*, Prior Proposed Order of July 2016 at pp. 5-6. The current Hearing Examiner, Mr. Haladay, seeks both to avoid the previous Hearing Examiner's legal reasoning as to the County's obligations under the statutory scheme (or lack thereof) and to bypass Mr. Payne's legal argument in favor of Payne's own summary judgment motion by asserting that "Payne has not identified authority that would require or authorize the DEQ or the Board of Environmental review to engage in such a broad review of a local government entity . . ." to determine if they complied with the requirements of law in the first instance. *See*, Proposed Order at p. 14.

a. *Contrary to what the Hearing Examiner holds, both the Board and the Hearing Examiner have the statutory authority to review whether Lincoln County followed statutory requirements and, thus, in turn whether Lincoln County Resolution Number 947 is binding upon the Department.*

The Hearing Examiner's assertions that Payne cannot challenge the lawfulness of 'Resolution No. 947 in this Forum' and that Payne has not identified a basis for doing so constitutes clear, reversible legal error. *See*, Id. This is because Payne has, throughout this two-year contested case proceeding, identified 'authority' that would authorize DEQ and/or the Board to review and determine the lawfulness of the Department's denial decision and the process used to formulate the same. That authority being, of course, MCA Section 75-10-515,

which such section expressly authorizes Payne to prosecute the present action challenging a decision by the Department to deny his boundary change application.

Further, the Hearing Examiner himself identifies the authority for the Board of Environmental Review to determine whether the Department's denial decision is valid and enforceable – that authority being the clear language of MCA Section 75-10-516, which the Hearing Examiner asserts is the controlling statutory scheme for disposing of this matter. If the Board determines that the County did not meet its statutorily required obligations as those obligations are set forth in MCA Section 75-10-516, the Board has the power to reverse and vacate the Department's denial decision of September 24, 2015. *See, e.g.* MCA Section 2-4-704(2). And, as the uncontested facts of this case show, the Board should reject the proposed order because Lincoln County did not meet its statutory obligations. To wit:

b. *Contrary to what the Hearing Examiner concludes in his proposed order, if MCA Section 75-10-516 is applicable and is the controlling statute, a reading of the plain language of MCA Section 75-10-516(2) requires that summary judgment be entered in favor of Payne in this matter.*

If MCA Section 75-10-516 is the operative and controlling statute in the present case, the plain language of MCA Section 75-10-516(2) gave Lincoln County the discretion to hold a public hearing on Mr. Payne's application to adjust his facility boundaries. The plain language of MCA Sections 75-10-516 (1) and (2), also makes clear that when Lincoln County exercised its discretion under the statute(s) to conduct a public hearing on Payne's application to change the boundaries of his existing motor vehicle wrecking facility to comply with the Department's shielding request, the County, in turn, was required (1) to hold a public hearing and (2) to

determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community.

Since the Hearing Examiner determined, as a matter of law, that this is the applicable statutory scheme, the Hearing Examiner was, subsequently, obligated to determine (as discussed in more detail above) whether the County held a public hearing on Payne's application and whether the quality of life finding was made by the County. These findings had to be made before the Hearing Examiner was authorized, as he did here, to award summary judgment to the Department on the Department's claim that Lincoln County's opposition resolution was and is legally operative and binding for purposes of applying MCA Section 75-10-516(3). A review of the proposed decision shows that the Hearing Examiner neither determined that the County held a 'public hearing' nor determined that the County made a written finding that Payne's application would adversely affect the quality of life of adjoining landowners and the surrounding community. Thus, it was error for the Hearing Examiner to award the Department summary judgment.

Again, under the statutory scheme the Hearing Examiner determines is controlling, if the County does not hold the public hearing and make the finding(s) required under MCA Section 75-10-516(2)(a) that the application, if granted, "will significantly affect the quality of, the County's resolution, resolution #947, opposing the location of Mr. Payne's proposed facility is void *ab initio*. Because the Hearing Examiner determined that Payne was not given notice of the County's "public meeting" before it was held and because it is uncontested that Resolution # 947 makes no finding that Payne's proposed boundary adjustment would significantly affect the quality of life of adjoining landowners and the surrounding community[5], the County's resolution

[5] *See*, Exh. "1" to Payne's briefing, p. 3, paragraphs 1-3.

has no legal affect for the purposes of applying MCA 75-10-516(3) (delineating the Department's actions when the County adopts a resolution in opposition to the location of the proposed facility).

For the reasons set forth above, Resolution No. 947 cannot lawfully serve as a valid basis for the DEQ to deny Mr. Payne's application under MCA Section 75-10-516(3) as the Hearing Examiner now asserts. Consequently, the Department's decision to deny Mr. Payne's modification application must be overturned and Mr. Payne's summary judgment motion granted. To rule otherwise would give the Board's stamp of approval to the County's, and then the DEQ's, unlawful actions.

In sum, the Proposal for Decision is affected by errors of law and is clearly erroneous in view of the evidence on the administrative record. Therefore, the Board must reverse and reject the Proposal for Decision. *Accord*, MCA Section 2-4-704(2). In turn, the Board must order the Hearing Examiner to grant the relief sought in Payne Logging's Petition.

4. **The Hearing Examiner erred as a matter of law by concluding that the Department's decision to deny Payne's application is valid and legally unassailable even when the County process and resolution used as the sole basis for the Department's decision may itself be unlawful or when the Department's decision may conflict with another statute.**

In his Proposal for Decision, the Hearing Examiner concludes, as a matter of law, the Department's denial decision is legally valid even in instances where the Department's decision is based solely on a county process or denial decision that may itself be unlawful or when the decision may conflict with other statutory provisions. *See*, Proposed Order at pp. 14-15. In support of this legal conclusion, the Hearing Examiner construes that the plain reading of MCA Section 75-10-516(3) serves as an absolute barrier for Payne to challenge the legality of the Department's denial decision or to obtain full judicial review of the county process used as the

basis for the Department to reach its denial decision. This is because, as the Hearing Examiner determines, Lincoln County adopted a resolution opposing Mr. Payne's application to modify the boundaries of his existing facility. Because Lincoln County adopted a resolution opposing the facility, the Hearing Examiner concludes that the Department was and is strictly required to deny the Payne application and to enforce such denial decision regardless of the separate statutory right to appeal the merits of that denial decision set forth in MCA Section 75-10-515, which such review necessarily encompasses reviewing the process used to promulgate the Department's denial decision.

The Hearing Examiner's interpretation and application of the Motor Vehicle Recycling and Disposal statutory scheme is erroneous because it forecloses Payne from fully exercising his right under both under MCA Section 75-10-515 and under MAPA to challenge fully the Department's denial decision. Under the Hearing Examiner's interpretation, any appeal right accorded to Payne is rendered illusory because, according to the Hearing Examiner, the review is limited to the single question of whether the County, Lincoln County in this case, passed a resolution. Again, the Legislature is presumed to not pass empty statutes. In light of this legal maxim, whenever an agency's statutory interpretation conflicts with the language of a particular statutory right, the usual deference accorded to an agency's interpretation of that statute should be withheld. *See*, Commonwealth, Dept. of Mines, Minerals & Energy v. May Bros., 11 Va. App. 115, 119, 396 S.E.2d 695, 697 (1990). The Hearing Examiner's legal reasoning renders meaningless the appeal right granted by the Legislature in MCA Section 75-10-515 and leads to the absurd[6] result posited by the Hearing Examiner that Payne was required to file a district court

[6] That the Hearing Examiner's reasoning creates absurd results is demonstrated by the fact that the Hearing Examiner recognizes that his interpretation of the statute will likely result in a constitutional due process challenge.

lawsuit prior to the time he could file the appeal accorded by MCA Section 75-10-515 in order to obtain meaningful administrative review and relief.

Again, in this case, it is the DEQ, not the County that rendered the final decision to deny Payne Logging's Application. Under the applicable statutory scheme, it is the Department, not Lincoln County, that is tasked with administering the Motor Vehicle Recycling and Disposal program. *See*, MCA Sections 75-10-501(3) and 75-10-503. As such, in order to give full effect to the Legislature's choice to provide for a meaningful and substantive statutory administrative appeals process to challenge a Department denial decision under MCA Section 75-10-515, the full statutory scheme must be read in its entirety and interpreted to authorize the Board to consider whether the County's exercise of its discretionary authority under MCA Section 75-10-516(2) to adopt a resolution opposing the location of Mr. Payne's proposed facility was conducted lawfully, i.e. that the County met the statutorily required procedural steps.

The Hearing Examiner's conclusion that the process used in the formation of Lincoln County Resolution #947 and as the basis for the Department's decision to deny Payne's application is not subject to any form of meaningful review to determine the legality of the DEQ decision and the process used to support the same is specifically undermined when one considers the relief available to Payne Logging for an erroneous or unlawful Department decision, as well as the decision criteria for determining the legal validity of the Department's denial decision, as the same are set forth in Montana law. As noted above, MCA Section 75-10-515 authorizes this administrative review and appeals proceeding, which such proceeding necessarily authorizes the Hearing Examiner and/or this Board to overturn the Department's denial decision when the decision is arbitrary, capricious, or affected by an error of law. *See e.g.*, MCA Section 2-4-

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The Hearing Examiner should interpret the statute to allow for the Board to review whether the County's actions complied with the statutory requirements set forth in MCA Section 75-10-516(2)(a).

704(1) & (2) (setting forth the standard of review which this Board utilizes in reaching its determination as to the merits of the Proposal for Decision as to the Department's denial decision); accord, MCA Section 2-4-621. Under the statutory scheme for contested case proceedings, the Board is authorized to overturn or reverse the Department's decision to deny the Payne application if that denial decision is affected in any way by an error of law or is the product of an irregular process that resulted in the Department's denial decision.

Here, the Hearing Examiner made a finding of fact that the Department denied Payne's Application solely because Lincoln County had adopted and transmitted a resolution to the Department opposing Payne's application pursuant to the County review process under MCA Section 75-10-516(2). *See,* Proposed Order at p. 11. As a result, because the Department used the County's opposition resolution as the sole legal basis for the Department's own denial decision and thereby incorporated the County's adopted process and decision(s) into the Department's final denial order, MCA Section 75-10-515 required the Hearing Examiner (and now this Board) to review, as part of the appeal process on the Department's denial decision, whether the County's actions in adopting the opposition resolution were lawful in the first instance. More specifically, before upholding the Department's denial decision on summary judgment, the Hearing Examiner was obligated to make a legal determination as to whether the County satisfied the procedural requirements of MCA Section 75-10-516(2)(a), which such statute mandates that Lincoln County hold a public hearing and make a quality of life finding as part of its adopted resolution.

This last statement is particularly applicable in this case where the Hearing Examiner himself cites to the 'whole act' rule in support of his decision. *See*, Proposed Order a p. 12, paragraph 55. That rule requires the Hearing Examiner to read, analyze and apply all aspects of

a statutory scheme in order to give full effect to the statute(s) involved. *See*, Dukes v. City of Missoula, 2005 MT 196, paragraph 14, 328 Mont. 155, 159, 119 P.3d 61. Applying that legal maxim to the Hearing Examiner's proposed decision, it is clear that the Hearing Examiner's decision actually violates the very rule of interpretation, the whole act rule, upon which the Examiner uses to support his outcome.

As the Proposal for Decision demonstrates on its face, the Hearing Examiner refuses to determine whether the County satisfied its obligations under MCA Section 75-10-516(2)(a) even though those obligations are clearly set forth in the statutory scheme applied by the Hearing Examiner and despite Payne requesting such review as part of Payne's appellate right as provided for in MCA Section 75-10-515. In doing so, the Hearing Examiner's proposed order omits and purposefully reads out of MCA Section 75-10-516, subsection (2)(a) of that statute. Payne files an exception to this reasoning on the part of the Hearing Examiner. Not only does the Hearing Examiner's refusal to review the lawfulness of Lincoln County's adopted process violate the whole act rule, the refusal is a misapplication of the statutory scheme passed by the Legislature, endorses the Department's attempt to evade administrative review of its denial decision, strips away the procedural review safeguards put in place by the Legislature in MCA Section 75-10-515, and thereby constitutes a reversible error of law. *See e.g.*, MCA Section 2-4-702(a) (authorizing the Board to review whether the Department's denial decision was made upon an unlawful procedure or is based on actions that violate statutory provisions).

The law is clear and unambiguous as to the legally required outcome of Mr. Payne's appeal. An agency decision, such as the Department's denial decision in this case, which is based on unlawful action, even when such action is taken by another government entity, is unlawful and unenforceable on its face. *See, e.g.* Kalb v. Feurestein, 308 U.S. 433, 60 S. Ct. 343,

84 L ed. 370 (1940) (a void decision does not create any binding obligation); *see*, *also,* U.S. v. Holtzman, 762 F.2d 720 (9th Cir. 1985).

Here, as the administrative record shows, the Department promulgated its now challenged denial decision solely on the County's opposition resolution. That Resolution was adopted by the County after the County held a so-called "public meeting" of which Mr. Payne, the affected party, was not notified and after the County failed to make any kind of finding that Mr. Payne's proposed boundary adjustment within the footprint of his existing facility footprint would affect the quality of life of adjoining landowners and the surrounding community[7]. Therefore, as the County's resolution is the product of an unlawful process, said resolution is not legally binding on the Department. Accordingly, the Department's denial decision is itself unlawful and void.

For the reasons set forth above, the Hearing Examiner's legal conclusion that the County's opposition resolution serves as an absolute bar to this Board's review of the lawfulness of the process used in the making of resolution cannot be substantiated. The Hearing Examiner's legal conclusion that the County's opposition resolution is not subject to review for legal error in this forum is further called into question by the clear and unambiguous terms of MCA Section 75-10-504. This statute supports Payne's reading that his modification application should not have gone through the county review process in the first instance because Payne was and is not applying to license a new facility. Payne was and is applying to modify the boundaries of an existing facility within the footprint of the existing facility in order to meet the Department's shielding requirements.

[7] The reality is that the boundary adjustment would actually result in a benefit to the quality of life of adjoining landowners and the surrounding community because it would result in better shielding of Payne's wrecking yard.

a statutory scheme in order to give full effect to the statute(s) involved. *See*, Dukes v. City of Missoula, 2005 MT 196, paragraph 14, 328 Mont. 155, 159, 119 P.3d 61. Applying that legal maxim to the Hearing Examiner's proposed decision, it is clear that the Hearing Examiner's decision actually violates the very rule of interpretation, the whole act rule, upon which the Examiner uses to support his outcome.

As the Proposal for Decision demonstrates on its face, the Hearing Examiner refuses to determine whether the County satisfied its obligations under MCA Section 75-10-516(2)(a) even though those obligations are clearly set forth in the statutory scheme applied by the Hearing Examiner and despite Payne requesting such review as part of Payne's appellate right as provided for in MCA Section 75-10-515. In doing so, the Hearing Examiner's proposed order omits and purposefully reads out of MCA Section 75-10-516, subsection (2)(a) of that statute. Payne files an exception to this reasoning on the part of the Hearing Examiner. Not only does the Hearing Examiner's refusal to review the lawfulness of Lincoln County's adopted process violate the whole act rule, the refusal is a misapplication of the statutory scheme passed by the Legislature, endorses the Department's attempt to evade administrative review of its denial decision, strips away the procedural review safeguards put in place by the Legislature in MCA Section 75-10-515, and thereby constitutes a reversible error of law. *See e.g.*, MCA Section 2-4-702(a) (authorizing the Board to review whether the Department's denial decision was made upon an unlawful procedure or is based on actions that violate statutory provisions).

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Clearly, the Legislature enacted MCA Section 75-10-515 to allow the Board to review all aspects of the Department's denial decision. The Hearing Examiner's legal conclusion that the Department's denial decision is automatically valid and legally unassailable merely because a Montana county, Lincoln County in this case, adopted a resolution in opposition to the location of the proposed facility, regardless of the lawfulness of the process used by the County to make that resolution, is obvious legal error. Thus, the Proposal for Decision must be rejected as it is affected by an error of law. *Accord*, MCA Section 2-4-704(2)(v).

Respectfully submitted this 2nd day of October, 2017.

THE JAMES BROWN LAW OFFICE, PLLC

James E. Brown
Attorney for Payne Logging, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Payne Logging's List of Exceptions to Hearing Examiner's Proposal for Decision* was served via hand delivery and via U.S. first-class mail, postage prepaid, on this 2nd day of October, 2017, upon the following:

Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
P.O. Box 201440
Helena, MT 59620-1440

Lindsay Ford
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 E. 6th Ave.
P.O. Box 200901
Helena, MT 59620-0901

Bradley Jones
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Mr. Ed Thamke, Bureau Chief
Waste & Underground Tank Management Bureau
Department of Environmental Quality
PO Box 200901
Helena, MT 59620-0901

James Brown

Bradley R. Jones
Special Assistant Attorney General
Department of Environmental Quality
Legal Unit, Metcalf Building
1520 E. 6th Ave.
Helena, MT 59601
Telephone: (406) 444-5690

Attorney for Montana Department of Environmental Quality

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: TERMINATION BY DEQ OF THE APPLICATION BY PAYNE LOGGING, INC. REQUESTING TO MOVE BOUNDARIES OF THE PAYNE LOGGING FACILITY IN LIBBY, LINCOLN COUNTY, MONTANA.	**Case No. BER 2015-08 JV** **DEQ'S RESPONSE BRIEF IN OPPOSITION TO PAYNE LOGGING'S LIST OF EXCEPTIONS TO THE HEARING EXAMINER'S PROPOSAL FOR DECISION**

On September 8, 2017, the Hearings Examiner in this appeal submitted his Findings of Fact, Conclusions of Law and Proposed Order on Summary Judgment (Hearings Examiner's FOFCOL) to the Board. On October 2, 2017, Payne Logging, Inc. (Payne) filed its List of Exceptions to Hearing Examiner's Proposal for Decision (Exceptions) in the second iteration of this appeal. The Department of Environmental Quality (Department) hereby files the following Response in opposition to Payne's Exceptions.

DEQ'S RESPONSE TO PAYNE'S EXCEPTIONS

I. BACKGROUND

Payne originally filed this appeal on October 23, 2015. In the first iteration of Payne's appeal, the Department filed a motion to dismiss, which after full briefing, the Hearings

Examiner granted in his July 14, 2016 Proposal for Decision. Payne subsequently filed exceptions to the Proposal for Decision. After full briefing on Payne's first exceptions, the Board held oral argument on December 9, 2016. At the conclusion of oral argument, the Board rejected the Proposal for Decision and voted to remand Payne's appeal to the Hearings Examiner "for the purpose of conducting further proceedings with respect to all possible issues that the parties may wish to raise with respect to the appropriateness of the Department's action on the application [Payne's application for a MVWF license]." On remand to the Hearings Examiner, both the Department and Payne moved for summary judgement, which the Examiner granted to the Department in the FOFCOL at issue.

To the degree that all issues Payne wished to raise before the Board were not previously brought in the first iteration of this appeal, all of those issues are now ripe for disposition. The Department requests that the Board adopt the FOFCOL and dismiss Payne's appeal.

II. LEGAL STANDARD

Payne wrongly cites to two separate standards of review in his Exceptions, one the standard for summary judgment, and the other one the standard for judicial review of the Board's decision, which it has not yet rendered.

First, Payne inaccurately cites to a standard of review for summary judgment in the Legal Standard section of its Exceptions. Payne's Exceptions, p. 2; 10. Summary judgment, as provided in the Montana Rule of Civil Procedure 56, was the appropriate standard under which the parties moved for judgment from the Hearings Examiner, but, once the Examiner has granted summary judgment, the standard shifts for the Board's review to Section 2-4-621(3), MCA, part of the Montana Administrative Procedure Act (MAPA). That statute:

"(1) When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.

(2) The proposal for decision must contain a statement of the reasons for the decision and of each issue of fact or law necessary to the proposed decision and must be prepared by the person who conducted the hearing unless that person becomes unavailable to the agency.

(3) The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." (*emphasis added*)
See also Blaine Cty. v. Stricker, 2017 MT 80, ¶¶ 24-28; *Moran v. Shotgun Willies,* 270 Mont. 47 (1995).

Here, the "majority of the officials of the agency who are to render the final decision" compose the Board and the FOFCOL at issue is the "decision" or "proposal for decision." The Hearings Examiner has followed this statute and, now, Section 2-4-621(3) is the sole standard governing the Board's review of findings already made by the Hearings Examiner.

In its second paragraph of the Legal Standard section, as well as on Pages 3, 14, and 16-18 of its Exceptions, Payne also wrongly cites to a different standard, found at Section 2-4-704, MCA, as applicable to the Board's review. As in Payne's previous briefing in this case, Payne has failed to understand that the Board is not an appellate body or a court of open jurisdiction, but an agency decision maker. The standard proposed by Payne governs a district court's review of the Board's decision of a contested case conducted under MAPA, not the Board's review of the Hearings Examiner's proposed decision. *See Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality, holding* "A district court reviews a decision in a MAPA contested case proceeding

pursuant to § 2-4-704, MCA." 2005 MT 96, ¶ 9. Section 2-4-621 provides the complete standard by which the Board should judge the Hearings Examiner's FOFCOL.

III. ARGUMENT

A. Summary of Arguments

Payne's arguments in its Exceptions can be distilled into the following:

1) That under Section 75-10-504, MCA, Payne's facility existed within 18 months prior to his submittal to the Department of an application for a Motor Vehicle Wrecking Facility (MVWF) with a new boundary, thus shielding Payne's application from review by Lincoln County (Payne's Exceptions, p. 4-5);
2) That, consequently, the Department erred when it notified the County of Payne's application for consideration (Payne's Exceptions, p. 4-5);
3) That, once the County considered that application in a hearing, it had a duty to provide notice of that hearing to Payne (*Id.*);
4) That the County violated Payne's rights by failing to provide it notice (Payne's Exceptions, p. 5);
5) That the Department had a duty to supervise Lincoln County's conduct to determine if Payne was provided notice (Payne's Exceptions, p. 10);
6) That Lincoln County had a duty to make written findings regarding whether Payne's application would adversely affect the quality of life of adjoining landowners and the surrounding community, and that the Department had a duty to supervise the County's conduct in making that finding (Payne's Exceptions, p. 13);
7) That Lincoln County's resolution opposing Payne's application, Resolution 947, was invalid because of Lincoln County's alleged violations of Payne's rights (Payne's Exceptions, p. 13);
8) That the Hearings Examiner erred when he determined that Resolution 947 was "presumptively valid." (Payne's Exceptions, p. 9; Hearings Examiner's FOFCOL, Conclusion of Law (COL), ¶¶ 73-76);
9) Generally, that the Department's termination of Payne's application was unlawful because it was premised upon what Payne alleges was a blatantly unlawful County decision and, generally, that the Department had a duty to supervise the County's conduct vis-à-vis Payne to ensure that Payne's constitutional rights were not, in any way, violated (Payne's Exceptions, p. 10; 17);
10) That a reading of Montana's MVWF laws through the lens of the "whole act rule" supports Payne's conclusion that the Department had a duty to oversee the Lincoln County's conduct to ensure that Payne's rights were not violated (Payne's Exceptions, pp. 17-18);

11) Generally, that the Hearings Examiner's proposed Findings of Fact fail to include all relevant facts regarding Payne's appeal (Payne's Exceptions, p. 3 ; and
12) That Payne has no other remedy for his grievances against Lincoln County and/or the Department than as before this Board in a contested case (Payne's Exceptions, p.14).

Contrary to Payne's contentions, and, as the Hearings Examiner correctly determined in his FOFCOL, the core, indisputable facts in this case are: 1) On July 20, 2015, DEQ received a "Motor Vehicle Wrecking Facility Application For License" from Payne requesting approval from the Department for a new license for a motor vehicle wrecking facility (MVWF) with different boundaries than allowed by his previous license (FOFCOL, Finding of Fact (FOF), ¶ 4); 2) On July 30, 2015, the Department sent a letter to the Lincoln County Commissioners informing them of Payne's application (FOFCOL, FOF, ¶¶ 7-11); 3) On September 2, the Lincoln County Commission adopted Resolution 947 titled "Payne Logging, Inc. Motor Vehicle Recycling & Disposal Act Permit," stating the County's opposition to Payne's application (FOFCOL, FOF, ¶¶ 12-13); 4) The County submitted Resolution 947 to the Department (FOFCOL, FOF, ¶ 15); and 5) On September 24, 2015, via letter, the Department notified Payne of Lincoln County's opposition and "terminated [Payne's] application…due to the denial at the county level." (FOFCOL, FOF, ¶ 16).

Payne's arguments fail to undermine the reasoning of the Hearings Examiner's FOFCOL based on a simple reading of two statutes, Sections 75-10-516 and 75-10-504. As the Hearings Examiner correctly found, under the plain language of the governing statute, Section 75-10-516, the Department was legally obligated to submit Payne's application to Lincoln County for consideration, regardless of whether Payne previously had a separate MVWF license on another part of his property. Hearings Examiner's FOFCOL, COL, ¶¶ 20; 52. Seemingly in response to that notification, Lincoln County adopted Resolution 947 opposing Payne's application and

transmitted the same to the Department. Hearings Examiner's FOFCOL, COL, ¶ 78. The Department had no authority or obligation to control the Lincoln County Commissioners during this process. Once the Department received the Resolution, it had no discretion to consider or grant Payne's application due to the strict mandate of Section 75-10-516(3). *Id.* Consequently, the Department had neither discretion, nor an obligation to make any findings regarding any impact, whether positive or negative, on the quality of life of adjoining landowners. Hearings Examiner's FOFCOL, COL, ¶ 79.

Additionally, Payne's reliance on Section 75-10-504 is misplaced because a plain reading of that statute indicates that it involves shielding of MVWF's from view, not the approval process for licensing a given piece of land for use as a MVWF. Hearings Examiner's FOFCOL, COL, ¶¶ 35; 38. It is not in dispute that Payne was applying for a MVWF with a different footprint than his previous facility, thus shielding wasn't at issue, approval of the new footprint was. Hearings Examiner's FOFCOL, COL, ¶ 36. In any case, nothing in Section 75-10-504 overrides, or even specifically references the application of Section 75-10-516, so that the Department's duty under Section 75-10-516(3) is not qualified in any way.

B. By the Plain Language of the Governing Statute, Section 75-10-516, MCA, the Department Had To Notify Lincoln County of Payne's Application and, Having Received Resolution 947, Had No Choice But To Terminate the Application

Payne's primary assertion in his appeal is that the Department wrongfully submitted Payne's application to Lincoln County for consideration, and, having done so, the Department had an obligation, as the final decision maker, to ensure that Lincoln County did not violate any of Payne's rights. *See e.g.*, Payne's Exceptions, p. 3.

The governing statute regarding applications for MVWF, regardless of the applicant's

previous licensing status, is Section 75-10-516, MCA. Section 75-10-516 states:

> (1) When an application for a motor vehicle wrecking facility or motor vehicle graveyard is filed with the department, the department shall notify by mail:
> ....
> (b) the governing body of the county in which the proposed facility is to be located; and
> ....
> (2) Within 30 days of receipt of the notification in subsection (1)(b), the governing body of the county may:
> (a) conduct a public hearing to determine whether the proposed facility will significantly affect the quality of life of adjoining landowners and the surrounding community; and
> (b) adopt a resolution in support of or opposition to the location of the proposed facility and transmit a copy of the resolution to the department.
> (3) The department may not grant a license to a facility that a governing body has opposed under subsection (2)(b).
> (emphasis added)

The plain language of Section 75-10-516(1)(b) makes it clear that, whenever the Department receives an application for a MVWF, it must notify the relevant county of its ability to support or oppose the application. This remains true, even if, as in Payne's case, the applicant is operating a MVWF on another, adjacent piece of property. There is no special procedure, in either Montana law or the Department's regulations, providing for "boundary modifications" or governing different treatment for second-time applicants.

The next duty incumbent upon the relevant county, should it choose to weigh in on the future of the application, is to hold a public hearing, adopt a resolution, and transmit that resolution to the Department. There is no qualification found in 75-10-516, or in any other environmental laws administered by the Department, about what constitutes a "public hearing" in this context, who must have notice of the hearing, or what, specifically, must take place at the hearing. Nor is there any qualification about what form the resolution must take. The structuring of the statute, with subparts (a) and (b) under Section 75-10-516(2) leave no doubt that this process applies to the County, not the Department. The subsequent reference in Section

75-10-516(3) to Section 75-10-516(2)(b), reinforces this common-sense interpretation because it constrains the Department to look solely at whether the relevant county has resolved to supporte or oppose an application, and, should it oppose the application, the Department is strictly forbidden from granting the application. Only in those circumstances where a relevant county voices support for an application, or abstains from comment, does the final part of Section 75-10-516(4) come into place requiring the Department to "consider the effect of the proposed facility on adjoining landowners and land uses."

"[W]henever the language of a statute is plain, simple, direct, and unambiguous, it does not require construction, but it construes itself." *State ex rel. Long v. Justice Court*, 2007 MT 3, ¶ 8. When interpreting a statute, the Board must look to the "plain meaning of the words used, and if interpretation of the statute can be so determined" it may not "go further and apply any other means of interpretation." *State v. Trull,* 2006 MT 119, ¶ 32. "In the search for plain meaning, 'the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.'" The Board must look at the statute "to ascertain what it contains, 'not to insert what has been omitted nor to omit what has been inserted.'" *Gaub v. Milbank Ins. Co.,* 220 Mont. 424, 427 (1986).

As the Hearings Examiner correctly found, Payne, by its own admission, sought a different MVWF than his previous one because it occupied, at least partially, a different footprint of land, thus fitting within the framework of Section 75-10-516(1). Hearings Examiner's FOFCOL, COL, ¶ 35; Payne's Exception, p. 5. In keeping with Section 75-10-516(1)(b), the Department notified Lincoln County of Payne's application, which, in keeping with Section 75-10-516(2), wrote Resolution 947 in opposition to the location of Payne's proposed MVWF and transmitted Resolution 947 to the Department. Hearings Examiner's FOFCOL, FOF ¶ 12; 15;

COL, ¶ 49. In keeping with Section 75-10-516(3), the Department wrote Payne Logging, informing it that "the MVRDP has terminated the application requesting to move the boundaries of your facility due to the denial on the county level." Hearings Examiner's FOFCOL, FOF, ¶ 16. In short, the Department processed Payne's application in strict compliance with the unambiguous language of Section 75-10-516, MCA. Hearings Examiner's FOFCOL, COL, ¶ 52.

Payne also cites to the "whole act rule" to support his argument that the Hearings Examiner, and, by extension, the Board, "must read analyze and apply all aspects of a statutory scheme in order to give full effect to the statute(s) involved." Payne cites to *Dukes v. City of Missoula* to support this proposition. 2005 MT 196. The Court in *Dukes* cited the "whole act rule" for the holding that "Rather than restricting their scope to narrow clauses in a statutory scheme, courts will read the relevant statutes in their entireties; this gives courts the tools by which to effect the will of the Legislature." 2005 MT at ¶ 14. The Hearings Examiner's FOFCOL also recognized this general principal when he concluded that an "act must be read together, and, where possible, full effect given to all statutes involved." Hearings Examiner's FOFCOL, COL, ¶ 55 (*citing Carlson v. City of Bozeman*, 2001 MT 46, ¶ 15). "The goals behind construing a statute as a whole are to avoid conflicts and absurd results." *Id.* (*citing In Re Estate of Engellant*, 2017 MT 100, ¶ 11).

Payne's citation to what it terms the "Whole Act Rule" and to *Dukes* actually supports the Department's argument that the subparts of Section 75-10-516 must be read in concert with each other to give effect to the legislature's intent that local government have a sort of veto power over the Department's consideration of proposed MVWF's. Reading subparts (1)-(4) of Section 75-10-516, MCA together leads to only one reasonable interpretation: the Department

appropriately terminated Payne's application when it received Resolution 947 from Lincoln County.

C. The Hearings Examiner Properly Found That Section 75-10-504 Is Inapplicable Because An Inability To Shield Had Nothing To Do With The Department's Termination of Payne's Application

Payne argues that "the words of MCA Section 75-10-504....control the outcome of the present proceeding" because "Payne Logging, Inc. was a facility that was licensed within 18 months preceding the date Payne Logging submitted its application to modify its existing boundary....Therefore, under the clear terms of this statute, the Department both erred in sending Payne's application to the County in the first instance and in denying Payne's boundary change/shielding application in second instance." Payne's Exceptions, p. 7.

Section 75-10-504, MCA states:

> "A motor vehicle wrecking facility or graveyard site established or proposed on or after July 1, 1973, may not be approved for use or licensed if the proposed facility cannot be shielded from public view on the date it is initially established or proposed to the department for licensure. The prohibition concerning approval of a new motor vehicle wrecking facility or graveyard site does not apply to a facility site that was licensed as such at any time within the 18 months immediately preceding the date an application is made for licensure of such site."

Contrary to Payne's assertions, Section 75-10-504 has no applicability to this appeal. By the clear wording of the statute, Section 75-10-504 applies to shielding, not to applications for a MVRDF. Here, shielding as of the establishment date of Payne's original MVWF is not at issue, only Payne's subsequent request for a new license. Moreover, nothing in Section 75-10-504 refers to Section 75-10-516 and it has no bearing on that statute.

In truth, Payne is attempting to confuse the issue of shielding with Payne's application for a MVWF with a new land use footprint. As the Hearings Examiner appropriately found, "While Payne may have been attempting to comply with shielding requirements, he has already conceded that his application went beyond mere shielding: he expressly requested to add new land to the boundaries of his motor vehicle wrecking facility. This is a request separate and distinct from shielding." Hearings Examiner's FOFCOL, COL, ¶ 35. The Hearings Examiner's FOFCOL goes on to conclude "Payne seeks to take the second sentence of this statute [Section 75-10-504] out of context to allow him to apply for any site changes or other modifications to his license, without having to submit to the review process in Mont. Code Ann. § 75-10-516. Read in its proper context, Mont. Code Ann. § 75-10-504 applies to shielding questions alone." *Id.* at ¶ 38. The Hearings Examiner also correctly determined that Payne's proposed interpretation 75-10-504 would lead to absurd results because "as long as an existing facility operator claims that their application involves shielding, the can avoid review by the county government. This would encourage gamesmanship: like here, an existing facility owner could apply to site their facility on new land, claim that shielding is involved and prevent the county government from exercising any review power, otherwise provided for in Mont. Code Ann. § 75-10-516." Hearings Examiner's FOFCOL, COL, ¶ 62.

D. The Board Need Not Look To the Legislative History of 75-10-516 To Adopt the FOFCOL, but, If the Board Does So, The Hearings Examiner Correctly Found That the Legislative History Supports The Department's Termination of Payne's Application

In previous briefing in this case, Payne argued that, to fully understand the duties imposed by Section 75-10-516, the Board must consider the legislative history of the statute, as a means of statutory interpretation. Payne seems to have left this argument out of his Exceptions.

Nonetheless, because it is a significant portion of the Hearings Examiner's FOFCOL, the Department addresses it here in support of the FOFCOL's conclusions.

Legislative history is a form of statutory interpretation to which the Board need not resort if the Legislature's purpose can be gleaned from a plain reading of the statute at issue. *State v. Trull,* 2006 MT 119, ¶ 32; Hearings Examiner's FOFCOL, COL, ¶ 54. If, however, the Board does look to the legislative history of 75-10-516, it supports the Department's argument that a modification and/or expansion of a preexisting facility must still go through the process outlined in Section 75-10-516.

In the previous briefing in this case, Payne attached legislative testimony regarding Montana State Senate Bill 706 (SB 706), the act that was codified as Section 75-10-516, MCA, to bolster its contention that the statute only applies to new, not modified or expanded MVWF's. However, as the Hearings Examiner properly found, "The sponsor of SB 706 ….explained the purpose was to allow the county and local residents to have a say in whether motor vehicle wrecking facilities are compatible uses in the proposed areas." Hearings Examiner's FOFCOL, COL, ¶ 22. "The legislative intent was not only to allow counties a say in the facility siting process, but to give counties the ability to bar DEQ from issuing a license for a motor vehicle wrecking facility", as supported by testimony by proponents such as the Montana Association of Counties and SB 706's sponsor. Hearings Examiner's FOFCOL, COL, ¶ ¶ 23; 58-59.

Payne's argument that the Department is arbitrarily attempting to redefine Payne's permit modification as a new permit application can't hold water when compared with the Department's own testimony during the legislative hearing. When addressing the specific issue of permit changes, the Department's Jon Dilliard explained that "if an existing facility "wanted to expand they would have to go through the process in the bill." Hearings Examiner's FOFCOL, COL, ¶

24. The Hearings Examiner appropriately found that Payne's proposed interpretation would lead to absurd results in that "Under Payne's argument, an owner of an existing motor vehicle wrecking facility can constantly move the boundaries or site of an existing facility, with no recourse to or input by the local government. Facility operators who previously had to get county approval could move their facility to locations with incompatible land uses, by only going through DEQ. This type of behavior and lack of local review is exactly what SB 706 was intended to prevent." Hearings Examiner's FOFCOL, COL, ¶ 32. As a result, the Hearings Examiner properly found that the legislative history supports the Department's argument.

E. The Hearings Examiner Properly Found That Payne's Claims of Constitutional Violations and/or Open Meeting Laws May Not Be Adjudicated By The Board

Payne alleges, throughout its Exceptions, that it believes various wrongs have been committed against it by Lincoln County. It seems that Payne is alleging violations of Montana's open meeting and/or public participation laws and constitutional due process violations by Lincoln County for the County's supposed lack of notice to Payne prior to its September 2, 2015, hearing. Payne vicariously attributes these alleged violations to the Department because Payne believes that the Department has a duty to supervise the County's conduct generally. Payne also attributes blame to the Department for what Payne alleges is misconduct by the County because, Payne asserts, the Department adopted the County's decision making process as its own when it terminated Payne's application. Payne's Exceptions, p. 7.

However, as the Hearings Examiner appropriately found, any grievance Payne may have does not lie against the Department and cannot be properly adjudicated by the Board. Hearings Examiner's FOFCOL, COL, ¶ 83. To state the obvious, Lincoln County is an entirely separate governmental organization from the Department, over which the Department has no control. To

the degree that Payne wishes to bring any grievance against Lincoln County, or any other party, its remedy, if any, lies in district court. *Id.* Even Payne admits that constitutional issues, and issues generally outside the scope of the environmental laws administered by the Department are not properly brought before the Board. Payne's Exceptions, p. 7, FN 2; Hearings Examiner's FOFCOL, COL, ¶¶ 68; 84.

While the Department will not speculate what claims Payne could bring in district court against parties other than the Department or the merits of those claims, Payne is wrong when it suggests that the Hearings Examiner has attempted to bar Payne from any judicial review of its grievances. Payne's Exceptions, p. 14. If Payne wishes to seek redress of its alleged injuries against any other party, it is welcome to try its luck in district court against those parties. Payne admits this fact itself in its Exceptions. Payne's Exceptions, p. 7, FN 2.

IV. CONCLUSION

The Board need look no further than the plain language of Section 75-10-516 to conclude that the Department properly terminated Payne's application for new MVWF with a different land footprint than that reflected in its previous license. The FOFCOL recognizes that the Department was strictly constrained to terminate Payne's application once it received Resolution 947 from Lincoln County. Although Payne believes itself to be aggrieved by Lincoln County in regards to termination of its application, it has no remedy against the Department, or before this Board. The Board should adopt the Hearings Examiner's FOFCOL in whole and dismiss Payne's appeal.

If, however, the Board does take issue with any of the Hearings Examiners Findings of Fact or Conclusions of Law, it should use the standard set in Section 2-4-621 to guide its

rejection or modification of the Hearings Examiners FOFCOL.

DATED this 16th day of October, 2017.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

By: _____
BRADLEY R. JONES
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on 10/16/2017, I caused a true and accurate copy of the foregoing caption to be emailed to:

James Brown, Esq. at Jim Brown jim@thunderdomelaw.com
30 South Ewing Street, Suite 100
Helena, MT 59601

Sarah Clerget at SClerget@mt.gov
Solem, Aleisha at ASolem@mt.gov
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620

DATED: _____ 10/16/17
BRADLEY R. JONES Date

James E. Brown
THE JAMES BROWN LAW OFFICE, PLLC
30 South Ewing Street, Suite 100
Helena, MT 59601
Telephone: (406) 449-7444
Facsimile: (406) 443-2478
Email: thunderdomelaw@gmail.com

Attorney for Payne Logging, Inc.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: TERMINATION BY DEQ OF THE APPLICATION BY PAYNE LOGGING, INC. REQUESTING TO MOVE BOUNDARIES OF THE PAYNE LOGGING FACILITY IN LIBBY, LINCOLN COUNTY, MONTANA	Cause No. BER 2015-08 JV **PAYNE LOGGING'S REPLY BRIEF IN SUPPORT OF ITS LIST OF EXCEPTIONS TO HEARING EXAMINER'S PROPOSAL FOR DECISION**

COMES NOW PAYNE LOGGING, INC., (Payne Logging or Payne) by and through its undersigned attorney, and hereby files its reply brief to the Department's Response Brief to Payne's list of exceptions to the Hearing Examiner's Proposal for Decision of September 8, 2017.

I. OVERVIEW:

The Department's Response Brief in Opposition to Payne Logging's List of Exceptions grossly mischaracterizes both the role of the Board in this matter and Payne's argument as to the legal standard to be applied.

The Department argues that the Board does not play an appellate style role during its review of the proposal for decision. To read the Department's Answer Brief, one would think that the Board has absolutely no authority to modify and/or reject the Hearing Examiner's

conclusions of law and/or facts. This is simply not correct. Contrary to what the Department asserts in its brief, the Board is not a potted plant whose role is limited to doing nothing more than rubber stamping the Hearing Examiner's proposed decision.

Quite the contrary, it is the Boards' legal obligation under MAPA to (1) be the final decision maker as to the conclusions of law and (2) to ensure that the Board has, like an appellate court, taken the time to review and "master the record" before reaching the final decision in this matter. What is more, the express purpose of MAPA is to preclude the Board from merely "signing on the dotted line" as to the Hearing Examiner's proposed decision. *See*, Commissioners comments to the 1961 Revised Model State Administrative Procedure Act; *see, also*, Key West, Inc. v. Winkler, 2004 MT 186, 322 Mont. 184, 95 P.3d 666 (the Board of Personnel Appeals did not abuse its discretion to modify a proposed decision/order when the Board rejected the hearing officer's conclusions of law based on a review of the facts contained within the record of hearing); *see, also*, Mont. Code Ann. Section 2-4-621 and MCA Section 2-4-702.

In light of this legal authority, the Department wrongly implies to the Board in its Response Brief that it would be legal error for the Board to give an *appellate style hard look* at the facts both 'found' by the Hearing Examiner in his proposed decision, as well as to those facts omitted from the proposed decision as is alleged by Payne, and/or to modify or reject the conclusions of law and the Hearing Examiner's interpretation of the same (emphasis added). The Board should keep in the forefront of their minds the Department's incorrect legal assertions as to the Board's role in reviewing the record of the summary judgment proceedings in this matter while the Board reviews the following assertions by Payne.

II. LEGAL STANDARD:

The Department misstates the applicable legal standard. While the Board is correct that Mont. Code Ann. Section 2-4-621 is an applicable legal authority for the Board to apply when reviewing the summary judgment proceedings, the clear language of Section (3) of that statute allows the Board in its final order to "reject the conclusions of law and interpretation of administrative rules in the proposal for decision."

The Montana Supreme Court has time and again affirmed a board's, including this Board's, legal authority to reject a hearing officer's conclusions of law and its ability to freely reach a different conclusion than the hearing officer on the ultimate questions of law decided by the hearing examiner. *See, e.g.,* State Pers. Div. v. Dep't of Pub. Health & Human Servs.,Child Support Div, 2002 MT 46, 308 Mont. 365, 43 P3d 305. In order for the Board to determine whether it will accept, reject, or modify the hearing examiner's conclusions of law and the hearing examiner's interpretation of the same, the Board must apply the same legal standard used by the hearing examiner to reach his decision in this matter. As clearly set forth in the Hearing Examiner's proposed order, the Hearing Examiner awarded summary judgment to the Department on Payne's Petition.

Therefore, as part of its statutory responsibilities, the Board must determine whether the Department met its burden on summary judgment to show both that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. *See*, Mont. R. Civ. P. R. 56(c). Review of an award of summary judgment is always reviewed *de novo*, applying the same

criteria of M.R. Civ. P. R. 56 as would the hearing examiner. *See, e.g.* Pilgeram v. GreenPoint Mortg. Funding, Inc., 2013 MT 354, ¶9, 373 Mont. 1, 313 P.3d 839.

III. PAYNE'S ARGUMENT ON REPLY:

A. The Department has failed to rebut Payne's assertion that the hearing examiner erred by awarding the Department summary judgment.

In this matter, Mr. Payne contends that the Hearing Examiner clearly erred in reaching the legal conclusion that the Department was entitled to judgment as a matter of law under Mont. R. Civ. P. R. 56(c). Under the legal standard applied by the Hearing Examiner, the *Department* had and has the *burden* to show both that (1) there is no genuine issue of material fact and (2), as a result, the Department was and is entitled to judgment as a matter of law. (*emphasis added*).

As noted in Payne's list of exceptions, because of this proof burden, the Hearing Examiner should have denied the Department's summary judgment motion. This is because the Department failed to prove that Lincoln County either held a public hearing on Mr. Payne's application or that the County made a finding that Mr. Payne's facility would adversely impact the quality of life of his neighbors. Such findings were required of the Hearing Examiner due to the fact that the Hearing Examiner determined that MCA Section 75-10-516 is the applicable and controlling statutory authority for this matter.

Under the clear terms of that statute, namely, MCA Section 75-10-516(2)(a), in order for the County's opposition resolution to be binding on the Department under subparagraph (3), the County had to hold a public hearing on Payne's application and make a finding that the proposed facility 'will significantly affect the quality of life of adjoining landowners and the surrounding community . . .". As it is uncontested that the Hearing Examiner noted that Payne was never

provided notice by the County of the hearing held by Lincoln County on his application on September 2, 2015 and because the record shows that the County never made a finding that Payne's application, if granted, would significantly affect the quality of life of his neighbors and the surrounding community, the statutory requirements needing to be satisfied in order for the Department to rely upon the County's resolution for disapproving Payne's application under MCA Section 75-10-516(3) have not and never were satisfied

In the Department's Response Brief to Payne's exceptions, the Department once again comes forth with no evidence to show that the public meeting and quality of life requirements clearly set forth in MCA Section 75-10-516(2) were satisfied prior to the Department's application denial decision[1]. Therefore, as a matter of law, if the Board agrees with the Hearing Examiner that MCA Section 75-10-516 is the controlling statutory scheme for resolving Payne's appeal, the Board must, in turn, conclude that the Hearing Examiner erred in awarding summary judgment to the Department. This legal conclusion is required because (1) the Department failed to meet its burden to show there is no genuine issue of material fact as to whether a 'public hearing was held' or that a 'quality of life' finding was made and (2), therefore, the Department failed to meet its burden to show it was and is entitled to judgment as a matter of law on Payne's appeal.

B. *The Department has failed to rebut Payne's assertion that the Hearing Examiner clearly erred when reading out of MCA Section 75-10-516(2) the clear statutory requirements*

[1] In its Response, the Department seeks to address this contention by Payne by assertion that there is no language in the statute that defines what is a 'public hearing in this context', or that states who must receive notice of the hearing, or that denotes what must take place at and during the County hearing. *See*, Resp. Br. at p. 7. In acknowledging the fact that the statute upon which both the Department and the Hearing Examiner rely in order to defend the Department's unlawful actions in this matter is vague on its face as to key terms contained within the statute, the Department provides another basis for the District Court to determine that the statute violates Mr. Payne's due process rights.

that Payne be given a public hearing on his application and that the County make a finding that Payne's application, if granted, would adversely affect the quality of life of adjoining landowners and the surrounding community.

Again, the Hearing Examiner concludes in his proposed order that summary judgment must be awarded to the Department because he determines the Department is bound by the County's opposition resolution, Resolution #947. In reaching this legal conclusion, the Hearing Examiner asserts that the clear language of the entire statute, MCA Section 75-10-516, when such statute is read a whole, requires and required the Department to deny Payne's application under MCA Section 75-10-516(3) merely because the County adopted Resolution No. 947. However, in support of this outcome, the Hearing Examiner also held, as a matter of law that neither the DEQ nor the Department has the power to review the actions of a 'local government', in this case Lincoln County, in order to determine whether the County's actions complied with the requirements of law, namely MCA Section 75-10-516. MCA Section 75-10-516 is the very statute applied by the Hearing Examiner in order to grant summary judgment to the Department.

As set forth in Payne's exceptions, the Hearing Examiner's assertion that Payne cannot challenge the lawfulness of Resolution No. 947 'in this forum' and that the Hearing Examiner has no authority to review the County's actions as those County actions impact Payne's DEQ application is clear legal error. This is because the Hearing Examiner's interpretation serves to read out of MCA Section 75-10-515, paragraph (2)(a) of that statute. It is a well-known legal maxim that a statute must be read and reviewed in order to give effect to the entire statute. *See*, Carlson v. City of Bozeman, 2001 MT 46, ¶15, 304 Mont. 277, P.2d 792 (Rather than restricting a statutes scope to narrow clauses in a statutory scheme, courts will read the relevant statutes in their entireties; this gives courts the tools by which to carry out the will of the Legislature).

Clearly, by holding as a matter of law that neither the Department nor the Board has the power to review during this contested case proceeding whether the requirements of MCA Section 75-10-516(2) have been satisfied on an appeal filed pursuant to MCA 75-10-515, the Hearing Examiner impermissibly fails to give effect to the entire statutory scheme enacted by the Legislature. And, in substance, the Hearing Examiner's interpretation of law also results in giving no effect to the appeal right accorded by the Legislature to Payne under MCA 75-10-515. The Hearing Examiner's incorrect interpretation and application of MCA sections 75-10-515 and 75-10-516(3) requires the Board to reject the Hearing Examiner's proposed decision. *See, e.g.* MCA Sections 2-4-621(3) and 2-4-704.

In its Response Brief, the Department doubles down on the Hearing Examiner's reasoning. The Department asserts that the plain language of Section 75-10-516(3) required the Department to reject Payne's application and that the Department processed Payne's application in strict compliance with the 'unambiguous language of Section 75-10-516, MCA[2].". *See,* Dept. Resp. Br. at p. 9. Yet, in direct contrast to the plain language argument it makes, the DEQ also asserts that neither the Department nor the Hearing Examiner have an obligation to review whether Lincoln County acted on and processed Payne's application in strict compliance with

[2] Payne would note that the Department's recitation of the terms of MCA Section 75-10-516 in its Response Brief omits subparagraph (4) of that statute. *See*, Dept. Resp. Br. at p. 7. The 75-10-516(4) reads: "In making its decision to grant or deny a license application, the department shall consider the effect of the proposed facility on adjoining landowners and land uses.". Payne assumes this omission of a provision of the statute that the Department considers is the controlling statute was by accident, and not be design.

the plain, unambiguous language of the very same statute, i.e. the 'unambiguous language of Section 75-10-516(2)'[3].[4]

The Department and/or the Hearing Examiner cannot have it both ways as they attempt to do in these proceedings. The statute cannot be interpreted, as it has been by the Hearing Examiner, to allow for the Hearing Examiner to be able to review and decide on the lawfulness of the Department's actions as to acting in conformance with MCA Section 75-10-516(3), but to not allow the Hearing Examiner to review whether the County's actions were taken in conformance with MCA Section 75-10-516(2). If MCA Section 75-10-516 is the controlling authority as the Hearing Examiner so concludes, the Hearing Examiner has committed reversible error in his application and interpretation of the same.

C. *The Department has failed to rebut Payne's assertion that MCA Section 75-10-514, not 75-10-516, is the controlling statute in this matter and that the Hearing Examiner erred in not so concluding.*

On summary judgment, the Hearing Examiner determined, contrary to what Payne argued in his summary judgment motion, that MCA Section 75-10-504 is not the controlling statute for this matter. In its response, the Department adopts this conclusion by arguing that Payne's reliance on this code section is 'misplaced because a plain reading of that statute indicates that it involves shielding of MVWF's from view . . .". *See*, Resp. Br. at p. 6. However,

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[3] The Department's argument that neither Board nor the Hearing Examiner have jurisdiction over a county entity, such as the Lincoln County Commissioners is a non- sequitur and completely misses the mark. By reviewing the procedural actions taken by the County as to the Payne application, the Board is not asserting jurisdiction or control over the County; rather, it is ensuring that a statutory scheme within its jurisdiction was followed.

[4] This argument is clearly meritless in light of the fact that the Legislature has authorized an applicant to appeal administratively appeal a denial decision made by the Department. Once an appeal is timely filed, such appeal right necessarily requires the Hearing Examiner and, in turn, the Board to review all aspects of the decision, including whether all the controlling statutory process requirements have been satisfied and/or met. If the Board were to hold otherwise, such an interpretation would render the entire contested case proceeding process meaningless.

a proper application of the facts of this case to the law shows that it is the Hearing Examiner's conclusion and the Department's argument that is what is 'misplaced'.

Contrary to what the Department argues, Payne's application and the County's denial of the same does involve the issue of shielding. And, thus, MCA Section 75-10-504 is the controlling statute as asserted by Payne. As the exhibits attached to Payne's Motion for Summary Judgment show, the undisputed facts[5] of this appeal demonstrate the following:

1. Prior to filing his application, Payne had an existing motor vehicle wrecking facility for the 18-month period preceding the date he filed his application;
2. Payne filed his application to modify the boundaries of his existing facility in order to better shield his vehicles from public view;
3. The application was submitted in order to comply with a compliance plan developed by the Lincoln County Environmental Health Department, which such compliance plan required Payne to better shield his vehicles from public view;
4. On September 2nd, 2015, in response to Payne's application to modify his boundaries in order to better shield his vehicles from public view, Lincoln County passed Resolution No. 947. The express terms of Resolution No. 947 state that the County opposed Payne's application to modify Payne's current license until such time as Payne brought his license into full compliance with the Department's shielding requirements[6].

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[5] As noted in Payne's list of exceptions, the Hearing Examiner erred in not making or even addressing the findings set forth herein and in the list of exceptions even though the same were requested by Payne.

[6] The County and the Department have put Payne into a catch-22 situation. Payne filed his application with the Department to modify the boundaries of his existing licensed facility in order to comply with the Department's compliance plan, which such compliance plan required him to take an action to better shield his vehicles. The Department sent his application to the County which, in turn, denied the very application submitted to satisfy the Department's shielding requirement on the grounds that Payne first come into compliance with the Department's shielding requirements. This situation specifically, and this case in general, is the very definition of arbitrary and

Applying those just-recited facts to the clear terms of MCA Section 75-10-504 shows that, as a matter of law, Payne's application should never have been sent to the Lincoln County Commissioners in the first instance. This is because the statute specifically and clearly reads that the prohibition against licensing a motor vehicle wrecking facility based on shielding grounds does not apply to a "facility site that was licensed as such at any time within the 18 months immediately preceding the date an application is made for licensure of such site." Id. But, that is exactly what happened here, the Department, not the County, prohibited Payne's existing facility from being licensed with a modified boundary based on the County's determination that Payne was not complying with the Department's proper shielding requirements. Therefore, under a plain reading of the clear and controlling terms of MCA Section 75-10-504, the Department both erred in sending Payne's application to the County in the first instance and in denying Payne's boundary change/shielding application thereafter. *Accord*, Cruse v. Fischl, 55 Mont. 258, 265, 175 P. 878, 880 (1918)(whenever the language of a statute is plain, simple, direct, and unambiguous, it does not require construction, but construes itself).

Applying the plain reading of the terms of MCA section 75-10-504 shows that the Payne's application should not have been sent to the County once filed. Rather, the Department should have processed the application in accordance with MCA Section 75-10-504. And, as such, it was error for the Hearing Examiner to deny Payne's summary judgment motion asserting the same. And, in turn, it was and is further error on the part of the Hearing Examiner to award

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capricious government action. Payne attempted, in good faith, to work with Lincoln County Environmental Health in order to better shield his wrecking facility vehicles from public view. In turn, the Department has awarded Payne's good faith compliance efforts with two years of administrative proceedings and associated costs and attorney fees.

the Department summary judgment on its claim that proper shielding is not an issue in this case and, therefore, MCA Section 75-10-504 has no relevancy in determining the outcome of this appeal proceeding. *See,* Dept. Resp. Br. at pp. 5-6.

CONCLUSION:

For the reasons set forth above and in its initial list of exceptions, Payne Logging respectfully requests that the Board reverse the Hearing Examiner's proposed decision. Further, Payne Logging respectfully requests that the Board grant Payne's appeal and reinstate Payne's application.

Respectfully submitted this 24th day of October, 2017.

THE JAMES BROWN LAW OFFICE, PLLC

James E. Brown
Attorney for Payne Logging, Inc.

CERTIFICATE OF SERVICE

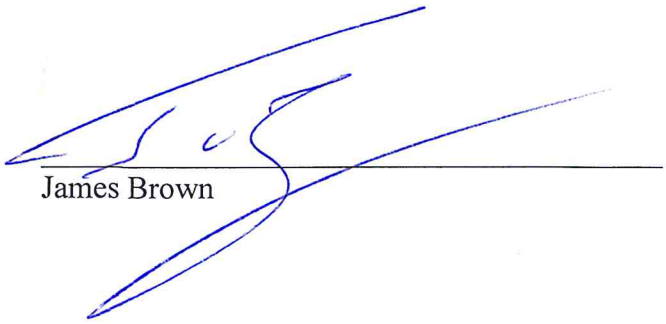
I hereby certify that a true and correct copy of the foregoing *Payne Logging's Reply Brief in Response to the Department's Response Brief to Payne's List of Exceptions to Hearing Examiner's Proposal for Decision* was served via email, hand delivery and/or via U.S. first-class mail, postage prepaid, on this 24th day of October, 2017, upon the following:

Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
P.O. Box 201440
Helena, MT 59620-1440

Lindsay Ford
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 E. 6th Ave.
P.O. Box 200901
Helena, MT 59620-0901

Bradley Jones
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
By email only

Mr. Ed Thamke, Bureau Chief
Waste & Underground Tank Management Bureau
Department of Environmental Quality
PO Box 200901
Helena, MT 59620-0901



James Brown