

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA LAND TITLE ASSOCIATION,

Petitioner,

vs.

IOWA TITLE GUARANTY DIVISION,

Respondent,

And also concerning

CHARLES W. HENDRICKS,

Applicant.

NO. CV 6748

**REPLY BRIEF OF PETITIONER,
IOWA LAND TITLE ASSOCIATION**

I. INTRODUCTION

In its response to the initial brief of Petitioner, Iowa Land Title Association (ILTA), the Iowa Title Guaranty board (ITG) attempts to camouflage what ITG did in ruling on Charles Hendricks' (Hendricks) application for a waiver of the statutory requirement that he own or lease a forty-year title plant to act as an approved abstractor under the Iowa Title Guaranty program. ITG's ruling concluded that the forty-year title plant requirement is an impediment to further expansion of the program. To remain what ITG calls "competitive" with title insurance, ITG dispenses with the forty-year title plant requirement completely. Rather than seeking an amendment of the statutory requirement through the normal legislative political process, the ITG board instead improperly utilizes its power to grant a waiver.

In granting this waiver, ITG ignored its prior decisions granting waivers and buttresses its new statutory interpretation by finding facts without supporting evidence. The final action of

ITG granting this waiver application constitutes an improper usurpation of legislature power.

II. STANDING

Both ITG and Hendricks assert ILTA is without standing to bring this appeal. ILTA has standing to bring this appeal under both specific precedent under the Iowa Administrative Procedure Act and the specific rules of the ITG board.

To bring the appeal, ILTA must have exhausted its administrative remedies and show it has been “aggrieved or adversely affected” by the agency action appealed from. Section 17A.19(1), Iowa Code (2007).

The Iowa Supreme Court has stated that a party can establish it has been “aggrieved or adversely affected” by demonstrating:

“(1) a specific personal and legal interest in the subject matter of the agency decision and (2) a specific and injurious effect on this interest by the decision.” Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm’n, 347 N.W.2d 423, 426 (Iowa 1984) (citing Iowa Bankers Ass’n v. Iowa Credit Union Dep’t., 335, N.W.2d 439, 445 (Iowa 1983).

The Iowa Supreme Court has further stated this threshold is a low one:

“The specific interest required for standing needs only to be distinguishable from a ‘general interest such as is the concern...of the community as a whole’...a party only needs to show some injury to an interest which is distinguishable from that of the general public; a party may have standing without being the primary object of the agency action.” Iowa Power & Light vs. State Commerce Comm’n, 410 N.W.2d 236 (Iowa 1987) (citations omitted) (emphasis added).

In applying this test, the Court has previously granted standing to representative organizations of members “aggrieved or adversely affected” by agency action. In Iowa Bankers Ass’n vs. Iowa Credit Union Dept., 335 N.W.2d 439 (Iowa 1983), the Court granted standing to the Iowa Bankers Association to appeal departmental rules which would expand credit union authority to compete with its bank members through share-draft accounts. The Court stated “the

association's showing of past lost business due to credit union share-draft business is sufficient, however, to demonstrate a special, injurious effect to its competitive interest. Only a likelihood or possibility of injury need be shown." Id., at 444-5.

In Iowa Power & Light v. State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987), the Court ruled a membership organization of fifty-six member municipalities had standing to challenge proposed regulations which affected the "pecuniary and penal interests" of its members. Id., at 240.

ILTA's "Active Membership" is comprised of "any person, firm or corporation that primarily engages in and is recognized as a participating abstractor in the Title Guaranty Division of the Iowa Finance Authority or title insurance underwriter, subscribes and adheres to the Code of Ethics of the Association, and agrees to be governed by the Bylaws of the Association." (Exhibit A attached hereto).

In its ruling, ITG adopted as one of its bases for granting the waiver the financial and competitive effect such waivers would have on other abstractors:

"The board finds that this waiver clearly serves the public interest by increasing competition among abstractors." Ruling, p. 10.

"In other words, national or regional lenders will often choose to use out-of-state title insurance companies instead of Title Guaranty if abstractors are unable or unwilling to offer competitive pricing and service." Ruling, p. 11.

It is silly for ITG to argue that ILTA and its members have no interest separate from that of the public when it cites the affect this ruling will have on ILTA members' financial and competitive interests as a basis for its decision. This disingenuousness is further demonstrated by the ITG's own administrative rules which recognize the special interest ILTA has in a waiver application. ITG rule 9.7(3) states:

“The division will inform participating abstractors and participating attorneys in the county for which the waiver is requested, the Iowa State Bar Association, the Iowa Land Title Association, and any person requesting such information that an application for waiver has been made to the division....” 265 Iowa Administrative Code, section 9.7(3). (Emphasis added).

The Iowa Land Title Association has been “aggrieved or adversely affected” by the board’s ruling on Hendricks’ waiver application and has standing to bring this appeal.

III. STANDARD OF REVIEW

ILTA agrees with ITG that the district court’s review of ITG’s statutory interpretation of the waiver requirements is for errors at law, as ITG has not been clearly vested with discretion to interpret the pertinent statute. ITG Brief, p. 13.

IV. ITG ERRED IN ITS DETERMINATION IN WHAT CONSTITUTES “HARDSHIP” UNDER THE STATUTE

In ILTA’s initial brief in this matter, we asserted that ITG is using this waiver application “as an excuse to gut” the forty-year title plant requirement by “setting a waiver standard so low that virtually any applicant can meet it without actual proof.” ILTA Brief, p. 8. In its response, ITG does not dispute this description, it merely asserts “the board’s interpretation of hardship is consistent with Section 16.91(5).” ITG Brief, p. 14.

In explaining the board’s interpretation of “hardship” under the statute, ITG has to concede that the public purpose expressed by the legislature underscores the importance of the abstract-attorney opinion system in maintaining the stability and marketability of land titles. Indeed, ITG acknowledges this to be the first “public purpose” identified by the legislature in Section 16.3(15) of the statute. ITG further concedes in its brief that the statute expresses an interest in maintaining the “integrity of the land-title system” by requiring abstractors to use forty-year title plants. ITG Brief, pp. 16-17. ITG denies, however, that the legislature requires

the use of the forty-year title plant “at any cost” or “at all costs.” Id.

Unfortunately, ITG cannot point to any language in the statute that provides any insight into such an interpretation. ITG cites section 16.3(15) of the statute as support for this proposition, but that section clearly does not permit ITG to utilize waivers as substitutes for the forty-year title plant requirement. The statute states in pertinent part:

“A public purpose will be served by providing an adjunct to the abstract-attorney’s title opinion system, a low cost mechanism to provide for additional guaranties of real property titles in Iowa.” Id.

In its ruling, the board asserts that the title guaranty program can no longer compete as “an adjunct to” the land-title system, and asserts that the only way it can compete is to scuttle the requirement that abstractors own or lease a forty-year title plant. The legislature did not cede ITG its legislative power to erase the requirement that title guaranties act as an adjunct to the land-title system in providing its power to grant waivers. ITG’s ruling ignores the limit on its authority placed in the legislative findings portion of the statute.

The legislature could easily have given ITG the power it now seeks to assert. It could have clearly vested discretion with ITG to determine that waivers were necessary to allow the title guaranty program to keep up with competitive changes in the market or to reduce or eliminate the influence of title insurance in Iowa. The legislature limited ITG’s discretion by enumerating the specific public interest provisions it did in Section 16.3(15). The Hendricks waiver violates that limited discretion.

V. ITG ERRED IN GRANTING HENDRICKS’ WAIVER WITHOUT ACTUAL PROOF OF HARDSHIP

ITG admits in its response that Hendricks asserted no evidence of any type of business plan that would permit it to find he had proved that a lease or ownership of a forty-year title plant

on a state-wide basis was a hardship. Instead, ITG asserts it is permitted to find such a hardship based upon its “experience and common sense.” ITG Brief, p. 22.

At no point in its response does ITG respond to ILTA’s argument that this constitutes a significant departure from its previous practice of requiring waiver applicants to establish financial hardship by actual proof of the inability to make the capital investment a forty-year title plant would require. Instead, ITG attempts to down play the significance of its interpretation of the term “hardship” by arguing the case is limited to statewide waiver applications. ITG Brief, pp. 15, 19-20. By finding that Hendricks could establish a hardship without actual proof of such a hardship, merely by requesting a statewide waiver, ITG actually made it easier for applicants to obtain a waiver. Heretofore, an applicant submitting a waiver would have to prove a lack of financial ability to make the capital investment required to own or lease a forty-year title plant. The end effect of the Hendricks ruling is that any future applicant need only request a state-wide waiver. In lieu of evidence of a business plan or financial ability, the applicant can rely upon the board’s “experience and common sense” to conclude that the capital investment for a state-wide operation is a “hardship.”

VI. ITG ERRED IN CONCLUDING HENDRICKS’ WAIVER IS IN THE PUBLIC INTEREST

In its response to ILTA’s initial brief, ITG concedes it went beyond the public interests identified in section 16.3(15) in determining that granting Hendricks’ application was in the public interest. By doing so, ITG ignores the limited bases of public interest contained in the statute. Section 16.3(5) identifies the following public interests:

- The abstract-attorney’s title opinion system promotes land-title stability for determining the marketability of land titles;

- Providing for a low-cost mechanism to provide for additional guaranties of real property titles as an adjunct to the abstract-attorney's title opinion system; and (emphasis added)
- Title guaranties will facilitate mortgage lenders' participation in the secondary market and add to the integrity of the land-title transfer system in the state.

Instead of focusing on these public interests specifically enumerated by the legislature, ITG instead offers three "public interests" it seeks to further, none of which are identified by the statute:

- Increasing competition among abstractors (ITG Brief, p. 26);
- Encouraging the use of title guaranty (ITG Brief, p. 26); and
- Making title guaranty more competitive *vis-à-vis* title insurance (ITG Brief, p. 28).

ITG fails to identify any statutory source for its conclusion that increasing competition among abstractors is in the public interest. Of course, there is no such source. Further, ITG cites Hendricks' assertion that the waiver would succeed in "breaking up the existing abstract system," as support for this public interest. Such an interest flies directly in the face of the specifically enumerated public interests in the statute which describe the "existing abstract system," the abstract-attorney's title opinion system, as part of the public purpose which should be supported.

Finally, ITG fails to address ILTA's contention that ITG made up its conclusion that the waiver would further competition, when in fact, the waiver decreases competition. By relieving Hendricks of any of the capital costs incurred by his competitors, the waiver harms competition, not fosters it.

ITG concedes the record lacks no evidence, beyond Hendricks' "belief" (ITG Brief, p.

27) that the waiver encourages consumers to use title guaranty. Similarly, ITG concedes the record contains no evidence beyond Hendricks' (and the Board's) conclusory belief that granting the waiver will ultimately make Title Guaranty competitive with title insurance. Not a single lender or consumer testified of a refusal or inability to utilize title guaranty due to a lack of competitiveness with title insurance. Without such evidence, the board's finding constitutes mere speculation.

**VII. ITG IGNORES THE STATUTORY REQUIREMENT THAT THE
WAIVER BE "ABSOLUTELY NECESSARY" TO ENSURE THE
AVAILABLE OF TITLE GUARANTY THROUGHOUT THE STATE**

In its response to ILTA's initial brief, ITG ignores the modifying word "absolutely" in arguing that Hendricks' waiver will make title guaranties more available throughout the state. ITG strives to convince the Court that when the legislature used the term "absolutely" it did not intend "that title guaranty must be unavailable somewhere before the board could grant a waiver under this provision." ITG Brief, p. 30.

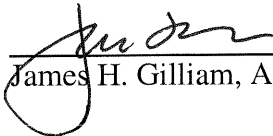
This is precisely what the legislature intended by the absolute term, "absolutely." If title guaranties are available throughout the state (as ITG concedes by their argument), the waiver is not "absolutely necessary to make title guaranties available throughout the state."

ITG conjures up the specter of a looming "crisis" if the waiver is not granted. No evidence of such crisis exists in the record and ITG cites to none. The Hendricks waiver is not "absolutely necessary" to ensure that Iowa consumers have access to title guaranty.

VIII. CONCLUSION

The Iowa Land Title Association requests this Court reverse ITG's approval of the waiver application of Charles W. Hendricks.

Respectfully submitted,



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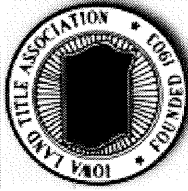
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 31st day of October, 2007.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature 



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Member Benefits

Iowa Land Title Association Benefits of Membership

As a member of the Iowa Land Title Association (ILTA), you will become part of a network of real estate title professionals that share the vision and work to accomplish the mission of the Association.

Benefits of membership:

*Board of Directors, Executive Director, Lobbyist and Committees working to assist members to develop and maintain the highest standards of product and services.

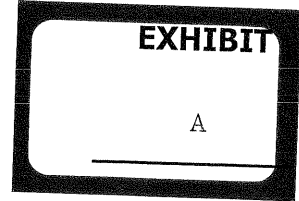
*Monthly receipt of the members-only Iowa Land Title E-News electronic newsletter.

*Copy of the ILTA Abstracting Standards. Commonly referred to as the "Blue Book", they are the only abstracting standards recognized by the Iowa Title Guaranty Division and the Iowa State Bar Association. A complimentary copy is provided to Active Members -- Associate Members pay purchase the "Blue Book" at a discounted rate.

*Educational opportunities throughout the year with the annual convention, training schools and regional meetings. Discounted rates apply for ILTA members.

*Interactive website with a Member's Only section and Discussion Forum.

Active Membership: Any person, firm or corporation that primarily engages in and is recognized as a participating abstracter in the Title Guaranty Division of the Iowa Finance Authority or title insurance underwriter, subscribes and adheres to the Code of Ethics of the Association, and agrees to be governed by



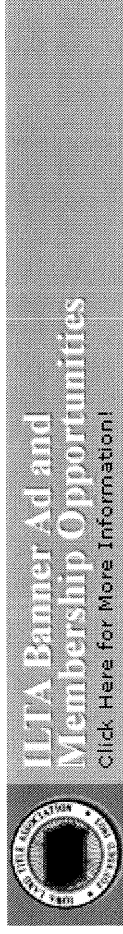
the Bylaws of the Association, shall be eligible for Active membership in the Association.

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