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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court properly conclude that Title Guaranty correctly interpreted what constitutes "hardship" under Iowa Code section 16.91(5)?

ABC Disposal Sys., Inc. v. Dep't of Natural Res., 681 N.W.2d 596 (Iowa 2004)

Auen v. Alcoholic Beverages Div., 679 N.W.2d 586 (Iowa 2004)

Greenwood Manor v. Iowa Dept. of Public Health, State Health Facilities Council, 641 N.W.2d 823 (Iowa 2002)

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Iowa Code § 17A.9A

Iowa Code § 17A.19

Iowa Code § 17A.19(10)(c)

Iowa Code § 17A.19(11)(b)

II. Did the district court properly conclude that substantial evidence supports Title Guarany's findings that Hendricks proved a hardship?

McClure v. Iowa Real Estate Commission, 356 N.W.2d 594 (Iowa Ct.App. 1984)

Office of the Consumer Advocate v. Iowa State Commerce Commission, 465 N.W.2d 280 (Iowa 1991)

Titan Tire Corp. v. Employment Appeal Bd., 641 N.W.2d 752 (Iowa 2002)

University of Iowa Hospitals & Clinics v. Waters, 674 N.W.2d 92 (Iowa 2004)

Iowa Code § 16.91(5)

Iowa Code § 17A.19

Iowa Code § 17A.19(10)(f)

III. Did the district court properly affirm Title Guaranty's interpretation of "public interest" in Iowa Code section 16.91(15)?

ABC Disposal Sys., Inc. v. Dep't of Natural Res., 681 N.W.2d 596 (Iowa 2004)

Auen v. Alcoholic Beverages Div., 679 N.W.2d 586 (Iowa 2004)

McClure v. Iowa Real Estate Commission, 356 N.W.2d 594 (Iowa Ct.App. 1984)

Office of the Consumer Advocate v. Iowa State Commerce Commission,
465 N.W.2d 280 (Iowa 1991)

Iowa Code § 16.91(5)

Iowa Code § 17A.19

Iowa Code § 17A.19(10)(c)

Iowa Code § 17A.19(11)(b)

IV. Did the district court properly conclude that substantial evidence in the record supports Title Guaranty's finding that the public interest is served by the waiver?

McClure v. Iowa Real Estate Commission, 356 N.W.2d 594 (Iowa Ct.App. 1984)

Office of the Consumer Advocate v. Iowa State Commerce Commission,
465 N.W.2d 280 (Iowa 1991)

Titan Tire Corp. v. Employment Appeal Bd.,
641 N.W.2d 752 (Iowa 2002)

University of Iowa Hospitals & Clinics v. Waters,
674 N.W.2d 92 (Iowa 2004)

Iowa Code § 16.91(5)

Iowa Code § 17A.19

Iowa Code § 17A.19(10)(f)

STATEMENT OF THE CASE

Nature of the Case. This appeal involves judicial review of "other agency action" under the Iowa Administrative Procedure Act, chapter 17A of the Iowa Code. Appellant Iowa Land Title Association (ILTA) appeals from the district court's decision affirming the Iowa Finance Authority, Title Guaranty Division's (Title Guaranty) decision to waive the 40-year plant and tract index requirement under Iowa Code section 16.91(5) to be a participating abstractor in the Title Guaranty program.

Course of Proceedings and Disposition Below. ILTA filed a petition for judicial review on August 1, 2007. Title Guaranty filed its answer on September 28, 2007. After considering the record before the agency, the parties' briefs, and oral arguments, the district court affirmed Title Guaranty's decision to grant Hendricks's waiver application in a written order dated December 28, 2007.

STATEMENT OF FACTS

Charles Hendricks, an Iowa attorney with an extensive real estate law experience, wanted to become a participating abstractor in the Title Guaranty program. Toward that end, Hendricks asked the Title Guaranty board to waive the requirement that abstracts be prepared using a 40-year title plant as permitted by Iowa Code section 16.91(5). Instead he asked the board to permit him to prepare

abstracts using another lawful method—direct searches— a method that has been in use before the Title Guaranty program was created.

Finding that Hendricks had proven a hardship and that a waiver was clearly in the public interest, the board granted Hendricks's waiver request. By granting the waiver, the board authorized Hendricks to use a legitimate, acceptable method of compiling an abstract without changing the information an abstract must include.

Iowa's Title Guaranty program. Iowa law prohibits the writing of title insurance within the state of Iowa. Iowa Code § 515.48(10). This Court affirmed this prohibition in *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17 (Iowa 1977). Because lenders often sell mortgages on the secondary market and because the secondary market requires title insurance, "title insurance frequently is sold across the state line to insure interests in property located in Iowa." 1 Patton and Palomar on Land Titles § 42 (3d. ed.). Title insurance generally provides more coverage to its insured than a title opinion or abstract. For an example, title insurance generally covers forgeries in public records affecting title to a parcel of real estate, while title opinions exclude coverage for forgeries. *Id, §41.*

This need for title insurance for mortgages sold on the secondary market prompted the Iowa legislature to create the title guaranty program in 1985 as an alternative to title insurance. When creating the title guaranty program, the legislature found that "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." Iowa Code § 16.3(15).

The legislature created the title guaranty program as a division of Iowa Finance Authority. Iowa Code § 16.91(1). The legislature also directed Title Guaranty to develop "a guaranty contract acceptable to the secondary market." Iowa Code § 16.91(3). Title Guaranty certificates generally provide coverage similar to the coverage provided by title insurance while preserving the attorney title opinion and abstracting process.

The 40-year title plant requirement. This judicial review action arises out of the requirement that participating abstractors must maintain what is known as a 40-year title plant and tract index (40-year title plant or title plant), unless Title Guaranty waives that requirement.

Iowa Code section 16.91(5) establishes the 40-year title plant requirement and, at the same time, grants Title Guaranty the power to waive this requirement:

> Additionally, each participating abstractor is required to own or lease, and maintain and use in the preparation of abstracts, an up-to-date abstract title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division. The tract indices shall contain a reference to all instruments affecting the real estate which are recorded in the office of the county recorder, and shall commence not less than forty years prior to the date the abstractor commences participation in the title guaranty program. However, a participating attorney providing abstract services continuously from

> November 12, 1986, to the date of the application, either personally or through persons under the attorney's supervision and control is exempt from the requirements of this paragraph.
>
> The division may waive the requirements of this subsection pursuant to an application of an attorney or abstractor which shows that the requirements impose a hardship to the attorney or abstractor and that the waiver clearly is in the public interest or is absolutely necessary to ensure availability of title guaranties throughout the state.

An abstractor must maintain a 40-year title plant to participate in the title guaranty program, unless Title Guaranty grants a waiver of the title plant requirement or the abstractor is a grandfathered attorney, an attorney who provided abstracting services from 1986 to the date of the attorney's application to participate in Title Guaranty. And the Title Guaranty board may waive that requirement if an attorney or abstractor establishes two conditions: (1) the requirement imposes a hardship; and (2) the waiver clearly is in the public interest or is absolutely necessary to ensure the availability of title guarantees.

What is a title plant? Section 16.91(5) requires a participating abstractor or attorney to maintain a 40-year title plant. This raises the threshold question: What is a title plant?

In broad terms, a title plant refers to a method of organizing copies of public documents that affect real estate. A title plant includes two groups of documents: (1) the property index, and (2) the general index. Charles B. Sheppard, *Assurances of Titles to Real Property Available in the United States: Is a Person Who Assures a*

Quality of Title to Real Property Liable for a Defect in the Title Caused by the Assured?, 79 N.D. L.Rev. 311, 335 (2003). The property index includes documents that affect title to real property that include a legal description of the affected property. *Id.* An abstractor creates a property index for a tract by searching the documents using the geographic description of the property in question and then by reviewing each document found to determine if it affects the property in question. Deeds, mortgages, leases, options to purchase, rights of first refusal, and releases are examples of documents included in a property index. *Id.* Conversely, the general index includes documents that affect title but do not include a legal description of the property. *Id.* General index documents include judgments liens, tax liens, and bankruptcy petitions. *Id.*

Direct search method. As an alternative to using a title plant to create an abstract, an abstractor can perform direct searches, using either a physical search of public records or a search of electronic records, or both. (Agency Record, pp. 77-78; App. __). Grandfathered or waived attorneys who are participating abstractors use this method instead of a title plant. While ILTA disparages direct searches as an inferior method of abstracting, section 16.91(5) authorizes and recognizes direct search as legitimate method of searching.

What is an abstract? An abstractor uses the documents found in the title plant to prepare an abstract of title. An abstract of title gives the prospective

purchaser or mortgagee of land "a simplified and convenient method of ascertaining the condition of title to the land without having to make a painstaking search of all of these various records." Marlin M. Volz, Jr., 1 *Ia Prac., Iowa Methods of Practice* § 1:1 (2007 ed.). An abstract of title "consists of a series of pages, each of which contains a summary of the material parts of a recorded or filed instrument affecting title to the property covered by the abstract." *Id.* It also includes information about the searches the abstractor performed with respect to judgments, taxes, mechanics' liens, and other matters of record affecting titles to real property. *Id.*

Impact of a waiver of the plant requirement on the abstract-attorney's title opinion process. If the Title Guaranty board grants a waiver of the title plant requirement, it has no effect on the abstract. Waiver of the title plant requirement changes only the method of searching for documents and instruments that affect real property, not the requirements of the abstract. As the board has explained,

> Attorneys exempt from the title plant requirement must still comply with abstracting standards applicable to all participating abstractors. The Title Guaranty participation requirements dictate that all participating abstractors prepare abstracts in accordance with the most recent Iowa Land Title Association Uniform Abstracting Standards (commonly referred to as the "Blue Book"). No exception is made for attorney-abstractors who are exempt from the title plant requirement. Consequently, an abstract prepared by an attorney without a title plant is required to contain the same information as an abstract prepared using a title

> plant. Although the process to create the abstract is very different; the end result is the same.

(Agency Record, pg. 257; App. __). Put differently, a waiver changes the method of searching, not the contents of the abstract.

Hendricks's waiver application. In May 2007, Charles Hendricks, an Iowa attorney, submitted an Amended Abstractor Application for a Waiver to Title Guaranty. In the waiver application, Hendricks asked Title Guaranty to waive the 40-year title plant requirement so that he could be a participating abstractor in the Title Guaranty program.

Hendricks is an Iowa attorney with extensive real estate law background, which was an important factor in the board's ruling. Since graduating from Drake University Law School in 1999 and since being admitted to practice law in Iowa later that year, Hendricks's practice has focused on real estate law. (Agency Record, pp. 63-64, 248-49; App. ___). Beginning in April 2003, Hendricks devoted almost 100% of his practice to real estate matters when he joined a law firm in West Des Moines. (Agency Record, pp. 63, 249; App. ___). He has examined thousands of abstracts conducted thousands of closings on real estate transactions, and conducted thousands of searches on various indices, such as the Iowa Land Records and Iowa Courts Online. (Agency Record pp. 63, 249; App. __). In November 2006, Hendricks started his own firm so that he could pursue the potential of becoming an abstractor. (Agency Record, pp. 63, 249; App. __). His main clients

are mortgage brokers who conduct business statewide. (Agency Record, pp. 64, 249; App. __). Hendricks is not affiliated with any title insurance company; his firm uses Title Guaranty relying on abstracts prepared by other participating abstractors. (Agency Record, pg. 249; App. __).

In ruling on the Hendricks's waiver application, Title Guaranty confronted the issue of a statewide waiver for the first time. Prior waiver applications had only sought a waiver of the title plant requirement for a single county, even though the board had concluded in earlier waiver applications that it would not restrict an exempt or waived attorney to abstracting to a single county. (Record, pg. 253; App. __).

The board discussed several factors for not restricting exempt or waived attorneys to abstracting in a single county, including this Court's decision in *Berger v. Iowa Finance Authority*, 593 N.W.2d 136, (Iowa 1999). In *Berger*, this Court held that a grandfathered attorney who was exempt from the 40-year title plant requirement "has no county-based geographic limit." *Id.* at 139. The board also considered a "new business model [that] has developed in Iowa by lenders who operate on a statewide basis." (Agency Record, pg. 255, App. __). These lenders, due to variances in pricing and turn-around time by abstractors, choose out-of-state title insurance companies over Title Guaranty. (Agency Record, pg. 255, App. __)

Proceedings before the agency. On June 5, 2007, the board held a meeting where it took comments on the Hendricks's waiver application from Charles Hendricks, ILTA's attorney, and other individuals. At the conclusion of the meeting, the board voted to grant Hendricks's waiver application subject to the board approving a written ruling. The board approved the written ruling granting Hendricks's waiver application during a telephonic board meeting on July 31, 2007.

ROUTING STATEMENT

The Supreme Court should retain this appeal because it involves substantial issues of first impression. Iowa R.App.P. 6.401(2)(c).

ARGUMENT

I. The district court properly concluded that Title Guaranty correctly interpreted what constitutes a "hardship" under Iowa Code section 16.91(5).

Preservation of Error. ILTA has preserved error by filing its timely petition for judicial review and its timely appeal to this Court.

Standards of judicial review. The Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs judicial review actions. "Administrative law's most fundamental tenet ... is that administrative decisions are to be made by the agencies, not the courts." *Leonard v. Iowa State Board of Education*, 471 N.W.2d 815, 815 (Iowa 1991). Judicial review of agency action is at law, not *de novo*. Iowa Code § 17A.19; *McClure v. Iowa Real Estate Commission*, 356 N.W.2d

594, 596 (Iowa Ct.App. 1984). When reviewing agency action, this Court exercises only appellate jurisdiction to correct errors of law and may not substitute its own judgment for that of the agency. *Office of the Consumer Advocate v. Iowa State Commerce Commission*, 465 N.W.2d 280, 281 (Iowa 1991); *McClure*, 356 N.W.2d at 597.

Judicial review turns on the type of administrative action being reviewed. As the district court found, this case involves "other agency action" because the Hendricks's waiver application does not constitute rulemaking or a contested case procedure. *Greenwood Manor v. Iowa Dept. of Public Health, State Health Facilities Council*, 641 N.W.2d 823, 832 (Iowa 2002).

In this case, ILTA contends that the board's interpretation of the controlling statutes is erroneous. Consequently, one of two possible standards of review applies under the IAPA, depending on whether the agency has been vested to interpret the statutory provision at issue. If an agency has not been clearly vested with the discretion to interpret the pertinent statute, the court gives no deference to the agency's interpretation of the statute. Iowa Code § 17A.19(11)(b). In this situation, a court on judicial review determines whether the agency's interpretation is "erroneous." Iowa Code § 17A.19(10)(c); *see also Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). On the other hand, when an agency has been vested with discretion to interpret the statute, a court on judicial review must

"give appropriate deference" to the agency's interpretation. Iowa Code § 17A.19(10)(c). In that case, a court will follow the agency's interpretation of the statute unless it is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(l); *see also ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 602 (Iowa 2004).

In this case, the district court reviewed Title Guaranty's interpretation of law under the errors of law standard. (Ruling, pg. 4, app. __) While believing the legislature vested interpretation of Iowa Code section 16.91(5) with Title Guaranty and without waiving the argument, Title Guaranty suggested the district court use the errors of law standard because the board's interpretation of the statutes would pass under either standard.

If this Court concludes that Title Guaranty's interpretation of section 16.91(5) constitutes an error of law, it should determine whether Title Guaranty's interpretation of the statute under the more deferential standard of review as an alternative basis of affirming the district court's ruling. The legislature has vested interpretation of Iowa Code section 16.91(5). Section 16.91 gives Title Guaranty the discretion to create and maintain the title guaranty program as an alternative to title insurance. This represents a broad grant of discretion to Title Guaranty. In addition, the language of section 16.91(5) demonstrates that the legislature intended to vest interpretation of the provision with Title Guaranty by using the terms

"hardship" and "public interest." These terms are inherently imprecise and require Title Guaranty to interpret the terms when deciding whether to grant a waiver of the 40-year title plant requirement.

In its Supreme Court brief, ILTA argues that Title Guaranty cannot ask this Court to use the deferential standard of review because it has not cross-appealed the district court's ruling on this issue. Contrary to ILTA's argument, Title Guaranty could not cross-appeal on this issue because the district court had ruled in its favor using the more deferential standard of review. As a result, this Court ought to apply the more deferential standard of review if it reverses the district court's ruling under the errors of law standard.

A. The board's interpretation of "hardship."

Under Iowa Code section 16.91(5), the Title Guaranty board can waive the 40-year plant requirement if an applicant can prove (1) the requirement imposes a hardship to the attorney or abstractor, and (2) the waiver clearly is in the public interest or absolutely necessary to ensure the availability of title guaranties. Neither Iowa Code section 16.91(5) nor the relevant administrative rules define "hardship." This meant the board had to interpret what constitutes hardship when it decided if it would grant or deny Hendricks's waiver application.

The Hendricks waiver application raised an important question: Is financial hardship alone sufficient to establish hardship required by section 16.91(5)? Here,

the board concluded "that financial hardship alone can constitute hardship under section 16.91(5), at least under certain circumstances." (Agency Record, pg. 252; App. __). The board also concluded that hardship "may include the financial hardship caused by the cost of creating and maintaining a title plant." (Agency Record, pg. 252; App. __). The fact that Hendricks sought a statewide waiver of the title plant requirement played an important role in the board's finding of hardship.

In addition, the board examined another statute—Iowa Code section 17A.9A—for guidance on what constitutes hardship under section 16.91(5). The board noted that the standard for granting a waiver of the 40-year title plant requirement differs from the standard for granting a waiver of an administrative rule under the Iowa Administrative Procedure Act. While that Act allows agencies to waive administrative rules, Iowa Code section 17A.9A requires a showing of "undue hardship." The board found the use of the adjective "undue" important:

> The adjective "undue" elevates the amount of hardship that must be shown for an applicant to obtain a waiver of an administrative rule. The legislature used no such adjective in section 16.91(5), even though it demonstratively could have done so. The lack of any qualifier or adjective in section 16.91(5) to modify the noun "hardship" strongly indicates that the legislature intended that any showing of hardship should be sufficient.

(Agency Record, pg. 253; App. __). In other words, the board found that "hardship" as used in section 16.91(5) imposes a lesser degree of hardship than "undue hardship" under the IAPA.

The board went on to say, "There is no reason to believe the legislature intended to deprive Iowans of the opportunity to use Title Guaranty unless the creation of a title plant can be shown to be a hardship of an extraordinary magnitude or type. A hardship is a hardship and meets the requirements of section 16.91(5)." (Agency Record, pg. 253; App. __). That is, nothing in section 16.91(5) requires an applicant to provide a higher showing of a hardship when the hardship is the cost of creating and maintaining a title plant.

B. The district court properly concluded that Title Guaranty's interpretation of "hardship" under Iowa Code section 16.91(5) was not an error of law.

ILTA advances two principal challenges to the board's interpretation of what constitutes a hardship under section 16.91(5). First, it argues that a "review of section 16.91(5) reveals an understanding of the deep appreciation the legislature had for the land-title transfer system existing in Iowa upon its passage in 1985 and the public interest maintaining [its] integrity." (ILTA's Brief, pg. 17). Second, it argues that by enacting 16.91(5), the legislature intended that the Title Guaranty program maintain the integrity of the land-title system at the cost of requiring

participating abstractors to incur the capital cost and administrative costs inherent in the system. (ILTA's Brief, pg. 18). Neither argument has merit.

ILTA first argues that section 16.91(5) reflects the legislature's interest in maintaining the integrity of the land-title system by having abstractors rely on a 40-year title plant to prepare abstracts. As a result, ILTA asserts that the board's interpretation of "hardship" is inconsistent with the legislative policy expressed in the statute. In other words, ILTA argues the legislature intended to require the use of title plants to prepare abstracts in every circumstance.

But ILTA's interpretation of section 16.91(5) conflicts with the purposes of the title guaranty program. Legislative findings found in chapter 16 of the Iowa Code explain the purposes of the title guaranty program:

> The abstract-attorney's title opinion system promotes land title stability for determining the marketability of land titles and is a public purpose. A public purpose will be served by providing, as 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. The title guaranties will facilitate mortgage lenders' participation in the secondary market and add to the integrity of the land-title transfer system.

Iowa Code § 16.3(15). Put differently, the purposes underlying the title guaranty program include (1) encouraging the abstract-attorney's title opinion system because it promotes title stability, (2) providing additional guaranties of real

property titles, and (3) facilitating mortgage lenders' participation in the secondary market.

As the district court found, the structure of section 16.91(5) demonstrates that the legislature did not intend a 40-year title plant to be indispensible to protecting the integrity of land titles. (Ruling, pg. 9; App. ___).

First, section 16.91 includes a waiver provision. The existence of a waiver provision demonstrates that the use of a title plant "is not indispensable to protecting the integrity of land titles." (Ruling, pg. 8; App. __). Had the legislature intended to codify the requirement that abstractors must always use a 40-year title plant, it would not have included a waiver provision. Instead, it would have imposed a higher standard of hardship as it did in Iowa Code section 17A.9A, which requires undue hardship for the waiver of an administrative rule. (Ruling, pp. 8-9; App. ___).

Second, section 16.91(5) also exempts grandfathered attorneys, who were providing services continuously from November 12, 1986, from the title plant requirement. These provisions, when read together, show that the legislature did not codify the requirement that an abstractor must always use a title plant when preparing an abstract when it enacted section 16.91(5).

ILTA next argues that "hardship" under section 16.91(5) cannot include the customary costs of starting and maintaining a title plant. (ILTA Brief, pg. 18).

Section 16.91(5), it argues, reflects the legislature's policy choice that the cost of starting and maintaining a title plant is necessary to maintain the integrity of the land-title system. (ILTA Brief, pg. 18). It further contends that Title Guaranty's interpretation of hardship to include financial hardship erases completely the legislative norm for participating as an abstractor and that the use of a 40-year title plant is a mere suggestion. (ILTA Brief, pg. 18).

ILTA's arguments lack merit. First, as the district court said, "the word 'hardship' means 'suffering, privation.'" (Ruling, pg. 8; App. ___). Nothing in the language of the statute limits the type of suffering or deprivation that must be shown to justify a waiver. (Ruling, pg. 8). In fact, the district court concluded that "it is difficult to imagine what other kinds of hardship the legislature may have had in mind." (Ruling, pg. 8; App. ___).

Second, as the district court pointed out, the concept of hardship is relative: "It cannot be given precise meaning in the abstract, as the division recognized by indicating that the cost of a forty year title plant could qualify as a hardship under 'certain circumstances.'" (Ruling, pg. 9; App. ___). As the board concluded,

> financial hardship alone <u>can</u> constitute hardship under certain circumstances. Hardship pursuant to section 16.91(5) may include the financial hardship caused by the cost of creating and maintaining a title plant.

(Agency Record, pg. 252; App. __).

What is more, the fact that Hendricks asked the board for a statewide waiver played a critical role in the board's finding of hardship. The board does not impose geographic limitation on attorneys who provide abstracting services. (Record, pg. 253; App. __). It relies on this Court's decision in *Berger*, which held that the 40-year title plant "exemption for participating attorneys has no county-based geographic limit." *Berger*, 593 N.W.2d at 139.

The board concluded that Hendricks had proven hardship under section 16.91(5). It found:

> Specifically, the board finds that Hendricks has proven he would incur a hardship to build and maintain or lease a 40-year title plant in each of Iowa's 99 counties. .... Thus, requiring Hendricks to create a plant for all 99 counties would require him to do what ILTA's entire membership has not accomplished.

(Agency Record, pg. 253-54; App. __). Further, as the district court found, while it might be a financial hardship for Hendricks as a sole practitioner to own or lease a title plant in every county, it may not be a hardship for a large corporation. (Ruling, pg. 9; App. __).

In conclusion, Title Guaranty's interpretation of hardship is not erroneous, nor is it illogical, irrational, or wholly unjustifiable. This Court should affirm the district court's decision.

II. The district court properly concluded that substantial evidence supports Title Guaranty's finding that Hendricks proved a hardship.

Preservation of Error. ILTA has preserved error by filing its timely petition for judicial review and its timely appeal to this Court.

Standards of judicial review. As discussed earlier in this brief, the Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs judicial review actions. Judicial review of agency action is at law, not *de novo*. Iowa Code § 17A.19; *McClure v. Iowa Real Estate Commission*, 356 N.W.2d at 596. When reviewing agency action, this Court exercises only appellate jurisdiction to correct errors of law and may not substitute its own judgment for that of the agency. *Office of the Consumer Advocate v. Iowa State Commerce Commission*, 465 N.W.2d at 281; *McClure*, 356 N.W.2d at 597.

ILTA argues that Title Guaranty's actions are not supported by substantial evidence. A district court may reverse, modify, or grant other appropriate relief from agency action, including other agency action, if it determines that substantial rights of the person seeking judicial review have been prejudiced because the agency action is "not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Substantial evidence "means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the

fact in issue with the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). And the "record before the court" means "the agency record for judicial review." Iowa Code § 17A.19(10)(f)(2).

"While 'courts must not simply rubberstamp the agency fact finding without engaging in fairly intensive review of the record to ensure that the fact finding is itself a reasonable ... evidence is not insubstantial merely because it would have supported contrary inferences.'" *University of Iowa Hospitals & Clinics v. Waters*, 674 N.W.2d at 95 (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 1993)). Courts, on judicial review, apply agency findings broadly and liberally "to uphold, rather than to defeat, an agency's decision." *Titan Tire Corp. v. Employment Appeal Bd.*, 641 N.W.2d 752, 755 (Iowa 2002) (quoting *Organic Techs. Corp. v. State ex rel. Iowa Dep't of Natural Res.*, 609 N.W.2d 809, 815 (Iowa 2000).

As the district court observed, even though a party can challenge other agency action for the lack of substantial evidence, nothing in chapter 17A mandates the nature, source, or form of evidence an agency may properly consider. (Ruling, pp. 12-13). Here, the record before Title Guaranty "consisted of the facts asserted in Hendricks' application, the facts asserted in the letters supporting and opposing the application and of the collective knowledge of the individual members of the

division's board." (Ruling, pg. 13). Under these circumstances, the court concluded that the board properly considered all three sources of facts when ruling on Hendricks's waiver application. (Ruling, pg. 13).

Argument. ILTA challenges Title Guaranty's finding that Hendricks had proven hardship. More specifically, it contends that the board's finding was not supported by substantial evidence.

The Title Guaranty board found that Hendricks had proven hardship under Iowa Code section 16.91(5). It found:

> Specifically, the board finds that Hendricks has proven he would incur a hardship to build and maintain or lease a 40-year title plant in each of Iowa's 99 counties. .... Thus, requiring Hendricks to create a plant for all 99 counties would require him to do what ILTA's entire membership has not accomplished.

(Agency Record, pg. 253-54; App. __).

ILTA argues the Hendricks failed to introduce enough information to support the board's finding of hardship. Hendricks, ILTA argues, should have provided a business plan demonstrating he was incapable of obtaining a 40-year title plant in every county.

First, nothing in Iowa Code section 16.91(5) requires a person seeking a waiver to provide a business plan or similar financial information or requires the board to request that information before finding hardship exists. Nor does ILTA cite any authority for this proposition.

Second, a business plan or other financial information is unnecessary to prove hardship when an applicant seeks a statewide waiver. Nevertheless, Hendricks addressed his personal financial hardship in his application and in a statement made to the board. (Agency Record, pp. 58, 68-69; App. ___). While acknowledging that Hendricks failed to provide a business plan, the board found sufficient hardship because

> the cost of doing so in 99 counties constitutes a hardship for an individual, in terms of both cost and the time necessary to create 99 title plants.

(Agency Record, pg. 254; App. __). The board, relying on its experience and the information presented during the hearing, reached an unremarkable conclusion: Creating and maintaining a title plant in each of Iowa's 99 counties constitutes a financial hardship. As the district court concluded, "[t]he statements in Hendricks' application and the division board members' knowledge in this area is sufficient evidence establishing that compliance with the statute would be prohibitively costly to Hendricks' doing what he intends to do." (Ruling, pg. 13; App. __).

ILTA also argues that substantial evidence does not support the board's finding of hardship. As discussed earlier, an applicant does not have to provide a business plan or financial information for the board to establish hardship. The board, using its experience and common sense as well as the information presented during the meeting, pointed out financial and practical difficulties of creating and maintaining or leasing title plants in all 99 counties. After all, as pointed out earlier

in this brief, a direct search of land records is an accepted, lawful method of searching. A method of searching land records that attorney abstractors have used for many years.

Finally, the board's ruling does not mean that Title Guaranty has created a de facto rule that a hardship exists whenever an attorney requests a statewide waiver. As the district court pointed out, the concept of hardship is relative:

> It cannot be given precise meaning in the abstract, as the division recognized by indicating the cost of a forty year title plant could qualify as a hardship under "certain circumstances." The court agrees. While it might be a financial hardship for Hendricks as a sole practitioner to own or lease a forty year title plant in every county, it may not be a hardship for a large corporation.

(Ruling, pg. 9; App. __). Here, the board concluded that it was a hardship for Hendricks, a sole practitioner, to own or lease a title plant in each county. And the board granted the waiver for Hendricks, an experienced real estate attorney with a demonstrated familiarity with land records across the state.

When the record before the court, including the board's ruling, is viewed as a whole, substantial evidence supports the board's finding of hardship. A neutral, detached, and reasonable person would have relied on this type of information to reach this conclusion.

Consequently, this Court should affirm the district court's ruling that Hendricks presented substantial evidence to satisfy the hardship requirement under 16.91(5).

III. The district court properly affirmed Title Guaranty's interpretation of "public interest" in Iowa Code section 16.91(15).

Preservation of Error. ILTA has preserved error by filing its timely petition for judicial review and its timely appeal to this Court.

Standards of judicial review. As previously discussed, the Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs judicial review actions. Judicial review of agency action is at law, not *de novo*. Iowa Code § 17A.19; *McClure v. Iowa Real Estate Commission*, 356 N.W.2d at 596. When reviewing agency action, this Court exercises only appellate jurisdiction to correct errors of law and may not substitute its own judgment for that of the agency. *Office of the Consumer Advocate v. Iowa State Commerce Commission*, 465 N.W.2d at 281 (Iowa 1991); *McClure*, 356 N.W.2d at 597.

Again, ILTA contends that the board's interpretation of the controlling statutes is erroneous. Consequently, one of two possible standards of review applies under the IAPA, depending on whether the agency has been vested to interpret the statutory provision at issue. If an agency has not been clearly vested with the discretion to interpret the pertinent statute, the court gives no deference to the agency's interpretation of the statute. Iowa Code § 17A.19(11)(b). In this situation, a court on judicial review determines whether the agency's interpretation is "erroneous." Iowa Code § 17A.19(10)(c); *see also Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). On the other hand, when an agency has

been vested with discretion to interpret the statute, a court on judicial review must "give appropriate deference" to the agency's interpretation. Iowa Code § 17A.19(10)(c). In that case, a court will follow the agency's interpretation of the statute unless it is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(l); *see also ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d at 602.

As previously discussed, the district court reviewed the board's ruling using the less deferential errors of law standard. If this Court reverses the district court's ruling under the errors of law standard, it should still review the board's ruling applying the more deferential standard for the reasons discussed in division I.

A. The board's interpretation of public interest found in Iowa Code section 16.91(5).

Here, the board concluded that Hendricks had proven the waiver was clearly in the public interest. In reaching this conclusion, the board identified how the waiver was clearly in the public interest including:

- The board found that "this waiver clearly serves the public interest by increasing competition among abstractors."
- The board found "the waiver clearly serves the public interest by encouraging the use of Title Guaranty throughout Iowa, including Iowa counties for which there is currently no plant in operation."
- The board found "that a waiver here will tend to make title guaranties more competitive and out-of-state title insurance less so, which is clearly in the public interest." In making this finding, the board discussed the impact of

the way statewide lenders do business and how this impacts the use of title guaranty or title insurance.

(Agency Record, pp. 254-55; App. ___).

In addition, the board examined whether waiving the 40-year title plant requirement would lead to an increase in claims. Minimizing title claims is an important public interest, too. In this case, the board concluded that waiving the title plant requirement would not lead to increase in claims. (Agency Record, pg. 258; App. __). Relying on Title Guaranty's own claim experience, the board found

> Since Title Guaranty's inception, exempt attorneys have routinely prepared abstracts without using a 40-year title plant. Nevertheless, Title Guaranty's claims rate is far below that of out-of-state title insurance companies. In fact, Title Guaranty has never paid a claim on account of an exempt attorney abstracting without a title plant. Title Guaranty has paid claims that arose from transactions using title plants, however.

(Agency Record, pg. 258; App. ___). This claims experience supports the board's conclusion the waiver in this case is in the public interest.

B. The district court properly concluded that Title Guaranty's definition of "public interest" in Iowa Code section 16.91(5) was not an error of law.

As the district court correctly noted, "ILTA does not challenge the literal meaning of the phrase "public interest." Rather, it criticizes [Title Guaranty] for identifying improper public interests." (Ruling, pg. 10; App. __).

ILTA argues the board could only consider one public interest: maintaining the quality of Iowa's land-title system. It believes this is the only public interest

that statutory scheme allows. Furthermore, it argues the board lacked the power to police competition among abstractors and between abstractors and title insurers.

But the district court properly rejected ILTA's claim that the legislature intended title integrity to be the only public interest when determining when to waive that requirement. (Ruling, pg. 11; App. ___).

First, the statute "does not expressly limit the division to considering only the protection of the integrity of land titles in assessing whether a wavier is in the public interest." (Ruling, pg. 11; App. ___). Nothing in section 16.91(5) restricts the definition of "public interest" to maintaining the integrity of the land-transfer system. Had the legislature wanted to restrict the meaning of "public interest" to maintaining the integrity of the land-transfer system, it could have said so or used a more restrictive term. But it did not do so.

Second, the statute itself suggests that Title Guaranty should consider other public interests when deciding whether a waiver is in the public interest. (Ruling, pg. 11; App. ___). For example, the statute refers to the title guaranty program being an adjunct to the abstract-attorney's title opinion system. It also refers to the program being a low cost mechanism to provide additional guaranties. (Ruling, pp. 11-12; App. __). And it refers to the program facilitating mortgage lenders' participation in the secondary market. (Ruling, pp. 11-12; App. ___).

Finally, agreeing with Title Guaranty, the district court concluded that "making title guaranties attractive from a cost perspective was an important public interest underlying the title guaranty program." (Ruling, p. 12, App. ___) In fact, the district court went even further when describing the public interests that Title Guaranty can consider when deciding whether to grant a waiver:

> It could not be seriously argued that bolstering the title guaranty program itself is not a proper public interest for the division's consideration. The title guaranty program itself being in the public interest, anything that bolsters it would also be in the public interest.

(Ruling, pg. 12; App. ___). Among the public interests that Title Guaranty may consider are the need to promote the abstract-attorney's opinion system, the need to provide a competitive alternative to title insurance, and the need to facilitate the sale of mortgages in the secondary market.

Without question, the district court properly concluded that Title Guaranty's interpretation of "public interest" was not was not an error of law. Nor was Title Guaranty's interpretation of that term irrational, illogical, or wholly unjustifiable. Consequently, this Court should affirm the district court.

IV. The district court properly concluded that substantial evidence in the record supports Title Guaranty's finding that the public interest is served by the waiver.

Preservation of Error. ILTA has preserved error by filing its timely petition for judicial review and its timely appeal to this Court.

Standards of judicial review. As discussed earlier in this brief, the Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs judicial review actions. Judicial review of agency action is at law, not *de novo*. Iowa Code § 17A.19; *McClure v. Iowa Real Estate Commission*, 356 N.W.2d at 596. When reviewing agency action, this Court exercises only appellate jurisdiction to correct errors of law and may not substitute its own judgment for that of the agency. *Office of the Consumer Advocate v. Iowa State Commerce Commission*, 465 N.W.2d at 281; *McClure*, 356 N.W.2d at 597.

Once again, ILTA argues that Title Guaranty's actions are not supported by substantial evidence. In addition, ILTA argues that Title Guaranty's actions are not supported by substantial evidence. A district court may reverse, modify, or grant other appropriate relief from agency action, including other agency action, if it determines that substantial rights of the person seeking judicial review have been prejudiced because the agency action is "not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Substantial evidence "means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact in issue with the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code §

17A.19(10)(f)(1). And the "record before the court" means "the agency record for judicial review." Iowa Code § 17A.19(10)(f)(2).

"While 'courts must not simply rubberstamp the agency fact finding without engaging in fairly intensive review of the record to ensure that the fact finding is itself a reasonable … evidence is not insubstantial merely because it would have supported contrary inferences.'" *University of Iowa Hospitals & Clinics v. Waters*, 674 N.W.2d at 95 (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 1993)). Courts, on judicial review, apply agency findings broadly and liberally "to uphold, rather than to defeat, an agency's decision." *Titan Tire Corp. v. Employment Appeal Bd.*, 641 N.W.2d at 755 (quoting *Organic Techs. Corp. v. State ex rel. Iowa Dep't of Natural Res.*, 609 N.W.2d 809, 815 (Iowa 2000).

Argument. ILTA argues the board's finding that the public is served by the waiver is not supported by the record before the agency. More specifically, it argues, "The glaring flaw in ITG's conclusions that Hendricks' waiver will serve the public interest is that ITG fails to pinpoint how <u>this</u> waiver will serve any public interest." (ILTA Brief, pg. 29). It also argues that substantial evidence does not support the board's conclusion that granting the Hendricks's waiver application would further the identified public interests.

The district court rejected ILTA's arguments, relying on the reasons identified in the board's written ruling. (Ruling pg. 14; App. ___). As the district

court stated, "Put simply, the division's conclusions regarding the effect of the requested waiver are well reasoned and supported factually. " (Ruling, pg. 14; App. __).

A. Hendricks's waiver clearly serves the public interest by increasing competition among abstractors.

ILTA first argues there is no evidence in the record that supports the board's finding that Hendricks's waiver serves the public interest by increasing competition among abstractors. This argument is without merit.

The record includes evidence that granting Hendricks's waiver will serve the public interest by increasing competition among abstractors. For example, in his waiver application, Hendricks argued that granting his waiver request would increase competition by breaking up the existing abstracting system, which he alleges constitutes a monopoly. (Agency Record, pp 73-75; App. ___). In addition, the waiver application, as well as Hendricks's testimony at the hearing, points out that granting the waiver would increase competition by decreasing turnaround time for title searches and increasing the availability of title guaranties. (Agency Record, pp. 79-80; App. __).

While ILTA may disagree with the board's analysis and believes the board could have drawn the opposite conclusion, the fact remains that a neutral, detached, and reasonable person could reasonably conclude that granting Hendricks's waiver application would increase competition among abstractors.

B. Hendricks's waiver clearly serves the public interest by encouraging the use of Title Guaranty.

ILTA next argues there is no evidence in the record that supports the board's finding that the waiver would serve the public interest by encouraging the use of Title Guaranty throughout Iowa. Once again, this argument ignores substantial evidence in the record.

Here, the board found that, "the waiver clearly serves the public interest by encouraging the use of Title Guaranty throughout Iowa, including in Iowa counties for which there is currently no title plant in operation." (Agency Record, pp. 254-55; App. __).

Contrary to ILTA's argument, substantial evidence supports the board's finding. First, the record includes evidence that there are Iowa counties—Louisa, Lee, and Davis—where there are no title plants in operation. Second, the record includes evidence that the waiver serves the public interest by encouraging the use of Title Guaranty throughout Iowa. At the hearing, Hendricks stated that he believed Title Guaranty will likely lose business to title insurance companies when abstractors refuse to meet the business needs of lenders. This is a reasonable observation. If the abstracting community cannot meet a lender's requirements, then the lender may use title insurance instead of title guaranty.

While ILTA disagrees with this evidence and believes the board could have drawn the opposite conclusion from the information presented, the fact remains that

a neutral, detached, and reasonable person could reasonably conclude that granting Hendricks's waiver application would encourage the use of title guaranty.

C. Hendricks's waiver clearly serves the public interest by making title guaranties more competitive and out-of-state title insurance less so.

Finally, ILTA argues that the record does not support the board's finding that the waiver will tend to make title guaranties more competitive and out-of-state title insurance less so. Nevertheless, substantial evidence supports the board's decision.

When examining the public interest, the board noted "a significant new business model has developed in Iowa by lenders who operate on a statewide basis." (Agency Record, pg. 255; App. ___). As a result, these lenders "demand uniform pricing and service, including turn-around time." (Agency Record, pg. 255; App. ___). Due to variances in pricing and turn-around time, "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." (Agency Record, pg. 255; App. ___).

During the hearing, the board heard from Hendricks and Loyd Ogle, director of Title Guaranty, about the changes in the marketplace and the impact those changes are having on the use of title guaranties. As previously noted, Hendricks, in his waiver application and presentation, told the board that the statewide or regional lenders he represents will obtain title insurance if title guaranties will not meet their business needs. In addition, Loyd Ogle told the board about the

significant changes in the lending industry, with lenders demanding uniform pricing and turnaround times.

While ILTA may disagree with this evidence, may disagree with the board's finding that the trend exists, and may believe the board could have drawn the opposite conclusion, the fact remains that a neutral, detached, and reasonable person could reasonably conclude that the waiver would tend to make title guaranties more competitive.

CONCLUSION

For the reasons discussed above, Appellee Iowa Finance Authority, Title Guaranty Division respectfully requests that this Court affirm the district court's decision.

REQUEST FOR ORAL ARGUMENT

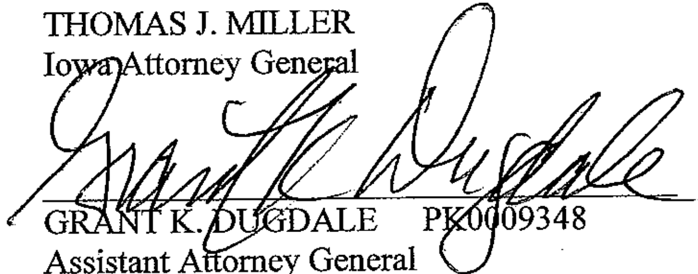
Upon submission of this case, counsel for Appellee Iowa Finance Authority, Title Guaranty Division requests oral argument.

COST CERTIFICATE

The undersigned certifies that the actual cost of printing was $_______.

Respectfully submitted,

THOMAS J. MILLER
Iowa Attorney General



GRANT K. DUGDALE PK0009348
Assistant Attorney General
Hoover State Office Building, Second Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3395
Fax: (515) 281-7551
Email: gdugdal@ag.state.ia.us

ATTORNEY FOR APPELLEE, IOWA
FINANCE AUTHORITY, IOWA TITLE
GUARANTY DIVISION