**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

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| **IOWA LAND TITLE ASSOCIATION**,<br>Petitioner,<br>vs.<br>**IOWA TITLE GUARANTY DIVISION**,<br>Respondent,<br>And also concerning<br>**CHARLES W. HENDRICKS**,<br>Applicant. | NO. CV 6748<br><br>**BRIEF OF PETITIONER, IOWA LAND TITLE ASSOCIATION** |

## STATEMENT OF THE CASE

This matter involves the judicial review of agency action by the Iowa Title Guaranty Division ("the board" or "ITG") of the Iowa Finance Authority. The petition for judicial review was filed by Iowa Land Title Association ("ILTA") on August 1, 2007, from a July 31, 2007 decision of the ITG.

The matter before the ITG involved the Application for a Title Plant and Tract Index Waiver under Iowa Code Section 16.91 filed by Charles W. Hendricks ("Hendricks") (Agency Record ("Record"), pp. 1-56) and amended and supplemented on May 2, 2007 (Record, pp. 57-116). On April 27, 2007, the ILTA petitioned to intervene in the proceedings before ITG (Supplemented Agency Record). ITG considered Hendricks' application at its June 5, 2007, meeting and voted to approve Hendricks' application three to one (ITG board members Taylor, Schneider and Peterson voted for approval; board member Murphy voted against the application;

board member Rodari was absent and did not vote).

On July 31, 2007, after consultation with its attorneys, the ITG members voting for the waiver issued a written decision (Record pp. 245-260). Board member Murphy was not permitted to consult an attorney for purposes of crafting a dissenting opinion (Record pp. 261-266).

Subsequent to the decision, the ITG board denied ILTA's motion to stay the ruling pending judicial review. The vote was again three (Taylor, Schneider and Peterson) to one (Murphy).

## STATEMENT OF THE FACTS

### Background

The sale of title insurance is prohibited in the State of Iowa. Section 515.48(10), Iowa Code (2007). The impetus for the ban occurred in 1947 when the collapse of some Sioux City title insurance companies left homeowners with worthless policies. "The Title Report," October Research Corporation, Vol. 7, No. 8 (2/20/2006). The prohibition was challenged by the Chicago Title Insurance Company in 1972 when it sought permission from the Iowa Insurance Commissioner to issue policies in the State. In upholding the ban, the Iowa Supreme Court found the statute appropriately targeted the potential for abuse when title insurance is written:

> "Obviously, a loss ratio of zero per cent represents a potential lucrative source of revenue to an insurer of titles and this Court cannot say the general assembly overstepped its power in barring a costly form of 'insurance' for which petitioner's own testimony demonstrates there is little need."

*Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 27 (Iowa 1977).

The Court further found that:

> "…the general assembly could have reasonably concluded the preclusion of in-state title insurance activities is necessary in order to prevent invidious practices such as rebates and commissions between institutional lenders and title insurance companies, all of which may have been deemed inimical to the public interest. In addition, our legislature might well have determined the competitive market is an ineffective force for effective regulation of title insurance due to the distinguishing oligopolistic nature of the industry. These considerations provide an ample basis for singling out this form of insurance for special legislative treatment, i.e. prohibition."

Id., at 29-30.

The Iowa title guaranty program was created by the Iowa legislature in 1985 "to provide additional guarantees of Iowa real property titles, to facilitate mortgage lenders' participation in the secondary market and to add to the integrity of the land-title transfer system." Title Guaranty Manual, Title Guaranty Division, Article I. The authority to initiate and operate the program is vested in the Iowa Title Guaranty Division ("ITG") of the Iowa Finance Authority. Section 16.91(1), Iowa Code (2007).

ITG has described its mission in its administrative rules:

> The mission of the division is to operate a program that offers guaranties of real property titles in order to provide, as an adjunct to the abstract-attorney's title opinion system, a low-cost mechanism to facilitate mortgage lenders' participation in the secondary market and to add to the integrity of the land-title transfer system in the state…" 265 Iowa Admin. Code Section 9.2.

The program established by the Iowa legislature envisions "participating abstractors" and "participating attorneys." Before a title guaranty can be issued, "an abstract of title" must be "brought up-to-date and certified by a participating abstractor…and a title opinion issued by a participating attorney…stating the attorney's opinion as to the title…" Section 16.91(6) Iowa Code (2007).

In order to participate as an abstractor under the title guaranty program, "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 are guaranteed by the division." Section 16.91(5), Iowa Code (2007).

The statute further requires what is known as the "forty-year title plant":

> "The tract indices shall contain a reference to all instruments affecting 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." Id.

Not surprisingly, the forty-year title plant matches the temporal limits set forth in the Iowa Marketable Record Title Acts, Sections 614.29-.38, Iowa Code (2007). That statute, first enacted by the Iowa legislature in 1971, was:

> "…designed to shorten the period of search required to establish title in real estate and give effect and stability to record titles by rendering them marketable and alienable in substance to improve and render less complicated the land transfer system."

*Chicago & Northwestern Ry. Co. v. City of Osage*, 176 N.W.2d 788, 793 (Iowa 1970).

The statutory scheme creating the Iowa title guaranty program provides two exemptions from the requirement that participating abstractors own or lease a forty year title plant. The first, known as the "grandfather" provisions, exempts those participating attorneys who provided "abstract services continuously from November 12, 1986, to the date of application." Section 16.91(5), Iowa Code (2007).

The second exemption, known as the "waiver" provision, provides that:

> "The division may waive the requirements of this subsection pursuant to

> an application of an attorney or abstractor which shows that the requirement imposes 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." Id.

Prior to the instant case, ITG had only approved waivers for attorneys on five previous occasions[1]:

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| June 5, 2001 | David Dunakey |
| June 5, 2001 | Charles Augustine |
| June 14, 2005 | Steven Sents |
| December 6, 2005 | John Donohoe |
| December 6, 2005 | Michael Gorsline |

ITG has never granted a waiver from the forty-year title plant requirement to a non-attorney abstractor, although ITG has, on occasion, permitted abstractors to participate on a temporary waiver basis while their title plant was being created.

In those cases where ITG previously granted waivers to attorney-abstractors, ITG never entered a ruling containing findings of fact and conclusions of law, nor did ITG make and keep a record of the proceedings beyond its routine minutes.

On the basis of an incomplete record, the Sents, Donohoe and Gorsline cases appear to have been granted waivers on the basis of the location of their practices (Louisa County, Scott County and Scott County, respectively) and the fact that each was mentored by "grandfathered" attorneys that would soon be retiring from practice.

[1] A sixth waiver, for attorney Mitchell Taylor, was overturned by the district court on appeal. *Des Moines County Abstract Company vs. Iowa Finance Authority, Title Guarantee Division*, CVEQ006597, Des Moines County, (4/5/07).

**Hendricks Application**

In his application, as amended, Hendricks requested that he be granted status as a participating abstractor, and that he be permitted to perform abstracting services on a "state-wide" basis, and that he be granted a waiver from the requirement to own or lease a forty-year title plant ("Record pp. 57-116).

Hendricks did not submit a business plan, but stated his intent is to offer clients state-wide standardized pricing, standardized "wash" agreements, and standardized "turn-around" time (Record p. 79).

Hendricks admitted in his application that he did not intend to construct or otherwise use a title plant in conducting searches. Instead, he indicated his intent to construct abstracts utilizing "direct grantor/grantee searches" (Record, p. 77) through on-line (Internet) records sources (Record, p. 78).

Hendricks asserted two distinct categories of "hardship" in his application. The first was in the form of a competitive hardship. He asserted that the primary competition for his business is title insurers that can provide wash agreements, quick turn-around and standard pricing. By relieving him of the burden of utilizing a forty-year title plant in creating abstracts, he argued he would be permitted to provide services that are competitive to those products offered by title insurance companies (Record p. 58).

The second form of hardship that Hendricks asserted is personal. He asserted that he maximized his credit line to build his current business and that the estimated cost of creating any title plant, let alone one state-wide, would be prohibitive. Hendricks did not submit a business plan that would explain his inability to lease the forty-year title plant or plants that would meet

the needs of his business, although he did acknowledge he will be required to "sub-contract all root of title abstract requests."

**Hearing**

Hearing on Hendricks' waiver application was conducted as part of ITG's regular meeting on June 5, 2007. No witnesses or testimony in support of the waiver application, beyond Hendricks himself, were presented. In addition to the presentation by intervenor ILTA, eleven participating abstractors made presentations against granting the waiver. Those abstractors testified that the waiver would adversely impact competition in that Hendricks would be able to compete head-to-head statewide with virtually no capital investment in a title plant of any kind.

The abstractors further testified that the grant of a waiver, particular one on a statewide basis, would contain none of the usual quality control present when waivers were granted to individuals with knowledge of local customs and practices.

The abstractors further testified that waivers where the abstractor planned to rely on Internet only searches would adversely impact the quality of Iowa Titles.

**ITG Decision**

In its July 31, 2007 written decision, the first ever entered by ITG in response to a waiver application, the ITG granted Hendricks his waiver from the forty-year title plant requirement. In so ruling, ITG found that "any showing of hardship," (emphasis in original) including a financial hardship, is sufficient to meet the statutory requirement, and that the statute created no threshold of hardship that must be met (Record p. 253).

ITG further found that granting Hendricks the waiver to be in the public interest by "increasing competition among abstractors," "encouraging the use of Title Guaranty through

Iowa," "that a waiver here will tend to make title guarantees more competitive and out-of-state title insurance less so" and that the waiver would improve the "quality of land title" (Record pp. 254-258).

Finally, ITG found the waiver "absolutely necessary to ensure the available of Title Guaranty throughout the state to Hendricks' lender clients and Iowa consumers" (Record p. 259).

## ARGUMENT

The Iowa legislature created a two-part test that applicants must meet to obtain a waiver of the requirement that the participating abstractor or attorney "own or lease" a forty-year title plant. An applicant must show:

> "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 guarantees throughout the state." Section 16.91(5), Iowa Code (2007) (emphasis added).

It is clear from a review of the ITG ruling in this matter that the board used the Hendricks waiver application as an excuse to gut the statute of the requirement that participating abstractors own or lease a forty-year title plant by setting a waiver standard so low that virtually any applicant can meet it without actual proof. In doing so, ITG exceeded its authority, exercising a prerogative reserved to the legislature. The ITG's ruling is neither supported by standard rules of statutory construction nor the facts in the administrative record.

### I. THE ITG ERRED IN ITS DETERMINATION OF "WHAT CONSTITUTES A 'HARDSHIP' UNDER IOWA CODE SECTION 16.91(5)."

In its decision granting Hendricks' application for a waiver, ITG, for the first time in its

history,[2] explains what it believes the legislature intended by the term "hardship." ITG opined that "any showing of hardship should be sufficient," including financial hardship (Record p. 253).

The Iowa Supreme Court has stated:

> "Our ultimate goal in interpreting statutes is to discover the true intention of the legislature concerning the clearly stated objects and purposes involved. In order to ascertain the meaning of statutory language, we consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole." *Tow vs. Truck County of Iowa, Inc.*, 695 N.W.2d 36, 39 (Iowa 2005) (citations omitted).

It is also incumbent upon a Court performing its statutory interpretation function to "accord recognition to some other statutes not here directly involved because a reading thereof will disclose an underlying motivating purpose common to all. *Presbytery of Southeast Iowa vs. Harris*, 226 N.W.2d 232, 235 (Iowa 1975) (citations omitted).

In tautologically concluding that "a hardship is a hardship" (Record p. 253), the ITG violates these rules of construction.

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 integrity. That section is replete with terms demonstrating its desire that the high quality of the land-title transfer system be maintained by having abstractors rely on a forty-year title plant:

- Participating abstractors are "required to own or lease and maintain and use… an up-to-date abstract title plant including tract indices…" (Emphasis added)

[2] Neither the statute nor ITG's rules define "hardship." The instant case is the first where ITG has issued a written decision reflecting its decision-making process for waiver applications.

- The tract indices "shall contain a reference to all instruments affecting the real estate…and shall commence not less than forty years prior…" (Emphasis added)

- Before a guaranty can be issued, "the division shall require evidence that an abstract of title…has been brought up-to-date and certified by a participating abstractor…" (Emphasis added)

The requirement that the title plant and indices commence "not less than forty years prior" was not conjured out of thin air. It clearly relates to the declaration in the Iowa Marketable Record Title Act, Sections 614.29-.38, Iowa Code (2007), that "any person who has an unbroken chain of title of record to any interest in land for forty-years or more, shall be deemed to have marketable record title…"

Certainly the legislature understood the complexity of the program for title guaranties it was creating and both the capital cost and administrative costs inherent in such a system when these provisions were enacted. By requiring these costs, the legislature obviously performed its own cost/benefit analysis and its own risk analysis in the enactment. By coming down on the side of requiring these customary costs of starting and maintaining a business, the legislature clearly intended that the integrity of the land-title system be maintained at such costs.

The standard adopted by ITG, that any hardship, including any financial hardship, is sufficient to exempt any abstractor from the forty-year title plant requirement, erases completely the legislative norm for participating as an abstractor. It is difficult to imagine the applicant that cannot show at least some hardship that would encountered in the course of an attempt to "own or lease and maintain and use" a forty-year title plant. Had the legislature merely intended that use of a forty-year title plant be a mere suggestion to ITG, it would not have created the statute it did.

In dismissing ILTA's objection, ITG argues that the Association's interpretation of the statute creates an "insurmountable" level of hardship (Record, p. 250), one that "as a practical matter…reads the waiver language out" of the statute (Record p. 251).

However, the standard advanced by ILTA is exactly the standing that ITG has applied in prior waiver situations. In the five applications it has granted to attorney-abstractors previously, ITG has relieved them of the forty-year title plant requirement only when those individuals showed some level of hardship that was beyond the norm. Those individuals either practiced in counties where no title plants existed or the use of title plants was rare. Those circumstances, coupled with specialized knowledge of local practices and customs, would have made application for the forty-year title plant requirement unfair. ILTA seeks that this Court require nothing more "insurmountable" than the same standard ITG has always applied up until the Hendricks application.

## II. ITG'S FINDING THAT HENDRICKS PROVED A HARDSHIP IS NOT SUPPORTED BY THE RECORD.

In his application for the waiver, Hendricks asserts two distinct types of hardship: financial hardship and competitive hardship.

ITG did not directly address his claims of competitive hardship but those assertions simply bear no relevance to any statutory criterion for the consideration of a waiver. In asserting competitive hardship, Hendricks seeks to compare his business with that of title insurers. The legislature was mindful of the existence of title insurance when the title guaranty program was promulgated and could have established a program enough similar to title insurance to be competitive on pricing, turn-around time and other title industry practices. However, the legislature instead opted for the development of a contract "acceptable to the secondary market," section 16.91(3), Iowa Code (2007), which maintained all of the protections of the land-title system in sections 16.91(5) and (6). Hendricks' "hardship" is that he seeks to provide a product and service with a guarantee issued by ITG without the customary investment of the capital and administrative costs required by the statute. That cannot be the hardship envisioned by the legislature.

Hendricks also asserted he suffered from a financial hardship, but an examination of Hendricks' application shows he did not submit any type of business plan demonstrating an incapability of obtaining a forty-year title plant through construction, purchase or lease. His application simply expressed his speculative projection that the costs associated with a construction of such a plant are prohibitive. His application failed to make even a speculative attempt to satisfy the requirement though lease. In the absence of any bona fide business plan, an applicant cannot show a hardship.

ITG agreed that Hendricks "did not provide a business plan showing that the projected cost of maintaining or leasing a title plant in each county was prohibitive" (Record p. 254). How could ITG find proof of a financial hardship without proof? Incredibly, ITG created a per se rule:

> "…the board nevertheless concludes that the cost of doing so in 99 counties constitutes a hardship for an individual, in terms of both cost and time necessary to created 99 title plants." (Record p. 254)

The net effect of ITG's ruling on the Hendricks application is to have created a standard for obtaining a waiver that swallows the rule. "Any hardship" is sufficient to obtain a waiver, and proof of an actual hardship is unnecessary. In doing so, the ITG erases the statutory requirement that participating abstractors own or lease a forty-year title plant.

## III. THE ITG RULING ADOPTS PUBLIC INTEREST STANDARDS NOT ESTABLISHED BY ITS STATUTE.

Pursuant to section 16.91(5), applications for waiver of the forty-year title plant requirement can only be granted upon evidence "that the waiver clearly is in the public interest." (Emphasis added.)

In its ruling granting Hendricks' waiver application, ITG found the waiver would serve five different public interests:

- "the public interest [in] increasing competition among abstractors" (Record p. 259).
- "the public interest [in] encouraging the use of Title Guaranty throughout Iowa" (Record p. 255).
- The public interest in "mak[ing] title guaranties more competitive and out-of-state title insurance less so" (Record p. 256).
- The public interest in improving the quality of land title (Record p. 256).

- The public interest of "protecting consumers" (Record p. 258).

Of the five interests identified, only the interest in improving the quality of the Iowa land-transfer system is contained in the statute creating the title guaranty process. The statute requires ITG to "fix a charge for the guaranty in an amount sufficient to permit the program to operate on a self-sustaining basis," section 16.91(1), Iowa Code (2007), and to develop "a guaranty contract acceptable to secondary market," section 16.91(3), but nowhere in the statute does the legislature command ITG to police competition among abstractors and between abstractors and title insurers.

The sole statutory provisions relating to quality control under ITG jurisdiction are contained in Section 16.91(5):

- Participating abstractors are "required to own or lease and maintain and use… an up-to-date abstract title plant including tract indices…" (Emphasis added)
- The tract indices "shall contain a reference to all instruments affecting the real estate…and shall commence not less than forty years prior…" (Emphasis added)
- Before a guaranty can be issued, "the division shall require evidence that an abstract of title…has been brought up-to-date and certified by a participating abstractor…" (Emphasis added)

Indeed, the ITG acknowledges in its own mission statement that its focus is to add to the quality of the Iowa title transfer process, a focus reasonably derived from the forty-year title plant requirement:

> The mission of the division is to operate a program that offers guaranties of real property titles in order to provide, as an adjunct to the abstract-attorney's title opinion system, a low-cost mechanism to facilitate mortgage lenders' participation in the secondary market and to add to the integrity of the land-title transfer system in the state…" 265 Iowa Admin.

Code Section 9.2. (Emphasis added).

It is against this public interest that the ITG should have measured the Hendricks application. The waiver should have been denied for its failure to clearly establish such a public interest.

Instead of utilizing "up-to-date" and "certified" abstracts derived from forty-year title plants as required by section 16.91(5), Hendricks indicated in his application and presentation his intent to conduct "direct grantor/grantee searches" and "direct on-line searches." He described his on-line searches as "the way abstracting is done" and described the investment in a forty-year title plant and tract index as "an unnecessary monetary expenditure of thousands, if not millions of dollars." He described a forty-year title plant as "actually inferior and…certainly unnecessary to the abstracting of real estate within the state of Iowa. By searching the tract, and not the grantor/grantee, an abstractor will discover stray recordings without any true legal effect on the property. Once these stray recordings are noted, the examining attorney must clear them."

The application failed to meet the public interest in several ways. First, as argued above, the legislature clearly expressed its desire to maintain the integrity of the land-title system by establishing the requirement of a forty-year title plant. Hendricks not only acknowledged he will neither use nor establish a forty-year title plant, he argues the forty-year title plant is inferior. However, any reliance on internet-based searches ignores the warnings contained on the website databank. At www.iowalandrecords.org the Iowa County Recorders Association, Inc. states:

> "The information contained herein is provided as a service to the public for informational services only and no representation is made as to its accuracy or fitness for any particular purpose. The Iowa Land Records System or the County Land Record Information System is not intended to replace a search of the official records maintained in the office of the County Recorder…"

Similarly, the Iowa Court Information System warns its users to:

> "Be advised, depending on the county, cases prior to September of 1997 may exist in manual docket format only and are not available on this page." www.judicial.state.ia.us/online_court_services/online_docket_record/index.asp

Any reliance on such internet-based information, to the exclusion of utilizing up-to-date, certified abstracts from forty-year title plants, cannot be in the public interest.

The board agrees that improving "the quality of the land title" (Record p. 256) is an appropriate measure of the public interest inquiry in the waiver process, but discounts the legislative conclusion that the forty-year title plant is the appropriate vehicle for achieving that goal. Instead, ITG argues that the Marketable Title Act, ILTA's Uniform Abstracting Standards, review by a participating attorney and resolving title objections will all serve to protect the quality of land title. (Record pp. 256 – 258).

This argument ignores the fact that the legislature could have established utilization of these processes and standards to the exclusion of the forty-year title plant had it chosen to do so. The legislature did not. The legislature established use of the forty-year title plant as the quality standard for measuring the public interest. Only in cases where a waiver would serve some equivalent level of quality control should a waiver be granted.

This was precisely the measure utilized by ITG in those waiver cases prior to the Hendricks application. Those attorneys were able to show experience and knowledge of local practices and customs that permitted the same level of comfort with the product as if a forty-year title plant had been relied upon. The application in this matter, for permission to abstract in all 99 counties, fails to provide any measure of knowledge or experience in the 99 counties the applicant wishes to abstract.

ITG improperly granted the waiver in this case.

## IV. ITG'S FINDING THAT THE PUBLIC INTEREST IS SERVED BY THE WAIVER IS NOT SUPPORTED BY THE RECORD

The glaring flaw in ITG's conclusion that Hendricks' waiver will serve the public interest is that ITG fails to pinpoint how this waiver will serve any public interest. Instead, ITG makes several findings that could be said of any waiver application which results in the adoption of another per se rule. Any applicant can say that a waiver will meet any of the generic interests identified in the ruling. Such a result erases the legislative forty-year title plant requirement from the statute.

In addition to failing to state how Hendricks' waiver will serve any of these interests, ITG failed to rely on any record evidence in finding these public interests would be served.

In its first "public interest" finding, ITG found "this waiver clearly serves the public interest by increasing competition among abstractors." (Record p. 254).

There is not a shred of evidence in the record to support this finding and the board cites none. Indeed, the evidence of record supports the contrary: permitting Hendricks to abstract without a capital investment matching his competitors harms competition. Several abstractors testified to ITG regarding the capital investment required to construct a title plant. Each testified about the adverse impact on competition of a competitor's ability to undercut price, timing and quality without any investment in the overhead required by the statute to participate in the title guaranty program. The evidence in the administrative record supports no conclusion reached by ITG regarding competition among abstractors.

Similarly, ITG concluded the waiver would serve the "public interest by encouraging the use of Title Guaranty through Iowa," but cites no evidence to support that conclusion (Record p. 255). There is simply no evidence that by granting this waiver, consumers would be "encouraged" to use title guaranty.

The third category of public interest cited by ITG, that the waiver "will tend to make title guaranties more competitive and out-of-state title insurance less so" (Record p. 256) is more wishful thinking by the board and not supported by any evidence of record. ITG cites a "significant new business model" (Record p. 255) when none was presented. No evidence was presented of any lender that would "simply refuse to use the abstractors and, therefore, Title Guaranty" or that any "national or regional lenders will often choose to use out-of-state title insurance companies instead of Title Guaranty." (Id.) Without such evidence, ITG cannot conclude such a public interest would be served.

The final public interest cited by ITG, that consumers will be protected (Record p. 258), also fails for a lack of record evidence. The board "finds it more likely that such clients would turn to out-of-state title insurance instead," (Id.) without citing any such evidence. With out evidence to support any of its conclusions, ITG's grant of the waiver cannot stand.

## V. HENDRICKS' WAIVER IS NOT ABSOLUTELY NECESSARY TO ENSURE TITLE AVAILABILITY OF TITLE GUARANTY THROUGHOUT THE STATE

If hardship is proven, an abstractor can be exempted from the requirement to own or lease a forty-year title plant upon proof that either:

> "…the waiver is in the public interest or is absolutely necessary to ensure availability of title guaranties throughout the state." Section 16.91(5). (Emphasis added).

The board concluded that:

> "As noted above, the lack of title plants in some counties and changing dynamics in the marketplace have put Title Guaranty at a distinct disadvantage versus out-of-state title insurance, particularly in some parts of the state. In some areas, many lenders simply will not use Title Guaranty due to these issues. As a result, Title Guaranty is effectively not available, or is becoming unavailable, in these counties." (Record p. 259).

In using the terms, "effectively not available" and "becoming unavailable" ITG admits that title guaranty is available at some level and that this waiver is therefore not "absolutely necessary to ensue available of title guaranties throughout the state."

ITG has participating abstractors and attorneys in each of Iowa's 99 counties. An Iowa consumer desirous of obtaining a title guaranty can do so in the absence of this waiver. This waiver is not "absolutely necessary" to making title guaranty available throughout the state.

Furthermore, ITG again makes findings to support its conclusions without evidence in the record. There is simply no evidence that any lender or client "will not use" title guaranty in the

absence of this waiver.

## CONCLUSION

1. In construing the terms "hardship," "public interest," and "absolutely necessary" as applied to granting waivers of the forty-year title plant requirement, ITG's agency action was:

- "beyond the authority delegated to the agency by any provision of law or in violation of any provision of law," section 17A.19(10)(b);
- was "based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency," section 17A.19(10)(c);
- was action other than a rule that is inconsistent with the agency's prior practice or precedents and not justified by stating credible reasons for the inconsistency, section 17A.19(10)(h);
- was "based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency," section 17A.19(10)(l); or
- was an "otherwise unreasonable, arbitrary, capricious or an abuse of discretion," section 17A.19(10)(n).

2. In finding proof of a "hardship," that this waiver is in the "public interest" or "absolutely necessary" to ensure availability of title guaranties throughout the state, ITG's agency action was:

- based upon a determination of fact that is not supported by substantial evidence in the record when that record is viewed as a whole, section 17A.19.10(f);
- the product of reasoning that is so illogical as to render it wholly irrational, section 17A.19(10)(i);
- based upon an irrational, illogical or wholly unjustifiable application of law to fact, section 17A.19(10)(m); or

- was otherwise unreasonable, arbitrary, capricious or an abuse of discretion, section 17A.19(10)(n).

Petitioner ILTA requests this Court reverse ITG's approval of the waiver application of Charles W. Hendricks and for such other relief the Court deems just and appropriate.

Respectfully submitted,

James H. Gilliam, AT0002882

BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-24446
Facsimile: 515-323-8546
E-mail: gilliam@brownwinick.com

ATTORNEY FOR PETITIONER

Original filed; copy to:

Grant Dugdale
Assistant Attorney General
Hoover State Office Building
Des Moines, IA 50319

Charles W. Hendricks, Esq.
1701 48th Street, Suite 290
West Des Moines, IA 50266

**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 _____ day of September, 2007.**

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

**Signature** _____