IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA LAND TITLE ASSOCIATION, Petitioner, vs. IOWA FINANCE AUTHORITY, IOWA TITLE GUARANTY DIVISION, Respondent, And also concerning CHARLES W. HENDRICKS, Applicant.	:	Case No. CV6748 **REPLY BRIEF OF APPLICANT, CHARLES W. HENDRICKS**

I. STATEMENT OF FACTS

Charles W. Hendricks (hereinafter Applicant) is an attorney licensed to practice law in the State of Iowa. The Applicant passed the Bar examination in 1999, and has been a member in good standing at all times. The Applicant's practice has always included Real Estate law, with nearly all of his time being devoted to real estate law since 2003.

Early in 2007, the Applicant submitted an Application for an abstracting waiver from Title Guaranty's requirement of a title plant and tract index. Later, the applicant amended his application to request the waiver to be statewide, and not issued for a single county.

During the action before the Title Guaranty Board, The Iowa Land Title Association (hereinafter ILTA) filed papers in opposition of the waiver request. On June 5, 2007, the Title Guaranty Board held a hearing during which the Applicant's waiver

request was heard. At the conclusion of the meeting, by a 3 to 1 vote, the board voted to grant the waiver application. At that time, the Title Guaranty Board decided it would draft a written ruling and reconvene at a later time to vote on the approval of the written ruling. The Title Guaranty Board later approved the written ruling granting the waiver application during a telephonic board meeting on July 31, 2007. The ILTA requested the authorization to abstract be stayed pending this appeal, however, the Title Guaranty Board denied the request. The ILTA appealed the ruling granting the waiver.

II. ARGUMENT

A. THE ILTA LACKS STANDING

As an initial matter, any person or entity challenging the ruling of a state administrative body, must produce some showing they are aggrieved or adversely affected by the body's decision. The Iowa Supreme Court has given some guidance with respect to what parties must show with respect to being aggrieved or adversely affected.

> In City of Des Moines v. PERB, we approved a two-part test for generally determining when a party is aggrieved or adversely affected: (1) the party must demonstrate a 'specific, personal, and legal interest' in the subject matter of the decision, and (2) the party must show this interest has been 'specially and injuriously affected by the decision.'

Southeast Warren Community School District v. Department of Public Instr., 285 N.W.2d 173, 176, (Iowa 1979).

As this passage clearly indicates, an aggrieved party is not simply a party who does not agree with the administrative body's decision, or even a party that possesses a colorable claim they are adversely affected. Instead, the adverse impact must be of such a nature to rise to "specially and injuriously" affecting the person or entity seeking to

challenge the decision. Also, the party must demonstrate a "specific, personal, and legal interest." Otherwise, the party lacks standing to do so.

This protection is with good merit. Almost every administrative decision made by our State Government and its various agencies impacts the general public, to some degree. Whether it is a decision to raise the speed limit, increase or decrease spending, or loosen regulation, that decision impacts society as a whole. However, where the adverse impact is the same for all persons and all entities, or the impact is not special and injurious, the judicial branch must defer to the State's decision and assume that it calculated the impact of its decision on the citizenry at large prior to reaching its decision.

Under the present case, no facts support any finding that the ILTA is "specially and injuriously affected by the decision." As background, the ILTA offers two levels of membership:

> **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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> **Associate Membership:** Associate membership shall be limited to those not qualified for Active membership. Associate membership shall be available to **any person, firm or corporation or other business entity engaged in providing services related to the land title industry** as defined by the Board of Directors.

See Iowa Land Title Association's Web Page, Member Benefits (Found on-line at http://www.iowalandtitle.org/join_us_benefits.cfm) (emphasis added). As the above suggests, the ILTA's members are as follows: Title Guaranty Abstractors, Title Insurance

Underwriters, or any person, firm or corporation or other business entity engaged in providing services related to the land title industry. The Applicant, if he wished to pay the membership fee, would qualify for an Associate Membership in the ILTA. There are currently Abstractor-Attorneys who do not own or lease a title plant who are ILTA members. Membership is open to Title Insurance Underwriters who clearly do not possess title plants when conducting searches. As such, all of the members to the ILTA clearly are not even adversely impacted by the grant of the title plant waiver, as many of them are already conducting business in a similar manner.

Assuming that all that is required is adverse impact to some of the ILTA membership, the adverse impact is not of such a nature to be special and injurious. As briefed and argued to the Title Guaranty Board, there currently exist over 50 attorneys participating as Title Guaranty Abstractors without title plants. Under Iowa Supreme Court precedent, these attorneys are authorized to abstract throughout the State of Iowa. The granting of the Hendricks waiver did absolutely nothing to change the Iowa Title landscape, other than increase that number by one. Where there were once 54 attorneys doing so, there are now 55 attorneys.

As an additional matter, there is a strong argument for the ILTA itself being benefited by the granting of the waiver. As a participating Title Guaranty Abstractor, the Applicant now is eligible for the Active Membership package with the ILTA, in lieu of Associate Membership. This would result in increased revenues to the ILTA, and clearly a benefit.

As an additional matter, the ILTA has no specific, personal, and legal interest in this matter. Title standard are a matter of interest to all persons and entities within our State, not just abstractors and not just persons in the real estate community.

The ILTA lacks standing to challenge the Title Guaranty Board's decision to grant the waiver. The ILTA cannot show special and injurious harm where there are already 50+ attorneys authorized to abstract without title plants. Additionally, not all of the ILTA members are even impacted by the decision. Finally, the ILTA As such, ILTA's appeal must be dismissed.

B. THE WAIVER

There are, under Iowa law, three ways in which an abstractor may participate in the Title Guaranty program. First, an abstractor may own or lease and maintain a 40-year title plant and tract index. Second, a participating attorney may be grandfathered in if he or she was abstracting on November 12, 1986, up to the date of his or her application. Last, Title Guaranty may waive the requirements of he 40-year title plant and tract index if an applying attorney shows: a) the requirements of a 40 year plant and tract index impose a hardship on the attorney; and b) the waiver is clearly in the public interest, or absolutely necessary to ensure the availability of title guarantees throughout the state. Iowa Code § 16.91(5) (2007). Any person or company may freely abstract throughout the State of Iowa, however, only a participating Title Guaranty abstractor may have Title Guaranty policies issued on his or her searches.

i. Hardship

The Applicant requested a waiver for each and every Iowa County. The business model for the Applicant's clients is such that providing title throughout the State at a

fixed price is required. As such, the Applicant argued it was both a financial hardship and administrative impossibility to own title plants in each Iowa County. The ILTA has, at various times, argued the Applicant could lease various title plants; however, there are not title plants in three Iowa counties, so clearly the applicant cannot lease that which does not exist. Also, the Applicant, as a competitor, would be required to enter into at least 96 lease agreements. The applicants' clients and business is such that the number of orders varies from month-to-month, county-by-county, and in some months the Applicant has no orders for various counties. This makes entering into lease agreements quite problematic, and certainly impossible.

The main thrust for the ILTA is that a financial hardship, no matter how great, cannot constitute hardship as pondered by the Iowa Code. As a premise for this argument, the ILTA points to the legislatures requirement of the title plant in the first instance, and the necessary capital costs and maintenance costs associated with the title plant. "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." ILTA Brief at 10. This argument does have merit, but only for non-attorneys.

The legislature did clearly understand the existing land-title system and the public interest in maintaining its integrity, and it was with that deep appreciation, understanding and intent to maintain the integrity that the legislature grandfathered all attorney-abstractors without title plants as participating Title Guaranty abstractors. All that was required for an attorney-abstractor to participate as a Title Guaranty abstractor was a

showing that the attorney continuously abstracted from the passage of the 1986 statute until the attorney's application to Title Guaranty. Clearly, had the legislature believed attorney-abstractors were detrimental to the Iowa land title system it would have prohibited their participation as Title Guaranty abstractors. Clearly, had the legislature believed the title plant was an integral component for attorney-abstractors it could have required that each grandfathered attorney establish a title plant. Instead, the legislature chose to welcome the attorneys into Title Guaranty, and exempted them from the costs of a title plant.

Had, as the ILTA argues, the legislature intended these costs be incurred to maintain the integrity of the land-title system it would not have grandfathered attorneys who did not have to incur such costs, or as stated above, it would have required the creation of title plans within a certain time period.

Section 16.9(5) also shows incredible foresight by the legislature. The legislature understood that title demands in Iowa would change over time. It was with this incredible foresight that the legislature incorporated the waiver provision for attorneys seeking to abstract without title plants. Arguably, a situation like this applicant's waiver request to provide standardized statewide pricing and turnaround to brokers and national lenders is exactly the scenario anticipated for the triggering of the granting of a waiver. It is only through attorneys that such abstracting can be made available throughout the State.

The legislature believed attorneys were qualified to abstract without title plants. The legislature exempted attorneys from the requirements and the costs of title plants, and inserted a specific provision where Title Guaranty could waive the title plant

requirements for attorney-abstractors. This was intentional and demonstrates the legislative intent in treating abstracting-attorneys differently than title plants.

Additionally, the Hendricks Application contains additional hardship, beyond just financial. Management of multiple title plants and the time consumed by the creation of a title plant in each county are just two additional hardships. As demonstrated, the creation and maintenance of multiple title plants creates a devastating hardship to the Applicant, and the Title Guaranty Board was correct in reaching it conclusion.

ii. Public Interest

Clearly, the existing abstracting system is a monopoly, in almost every Iowa County. This monopoly has come about in large part, by the State's regulation choking the ability of newcomers to enter the field. Michael LaFaive, a staff economist at the Mackinac Center for Public Policy, had the following to say regarding government created monopolies:

> In Adam Smith's day, monopoly referred to a firm that enjoyed some government grant of exclusive privilege (e.g. the Navigation Acts of 1651 or the Tea Act of 1773)--the use of the power of government on behalf of one or more special, private interests, to hobble or preclude competition. One step further in this direction, of course, is an actual government monopoly itself whereby government says, "We will do this work and will forcibly shut down anyone else who tries to compete with us." First class mail delivery is a good example.
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> Governments can do this in overt fashion as explained above, or it can indirectly accomplish some degree of the same thing (intentionally or otherwise) by burdensome taxation and regulation. **Taxes and regulations usually hit newcomer or smaller businesses harder than the older, bigger, or politically well-connected firms; the effect is, to some extent, to limit competition and thereby confer a degree of monopoly privilege on the existing or larger**

> **firms.** Many people today are candidates to start a business, perhaps in competition with large existing companies, but they do not do so because the tax and regulatory barriers discourage them from the start.
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> **When governments, by one method and to one degree or another, limit competition by the various means described above, the result is a coercive monopoly for those producers who benefit from the limitation of competition. This is the kind of monopoly to be concerned about because it breeds a situation where a company (or the government itself) can get away with abuse that would doom a company in a truly competitive, consumer-responsive market.**

See Michael LaFaive, Regulation and Monopolies (Nov. 1, 1997) (found on-line at http://www.mackinac.org/article.aspx?ID=683) (emphasis added).

This monopoly has, as monopolies often do, driven up the cost of title in the State of Iowa. While it remains below the national average, the only downward pricing change on title within this state over he past decade was when Title Guaranty decreased their premium fee.

This monopoly and overall title pricing increase is directly contrary to the legislative findings contained in Iowa Code section 16.3(15):

> 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 in the state.

Iowa Code § 16.3(15)(2007). As explained, competition in this field is a clear matter of public policy. The infusion of new abstractors is the only downward pricing

force monopolistic enterprises, such as abstractors, will face. Without this downward pricing force, abstractors will continue to increase their price and make Iowa more attractive to quicker, lower costing title insurance.

As an additional matter, the Applicant seeks to standardize pricing and title turnaround and help turn national lenders away from title insurance in our state. All of these matters are clearly in the public interest.

The ILTA suggest that the granting of the waiver is against the public interest because the standard of title in Iowa will decrease as a result. While this matter is and was contradicted by the Applicant and the fact over 50 attorneys abstract for Title Guaranty without title plants currently; the argument also fails to recognize the Iowa law.

Iowa Code section 558.55 provides that items indexed outside the grantor/grantee index are not entitled to constructive notice. It is only after the document has been properly filed and indexed that constructive notice is given.

In many ways, a title plant is actually inferior, and is certainly unnecessary, to the abstracting of real estate within the state of Iowa. By searching the legal description or tract, and not the grantor/grantee, an abstractor will discover stray recordings without any true legal effect on the property. Once these stray filing are noted, the examining attorney must clear them. In other words, Title Plants create title problems where there is not a legally recognized problem.

On a final note, the ILTA has repeatedly argued computerized searches are detrimental to Iowa title. The ILTA points to the disclaimers contained on the Iowa Land

Records web page, as well as the Iowa Court Information System (ICIS) web page, in arguing "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."

With the emergence of computers, direct on-line searches are now not only possible, but are the way many abstractors conduct business. As stated on its web site, the Iowa Land Title Association fully recognizes and endorses computer aided searches:

> Title plant maintenance switched from time-consuming handwritten posting of instruments to the computerized indexing of documents in many companies, often accompanied by scanned images of the documents. . . . In the early 1990s the State of Iowa created the Iowa Court Information System linking all judicial districts with the state office in Des Moines. Searches of names can now be done over the Internet from title offices at any time.

See Iowa Land Title Association's Web Page, Our History: 1978 – 2003 (Found on-line at http://www.iowalandtitle.org/about_us_history1.cfm). Almost all abstractors conduct their judgment lien searches on ICIS and contain disclaimers in their abstracts to that effect. It seems somewhat counterintuitive for the ILTA to endorse and champion on-line searches for its members, but then argue before this Court that those same searches its members are conducting are clearly not in the public interest and somehow inferior when conducted by an attorney, simply because there is no title plant. Abstracters are, and have been for sometime, searching in the same manner that the Applicants seeks to.

The granting of the Hendricks waiver request was clearly in the public interest. Increasing competition, standardizing pricing and infusing attorneys into the abstracting arena are all matters that benefit the public.

iii. Availability Throughout the State

The second prong of section 16.91(5) allows the granting of a waiver if "absolutely necessary to ensure the availability of title guarantees throughout the state." Clearly, the Applicant has established this is also necessary.

As put forth in the waiver requests, national lenders and mortgage brokers (many of whom are the Applicants' client) are unable to utilize Title Guaranty because they are unable to obtain standardized pricing at the abstracting level. As such, title guarantees are not available throughout the state to the applicants' clients seeking that standardized pricing. It is only through an attorney-abstractor who is able to offer standardized abstracting statewide that those lenders will be able to utilize Title. As such, this waiver request is "absolutely necessary to ensure the availability of title guarantees throughout the state" for those brokers and lenders seeking standardized pricing and turnaround times.

Also, three counties do not currently have a title plant. There is nothing guaranteeing that existing title plants will be continued or maintained. As such, allowing attorney-abstractors into the system helps limit this potential shortfall in the Title Guaranty program, and is absolutely necessary to ensure the availability of Title Guaranty throughout the State.

C. CONCLUSION

The ILTA lacks standing to challenge the findings of the Title Guaranty Board. The ILTA has no "specific, personal, and legal interest" in the subject matter of the decision, and is not "specially and injuriously affected by the decision."