BEFORE THE IOWA FINANCE AUTHORITY, TITLE GUARANTY BOARD

IN RE:	)	
APPLICATION FOR A TITLE PLANT AND TRACT INDEX WAIVER BY CHARLES W. HENDRICKS	)	RULING GRANTING WAIVER APPLICATION

INTRODUCTION

Charles W. Hendricks, an Iowa attorney, has applied for a statewide waiver of the 40-year title plant and tract index requirement to be a participating abstractor in the Title Guaranty program. The Iowa Land Title Association (ILTA), an association of abstract firms, has intervened in this matter, objecting to the waiver application.

Under Iowa Code section 16.91(5), the Title Guaranty Board can waive the 40-year plant and tract requirement if an applicant can prove (1) the requirement imposes a hardship to the attorney or abstractor and (2) the waiver clearly either is in the public interest or is absolutely necessary to ensure availability of title guaranties throughout the state. For the reasons explained below, the board grants the waiver.

RECORD

The record before the board includes the following:

- Charles W. Hendricks' Application for Waiver.
- Charles W. Hendricks' Amended Application for Waiver.
- Charles W. Hendricks' Argument in Favor of Granting Abstracting Waiver Pursuant to Iowa Code § 16.91(5).

- Iowa Land Title Association Motion to Intervene.
- Brief and Argument of Intervenor Iowa Land Title Association.
- Iowa Land Title Association Notice of Filing Supporting Letters dated May 22, 2007.
- Charles W. Hendricks' Reply Brief

In addition to these documents, the record includes numerous letters of support and opposition to the waiver.

The record also includes the board minutes, a tape recording of the June 5, 2007 hearing which will be maintained as part of the record of the hearing, and the tape recording is available to the public at the Title Guaranty office. While Iowa Land Title Association (ILTA) has styled itself as an "intervenor," nothing in Iowa Code section 16.91 or 265 Iowa Administrative Code rule 9.7 (governing title plant waivers) contemplates or authorizes "intervenors." Rule 9.7(3) permits "interested parties" to submit evidence or statements in support of or in opposition to an application for a waiver. ILTA is simply one of several interested parties who submitted written statements and evidence opposing Hendricks' waiver application.

On June 5, 2007, the board held a hearing on Hendricks' waiver application. The following individuals appeared before the board:

Charles Hendricks, Applicant, Attorney at Law, West Des Moines
James Gilliam, ILTA's attorney;
Bob McCloney – United Land Title Association
Sandy McCloney – United Land Title Association
Geraldine McLain – Abstract & Title
Chris Hoegh – Marion County Title Services
Bill Blue – American Abstract

Virginia Bordwell – IFA Board Member, Iowa Land Title Association,
Washington Title & Guaranty
Dan Kadrlik, Hancock & Winnebago County Abstract
Tim Reilly – Black Hawk County Abstract
James S. Davis – Iowa Land Title Association
James Gilliam – Attorney for Iowa Land Title Association
Adrian Knuth – Attorney at Law, Anamosa
Randee Slings – Iowa Title Company
Joan Johnson – Iowa Title Company

On July 31, 2007, the board held a Telephonic Board Meeting approving this written ruling granting the waiver. The record also includes a tape recording of the July 31, 2007 meeting, and this recording will be maintained as part of the record of the meeting, and the tape recording is available to the public at the Title Guaranty office.

ANALYSIS, FINDINGS, AND CONCLUSIONS

I. Applicable law.

This waiver request arises out of the requirement that Title Guaranty participating abstractors maintain what is known as a 40-year title plant and tract index, unless the board waives that requirement. Iowa Code section 16.91(5) establishes the 40-year title plant and tract index requirement and, at the same time, grants the Title Guaranty Division 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 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.

Put differently, an abstractor or attorney must maintain a 40-year title plant to participate in the Title Guaranty program, unless the board waives this requirement or the abstractor is a participating attorney providing abstract services continuously from November 12, 1986, to the date of application, either personally or through persons under the attorney's supervision and control. The board may waive the 40-year title plant and tract index requirement if an attorney or abstractor establishes that (1) the requirement imposes a hardship; and (2) the waiver clearly either is in the public interest or is absolutely necessary to ensure the availability of Title Guaranties throughout the state.

II. Hendricks' background.

Charles W. Hendricks graduated from the University of Wisconsin at Eau Clair in 1995. He received his law degree, with honors, from Drake University Law School in 1999, and was admitted to practice law in the state of Iowa later that year.

Real estate law has been one of the principal areas of Hendricks' practice since he began practicing law. Hendricks worked as an attorney with the Lipman Law Firm, where he handled all matters related to real estate law. Then, beginning in April 2003, Hendricks worked as an attorney with Wasker Dorr Wimmer & Marcouiller, P.C., where almost 100% of his practice focused on real estate matters. He 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, Iowa Courts On-line, and bankruptcy court records.

Last November, Hendricks left the Wasker law firm and started his own firm so that he could pursue the potential opportunity of becoming an abstractor. His main clients are mortgage brokers who, unlike banks, do not concentrate their loans in any geographic area. Instead, these clients conduct business statewide and, in some instances, outside the state. In addition, Hendricks employs support staff with extensive relevant experience. Hendricks is not affiliated with any title insurance company and does not use title insurance; instead, his firm uses Title Guaranty, relying on abstracts prepared by participating abstractors.

No one has challenged Hendricks' competence as a real estate attorney or his competence to perform abstracting services. Rather, those who object to the waiver request do so because they believe that Hendricks has failed to satisfy the requirements for a waiver under the statute.

III. The requirements for a waiver of the 40-year title plant requirement.

A. Has Hendricks established that the 40-year plant imposes a hardship under Iowa Code section 16.91(5)?

Hendricks must establish the first prong of the waiver—that the requirement imposes a hardship—before the board can waive the 40-year title plant requirement.

1. What constitutes a " hardship" under Iowa Code section 16.91(5)?

Hendricks' application raises a fundamental question: What constitutes a hardship under Iowa Code section 16.91(5)? Neither section 16.91(5) nor the relevant administrative rules define "hardship." As a result, it is up to this board to determine whether Hendricks has made the necessary showing of a "hardship."

ILTA argues the board should apply what amounts to an insurmountable test for hardship. 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 in maintaining its integrity."[1] Second, it argues that by enacting section 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. In other words, ILTA contends that the legislature made a policy decision to require participating abstractors to incur the capital costs necessary to create and maintain a title plant. Third, ILTA argues that when the legislature enacted the Title Guaranty

[1] Brief and Argument of Intervenor Iowa Land Title Association, page 5.

program, it opted to establish a program that was not necessarily to be competitive with out-of-state title insurance companies on pricing, turn-around time, and other title industry practices. Finally, ILTA contends that financial hardship associated with the creation and maintenance of a 40-year title plant is insufficient to establish hardship for purposes of section 16.91(5). ILTA states that if financial hardship alone can create a hardship, the exception will swallow the rule.

In fact, under ILTA's interpretation of what constitutes hardship, the board would lack the authority to waive the 40-year title plant requirement under almost any circumstances because, ILTA urges, the legislature made the policy choice to require participating abstractors to incur the capital costs associated with creating and maintaining a title plant. ILTA claims the legislature also made a policy decision to exempt one group—attorneys who were providing abstracting services continuously from November 12, 1986, to the date of the application—from incurring this cost. As a practical matter, ILTA reads the waiver language out of section 16.91(5).

Based on the plain language of the statute, the board concludes that Iowa Code section 16.91(5) gives the board the authority to waive the 40-year title plant requirement even if it means that persons who are granted waivers are not required to incur the capital costs that many other participating abstractors incur. If, as ILTA argues, section 16.91(5) reflects the legislature's policy choice that participating abstractors must incur these capital costs to maintain the integrity of Iowa's land title records, the legislature

would not have authorized the board to waive this requirement or it would have established express limits on the board's ability to grant such waivers. The ability to grant waivers is inconsistent with an absolute requirement. The legislature knows how to make a requirement mandatory; it choose not do so here.

The board also concludes that financial hardship alone can constitute hardship under section 16.91(5), at least 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. Had the legislature intended the board not to consider the cost of creating and maintaining a title plant when deciding whether hardship exists, it could easily have said so.

It is instructive that the standard for granting a waiver of the 40-year title plant under section 16.91(5) is different from the standard for granting a waiver of and administrative rule under the Iowa Administrative Procedure Act. Iowa Code section 17A.9A provides for the waiver of administrative rules by state agencies under certain circumstances. Unlike Iowa Code section 19.91(5), however, section 17A.9A requires a showing of "undue hardship." 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.

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 extrordinary magnitude or type. A hardship is a hardship and meets the requirements of section 16.91(5).

2. The board finds that Hendricks has proven hardship.

When deciding whether hardship exists, the scope of the waiver request plays an important role. Here, Hendricks has asked the board for a statewide waiver of the title plant requirement. While section 16.91(5) imposes a geographic limitation on abstractors, it does not impose such a limitation on attorneys who provide abstracting services. In reaching this conclusion, the board relies on the Iowa Supreme Court's ruling in Berger v. Iowa Finance Authority, 593 N.W.2d 136 (Iowa 1999) and informal advice from the Iowa Attorney General's office dated June 8, 2005, a copy of which is attached. The board finds the situations of waived and "grandfathered" attorneys to be analogous, and once the board grants a waiver to an attorney, the board will not impose additional restrictions, using the waiver, on the attorney's ability to abstract.

After considering the record, the board concludes that Hendricks has established hardship under Iowa Code section 16.91(5). 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. In some counties, this initial cost is undeterminable in advance, or is predictably very expensive. In some counties, even if a plant could be established without hardship, maintaining the plant would be a hardship where the business generated would not allow for profit or payment of expenses. Although Hendricks did not provide a business plan showing that the projected cost of maintaining or leasing a title plant in each county was prohibitive, 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 the time necessary to create 99 title plants. In fact, as Hendricks correctly points out, there are not 40-year title plants in all 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.

B. Has Hendricks proven the waiver either is clearly in the public interest or is absolutely necessary to ensure the availability of title guaranties?

1. The waiver is in the public interest.

Hendricks must establish the waiver is in the public interest or is absolutely necessary to ensure the availability of Title Guaranty—before the board can waive the 40-year title plant requirement.

After considering the record, the board concludes Hendricks has proven the waiver is in the public interest. The board finds that this waiver clearly serves the public interest by increasing competition among abstractors. Also, the board finds 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.

Moreover, the board notes that a significant new business model has developed in Iowa by lenders who operate on a statewide basis. Lenders who have adopted the "state-wide" approach demand uniform pricing and service, including turn-around time. In turn, these lenders offer consistent pricing to consumers around the entire state and are able to promise standard turn-around times and meet document fulfillment requirements of investors. To be competitive, these lenders cannot quote different prices per county, nor can they pick the highest price in the state and use that for quotes; conversely, they cannot pick the lowest quoted abstracting price for their quotes. These lenders make contracts with service providers to meet their demands.

Pricing and turn-around time varies significantly among abstractors around the state. In many Iowa counties, particularly those with only one participating abstractor, pricing and turn-around time are big issues, and lenders simply refuse to use the abstractors and, therefore, Title Guaranty. In other words, national or regional lenders will often choose to use out-of-state title insurance companies instead of Title Guaranty if abstractors are unable or unwilling to offer competitive pricing and service.

The Iowa Legislature made it plain that it does not look with favor upon title insurance when it forbade its sale in the state. See, e.g., Iowa Code §§ 515.48(10) and 535.8(2b). While the legislature is constitutionally limited in what it may do to prevent

out-of-state sales of title insurance, the board finds 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.

ILTA and others who object to the waiver argue that public policy supports denying the request because it will erode the quality of Iowa's land title system and increase claims under the Title Guaranty program. The board does not agree that granting a waiver will erode the quality of Iowa's land title system. In fact, the board believes the quality of land title will improve, for several reasons.

First, by granting this waiver, more land transactions are likely to pass through the abstract title opinion system and Title Guaranty, assuring the land transfers adhere to the Marketable Title Act. This should result in cleaner titles. Out-of-state title insurance companies are unregulated, and, given the high claims rate of out of state title insurance companies operating in Iowa, they are not in many cases keeping titles clean. In fact, they often do not use Iowa licensed attorneys who are obligated to adhere to the Marketable Title Act.

Second, the board concludes that waiving the 40-year title plant requirement here will not erode the quality of Iowa's land title system. In reaching this conclusion, the board relies on its collective expertise in that area. The Title Guaranty program has helped maintain the high quality of Iowa's land title system in counties where attorneys regularly abstract without a 40-year title plant. 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.

What is more, Title Guaranty has featured abstracting attorneys who do not own 40-year title plants as an integral part of its system since its inception without eroding the quality of titles in Iowa. Currently, approximately 25% of Title Guaranty's abstractors are attorneys abstracting without title plants. Title Guaranty has never been operated on a pure title plant basis, and the legislature's adoption of a specific waiver provision shows that the legislature did not intend to require it to operate that way. The board believes the key to maintaining the quality of Iowa's land titles, the *sine qua non* of the Iowa system, is the process of resolving title objections before the transaction closes, rather than merely insuring over them. When Title Guaranty is used, an attorney always reviews title, which is clearly in the public interest. Waiving the 40-year title plant requirement will not circumvent the process of resolving title objections.

Third, the board concludes that waiving the 40-year title plant requirement will not lead to an increase in claims. In reaching this conclusion, the board relies on its own claim experience; As noted above, 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 abstracts prepared using title plants, however. The board is convinced that waiving the 40-year title plant requirement will not result in an increase in claims. Should Title Guaranty experience higher losses with grandfathered or waived attorney-abstractors, it can take disciplinary action against their licenses.

Finally, the board concludes that granting a waiver to Hendricks clearly serves the public interest by protecting consumers. The alternative to granting Hendricks' waiver is likely to have abstracts or searches prepared outside of the Title Guaranty program. Hendricks could very well prepare abstracts and conduct title searches for out-of-state title insurance companies without a waiver from Title Guaranty. ILTA's argument that the waiver will not serve the public interest assumes that if the waiver were denied, those clients who would otherwise use Hendricks' services will turn to a traditional arrangement whereby a local abstractor will update (or create) an abstract for the property using a 40-year title plant, which abstract will then be reviewed by an Iowa lawyer.

Based on the record and Title Guaranty's experience, the board finds it more likely that such clients would turn to out-of-state title insurance instead. Thus, a grant of the waiver will result in Title Guaranty being used more frequently. Consumers are best protected when Title Guaranty is utilized because it is the only system which ensures the abstract is prepared according to the "Blue Book" standards and reviewed by an attorney.

2. *The waiver is absolutely necessary to ensure the availability of Title Guaranty.*

Hendricks must establish that the waiver is in the public interest or is absolutely necessary to ensure the availability of Title Guaranty before the board can waive the 40-year title plant requirement. Although the board finds this waiver is clearly in the public interest, the board also concludes the waiver is absolutely necessary to ensure the availability of Title Guaranty throughout Iowa. 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. The board concludes that granting the waiver is absolutely necessary to ensure the availability of Title Guaranty throughout the state to Hendricks' lender clients and Iowa consumers.

RULING

For the reasons set forth above, the board grants Hendricks' waiver application.

SO RULED this 31st day of July, 2007.

Loyd Ogle

Loyd Ogle, Secretary

(seal)