IN THE IOWA SUPREME COURT

APPEAL NO. 08-0133

IOWA LAND TITLE ASSOCIATION

APPELLANT

V.

IOWA FINANCE AUTHORITY, IOWA TITLE GUARANTY DIVISION,

APPELLEE

AND CONCERNING

CHARLES W. HENDRICKS,

APPLICANT

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY HON. DOUGLAS F. STASKAL, JUDGE

APPELLANT'S PROOF REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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I. OVERVIEW

In its brief, Iowa Finance Authority, Iowa Title Guaranty Division (ITG), acknowledges that the Iowa legislature created the title guaranty program "as an alternative to title insurance" in Iowa (ITG Brief, P. 5). It further acknowledges that the program was intended to "generally provide coverage similar to the coverage provided by title insurance while preserving the attorney title opinion and abstracting process." (ITG Brief, p. 6).

However, ITG fails to provide the court with any methodology that permits the court to meet these clearly stated objects and purposes of ITG's enabling statute and reach the same conclusion ITG reached on the waiver application submitted by Charles Hendricks.

Furthermore, ITG has failed to reply to the notion that the rules of construction it has urged this Court to adopt permit virtually any applicant to qualify for an exception to the statutory requirement that participating abstractors own or lease a forty-year title plant.

II. ITG'S STATUTORY INTERPRETATION FAILS TO GIVE MEANING TO THE CLEARLY STATED OBJECTS AND PURPOSES OF THE LEGISLATION.

The Court's end in statutory interpretation is clear:

> "Our ultimate goal in interpreting statutes is to discover the true intention of the legislature concerning the clearly stated objects and purposes involved." Tow v. Truck Country of Iowa, Inc., 695 N.W. 2d 36, 39 (Iowa 2005) (citations omitted).

In its responsive brief, ITG admits that the legislature intended to create an "alternative to title insurance" while preserving the *status quo* system of "the attorney title opinion and abstracting process." (ITG Brief, pp. 5-6).

The ITG must admit this legislative intent because of the legislature's clear expressions in the enabling statute:

> 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 guarantees will facilitate mortgage lenders' participation in the secondary market and add to the integrity of the land-title transfer system in the state. Section 16.3(15), Iowa Code (2007).

By emphasizing the stability that the abstract-attorney's title opinion system promotes, along with the notion that a title guaranty mechanism would serve as an "adjunct to the abstract-attorney's title opinion system," the legislature clearly intended to created a new method for assuring marketability of land titles, while preserving the *status quo* abstract-attorney's title opinion system.

The legislature's intent to preserve the *status quo* is also reflected in its choice to "grandfather" experienced abstracting attorneys from the requirement of owning or leasing a forty-year title plant. Section 16.91(5), Iowa Code (2007).

Despite acknowledging that the legislature's intent was to preserve the existing system, ITG attempts to elevate the "direct search" method ostensibly used by the grandfathered attorney-abstractors to the equivalent of abstracts obtained through an updated forty-year title plant. Such an equivalency is not borne out by an examination of the statute.

The direct search method is not mentioned anywhere in the statute. Conversely, the statute explicitly outlines the procedure for utilizing the 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…"
- The tract indices "shall contain a reference to all instruments affecting the real estate…and shall commence not less than forty years prior…"
- 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…" Section 16.91(5), Iowa Code (2007) (emphasis added).

The legislature could have established a title guaranty system that placed abstracts constructed by the direct search method on the same plane as those constructed by use of a forty-year title plant. However, the legislature did not.

At a minimum, the legislature prescribed a preference for forty-year title plants, or a "default" position that participating abstractors should own or lease a forty-year title plant, with the attendant capital investment, unless an applicant established grounds for obtaining an exception.

Conversely, ITG desires a new business model that is unhampered by what it considers to be systemic pricing and "turn-around" barriers caused by an abstractor's investment in a forty-year title plant. This desire is exposed in the various analytical reaches contained in ITG's ruling.

To get to its desired result, ITG cannot acknowledge that, as a minimum, the legislature stated a preference that participating abstractors own or lease a forty-year title plant. Instead, ITG must argue that the legislature considered direct searches to be a "legitimate" or "acceptable" equivalent (Record).

To get to its desired result, ITG cannot acknowledge that the legislature had to be mindful of the capital investment required to "own or lease and maintain and use … as up-to-date abstract title plant including tract indices…" Section 18.91(5), Iowa Code (2007). Instead, ITG must argue that the legislature would permit this standard to be abandoned upon any mere hardship, real or imagined.

To get to its desired result, ITG cannot acknowledge that the legislature directed its public purpose inquiry to those public purposes contained in its enabling statute. Instead of focusing on whether a waiver would serve as an "adjunct to" the abstract-attorney's title opinion system and promotes land title stability, ITG must rely on public purposes which have no legislative basis and that it conjures out of thin air.

The end result of the ITG's statutory analysis creates a title guaranty process which erases the statutory requirement that a participating abstractor own or lease a forty-year title plant. The power to do so is only vested in the legislature, not the Iowa Title Guaranty Division of the Iowa Finance Authority.

III. THE LEVEL OF PROOF REQUIRED BY ITG WILL RESULT IN AWARD OF A WAIVER TO ANY FUTURE APPLICANT.

In its decision granting the Hendricks application, ITG established proof thresholds for the "hardship" and "public interest" prongs for its waiver examination that will permit any application to obtain a waiver.

In this case, Hendricks asserted he was unable to obtain credit to sufficiently capitalize a state-wide abstracting operation. ITG found that assertion sufficient without additional proof, holding that to require "an individual" to such a capital requirement constitutes a hardship (Record).

Similarly, ITG found the public interest prong of the inquiry was met, not by any particular proof offered by Hendricks, but upon the mere assertions that the addition of his state-wide practice would:

- "increase competition among abstractors;"
- "encourage the use of Title Guaranty throughout Iowa;"
- "make title guaranties more competitive and out-of-state title insurance less so;" and
- "improve the quality of land title."

(Record).

In neither case has ITG responded to ILTA's argument that these constructions operate as a *per se* rule; that is, that any individual applicant "makes the case" simply by asserting these conclusions.

ITG's construction of the statute, and its application of the statute to Hendricks' application, results in the inescapable conclusion that <u>all</u> that an applicant needs to do to obtain a waiver of the forty-year title plant requirement is to assert the following "facts" in the application:

(1) The applicant desires to operate on a state-wide basis (or at least an area sufficient to create a "prohibitive cost to own or lease a forty-year title plant); and

(2) That in the area of the applicant's operation the addition of the applicant to the roster of participating abstractors will (1) increase competition, (2) encourage the use of Title Guaranty and discourage the use of title insurance, and (3) improve the quality of land title.

Under the argument advanced by ITG, actual proof of such facts is not required; the ITG is entitled to rely on its "own experience and information" in granting the waiver upon these assertions.

ITG relies on no actual proof in the record to support its ultimate conclusion that these standards were proven. If the ITG's standard is allowed to prevail, any notion that owning or leasing a forty-year title plant is the norm for participation as an abstractor in the title guaranty program will be erased.

CONCLUSION

1. In construing the terms "hardship" and "public interest" as applied to granting waivers of the forty-year title plant requirement, ITG's agency action 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," Iowa Code § 17A.19(10)(c).

2. In finding proof of a "hardship" and that this waiver is in the "public interest," ITG's agency action was otherwise unreasonable, arbitrary, capricious or an abuse of discretion. Iowa Code § 17A.19(10)(n).

Appellant 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.

REQUEST FOR ORAL ARGUMENT

Appellant, Iowa Land Title Association, requests to be orally heard in this matter.

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COST CERTIFICATE

I hereby certify that the true and actual cost for printing the foregoing proof reply brief of Appellant was $_____.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 15th of September, 2008, I served this brief on all other parties to this appeal by mailing a copy thereof to the following attorneys of record:

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I further certify that on the 15th of September, 2008, I will file this document by personally delivering three (3) copies of it to the Clerk of the Supreme Court, Statehouse, Des Moines, Iowa 50319.

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