IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA LAND TITLE ASSOCIATION, Petitioner, vs. IOWA FINANCE AUTHORITY, TITLE GUARANTY DIVISION, Respondent, And also concerning, CHARLES W. HENDRICKS, Applicant.	)	Case No. CV6748 IOWA FINANCE AUTHORITY, TITLE GUARANTY DIVISION'S JUDICIAL REVIEW BRIEF

Statement of Issues Presented for Review

I. Does the Iowa Land Title Association have standing to challenge Title Guaranty's decision to grant Hendricks's waiver application?

Medco Behavioral Care Corp. of Iowa v. State of Iowa Dep't of Human Serv., 553 N.W.2d 556 (Iowa 1996)

Swanson v. Civil Commitment Unit for Sex Offenders, 737 N.W.2d 300 (Iowa 2007)

Iowa Code § 16.91(5)

Iowa Code § 17A.19(1)

265 IAC 9.73

II. Is Title Guaranty's interpretation of what constitutes hardship under Iowa Code section 16.91(5) erroneous?

Iowa Code § 16.15

Iowa Code § 16.91(5)

Iowa Code § 17A.9A

III. Did Title Guaranty err when it found that Hendricks had proven hardship?

Iowa Code § 16.91(5)

IV. Did Title Guaranty err when it found that granting the Hendricks's waiver application was clearly in the public interest?

Iowa Code § 16.91(5)

Black's Law Dictionary 1244 (7th ed. 1999)

V. Did Title Guaranty err when it found that granting the Hendricks's waiver application was absolutely necessary to ensure the availability of title guaranties throughout the state?

Iowa Code § 16.91(5)

Title Guaranty also incorporates the authority identified in its standard of review section of this brief.

Introduction

This judicial review action, brought under chapter 17A of the Iowa Code, arises out of the Iowa Finance Authority, Title Guaranty Division's (Title Guaranty) granting Charles W. Hendricks's application to waive what is known as 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. 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) that the waiver clearly is in the public interest or is absolutely necessary to ensure availability of title guaranties throughout the state.

The Iowa Land Title Association (ILTA) purported to intervene in the Hendricks's waiver application and objected to the board granting the waiver, and it now seeks judicial review of that decision. The district court should affirm Title Guaranty's decision and dismiss this action for the reasons set forth below.

Background

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 requirement 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 track indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division. The track 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.

In other words, an abstractor or attorney must maintain a 40-year title plant to participate in the title guaranty program, unless Title Guaranty grants a waiver. 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.

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. In ruling on the Hendricks's waiver application, Title Guaranty squarely confronted an issue for the first time: He sought a statewide waiver of the 40-year title plant requirement. 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 cannot restrict an exempt or waived attorney to abstracting to a single county.[1]

Proceedings before the agency. The Iowa Land Title Association "intervened" in the Hendricks's waiver application proceeding. While ILTA styled itself an "intervenor," neither section 16.91(5) nor the administrative rules allows for intervenors in waiver proceedings. Rule 9.7(3) permits "interested parties" to submit evidence or statements in support of or opposition to an application for a waiver."[2] It does not, however, authorize intervention.

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.

Argument

I. The district court should dismiss this petition for judicial review because the Iowa Land Title Association is not aggrieved or adversely affected by the board's decision and, therefore, lacks standing to challenge Title Guaranty's waiver decision.

The district court should dismiss this petition for judicial review because the ILTA lacks standing to seek judicial review of the board's granting the Hendricks's waiver

[1] Record, pg. 253.
[2] 265 IAC 9.73.

application. More specifically, the ILTA is not aggrieved or adversely affected the board's decision to grant the Hendricks waiver.

Under the IAPA, parties who are "aggrieved or adversely affected by agency action" may seek judicial review in district court to determine whether their substantial rights have been prejudiced.[3] From this language, the Iowa Supreme Court has developed a two-prong test for standing under the IAPA: "the complaining party must (1) have a specific, personal, and legal interest in the litigation; and (2) the specific interest must be adversely affected by the agency action in question."[4] ILTA fails under both prongs of the test for standing.

A. Iowa Land Title Association does not possess a specific, personal, and legal interest in the Hendricks's waiver application.

ILTA fails the first prong—a specific, personal, and legal interest—of the test for standing for two reasons.

First, ILTA does not have a stake in the outcome of the Hendricks's waiver application. Its interest in the waiver decision is indistinguishable from the public in general.

To have a specific, personal, and legal interest, a party must, in simple terms, have a stake in the outcome as the Supreme Court recognized in *Medco Behavioral Care Corp.*

[3] Iowa Code § 17A.19(1).
[4] *Medco Behavioral Care Corp. of Iowa v. State of Iowa, Dep't of Human Services*, 553 N.W.2d 556, 562 (Iowa 1996).

v. State of Iowa, Department of Human Services.[5] In *Medco*, the Court held that an unsuccessful bidder "possessed a specific, personal, and legal interest in being awarded the contract that was adversely affected when DHS initially decided to award the contract" to another vendor.[6] That is, an unsuccessful bidder had a stake in being awarded the contract. In contrast to an unsuccessful bidder's stake in the outcome of a competitive bid, ILTA lacks a personal stake in the outcome of the Hendricks's waiver application greater than any member of the public. Consequently, ILTA lacks a specific, personal, and legal interest in the outcome of the Hendricks's waiver application and, as a result, lacks standing.

Second, ILTA does not have a specific, personal, and legal interest in the Hendricks's waiver application due to a board rule permitting interested parties to comment on waiver applications. Rule 9.7(3) permits "interested parties" to submit evidence or statements concerning a waiver application. Being an "interested party," however, does not create a specific, personal, and legal interest in ILTA or anyone else who submits evidence or statements.[7] In fact, the rule expressly states that Title Guaranty's failure to notify or inform "interested parties" about a waiver application does not affect the board's decision on a waiver application.[8] This is inconsistent with ILTA's

[5] 553 N.W.2d 556 (Iowa 1996).
[6] 553 N.W.2d at 563.
[7] 265 IAC 9.7(3)
[8] 265 IAC 9.7(3).

argument that it has a specific, personal, and legal interest in the Hendricks's waiver application.

Third, ILTA cannot create a specific, personal, and legal interest in the Hendricks's waiver application by characterizing itself as an "intervenor." Nothing in Iowa Code section 16.91(5) or Rule 9.7 authorize "intervenors" in waiver matters.

B. Iowa Land Title Association does not have a specific interest that will be adversely affected by the board's decision in the Hendricks's waiver application.

ITLA also fails the second prong—adversely affected by the decision—for standing. It does not have a specific interest that will be adversely affected by Title Guaranty's waiver decision. Put simply, Title Guaranty's decision to grant Hendricks's waiver application will not have any effect on ILTA.

A case decided earlier this year illustrates why ILTA lacks standing in this case. In *Swanson v. Civil Commitment Unit for Sex Offenders*, the Supreme Court considered whether Swanson—a patient in the Civil Commitment Unit for Sexual Offenders—was aggrieved and adversely affected by major behavioral reports that delayed his progression from one treatment phase to another and, ultimately, his possible release from the program.[9] Despite these delays that affected his progression in the treatment program, the Supreme Court held that Swanson was not an aggrieved person under section 17A.19(1).[10] In reaching this conclusion, the Court reasoned, "The failure of a person to

[9] 737 N.W.2d 300 (Iowa 2007).
[10] 737 N.W.2d at 307.

progress because of the issuance of a major behavioral report is not an adverse action, but an integral part of the treatment under a cognitive-behavioral model."[11]

Swanson presents a more compelling case for standing than the case for ILTA having standing in this case. The major reports delayed Swanson's possible release from the program; yet the Supreme Court held that he was not aggrieved by those reports. ILTA's interests, whatever they may be, pale in comparison to Swanson's interests. Simply put, ILTA has not by aggrieved by Title Guaranty's ruling on the Hendricks waiver application.

C. Conclusion.

For these reasons, ILTA lacks standing to challenge Title Guaranty's granting the Hendricks waiver application because it has not been aggrieved or adversely affected by the decision. The district court should dismiss the petition.

II. Standards of judicial review.

If the district court concludes that ILTA has standing, Title Guaranty wants to address the standards of judicial review, which ILTA obliquely referred to in its brief.

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."[12] Judicial

[11] 737 N.W.2d at 307.
[12] *Leonard v. Iowa State Board of Education*, 471 N.W.2d 815, 815 (Iowa 1991).

review of agency action is at law, not *de novo*.[13] When reviewing agency action, a district court exercises only appellate jurisdiction to correct errors of law and may not substitute its own judgment for that of the agency.[14]

Judicial review turns on the type of administrative action being reviewed. This case involves "other agency action" because the Hendricks's waiver application does not constitute rulemaking or a contested case procedure.[15] Thus, it is other agency action.

A. Unreasonable, arbitrary, or capricious standard of review.

In this case, ILTA argues that Title Guaranty's actions are unreasonable, arbitrary, or capricious. A district court reviews other agency action to correct errors of law or to correct unreasonable, arbitrary, or capricious action.[16] An agency's action is arbitrary or capricious when the decision was made without regard to the law or facts.[17] Likewise, an agency acts unreasonably if its decision is contrary to reason and the evidence.[18] This means that a court will find that agency action to be unreasonable if the agency acts in the face of evidence about which there is no room for difference of opinion among reasonable minds.[19]

B. Substantial evidence standard of review.

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[13] Iowa Code § 17A.19; *McClure v. Iowa Real Estate Commission*, 356 N.W.2d 594, 596 (Iowa Ct.App. 1984).
[14] *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.
[15] *Greenwood Manor v. Iowa Dept. of Public Health, State Health Facilities Council*, 641 N.W.2d 823, 832 (Iowa 2002).
[16] *Greenwood Manor*, 641 N.W.2d at 831; *Sindlinger v. Iowa State Board of Regents*, 503 N.W.2d 387, 390 (Iowa 1993); *Sheet Metal Contractors of Iowa v. Iowa Commissioner of Ins.*, 427 N.W.2d 859, 867 (Iowa 1988).
[17] *Greenwood Manor*, 641 N.W.2d at 831; *Bernau v. Iowa Dept. of Transp.*, 580 N.W.2d 757, 764 (Iowa 1998); *Dico, Inc. v. Iowa Employment Appeal Board*, 576 N.W.2d 357, 355 (Iowa 1998).
[18] *Greenwood Manor*, 641 N.W.2d at 831; *Dico*, 576 N.W.2d at 355.
[19] *Greenwood Manor*, 642 N.W.2d at 831.

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."[20] 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."[21] And the "record before the court" means "the agency record for judicial review."[22]

"While 'courts must not simply rubberstamp the agency fact finding without engaging in a 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.'"[23] Courts, on judicial review, apply agency findings broadly and liberally "to uphold, rather than to defeat, an agency's decision."[24]

As noted above, this case involves other agency action—a waiver application. While the substantial evidence standard appears to apply to judicial review of other

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[20] Iowa Code § 17A.19(10)(f).
[21] Iowa Code § 17A.19(10)(f)(1).
[22] Iowa Code § 17A.19(10)(f)(2)
[23] *University of Iowa Hospitals & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004) (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 1993)).
[24] *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).

agency action, the record in an other agency action matter is different from the record in a judicial review action of a contested case proceeding.

Unlike a contested case, other agency action is not an evidentiary proceeding where the parties put on evidence in support of their positions and the administrative agency decides the case. In this context, the board was not acting as a judge in a contested case based on the evidence produced by the parties during a hearing. Instead the board decided whether it would grant Hendricks's request for a waiver relying on the information gathered during the meeting and relying on its own knowledge and expertise. In this situation, the board was not required to provide "evidence" of its knowledge and expertise during the meeting. Rather its written ruling constitutes "evidence" of the information it relied on when it granted Hendricks's waiver request.

C. An agency's interpretation of a statute standard of review.

Finally, ILTA's 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.

Under section 17A.19(10), a court must reverse agency action when "substantial rights of the person seeking judicial review have been prejudiced because the agency action is any of the following":

> c. Based upon an erroneous interpretation of a provision of law whose interpretation has not been vested by a provision of law in the discretion of the agency.
>
> . . . .
>
> l. 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.[25]

As a careful comparison of these two provisions reveals, "the appropriate standard of review depends on whether the legislative has clearly vested the interpretation of the statute at issue in the discretion of the agency."[26]

If an agency has not been clearly vested with the discretion to interpret the pertinent statue, the court gives no deference to the agency's interpretation of the statute.[27] In this situation, a court on judicial review determines whether the agency's interpretation is "erroneous."[28] 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.[29] In that case, a court will follow the agency's interpretation of the statute unless it is "irrational, illogical, or wholly unjustifiable."[30]

In this case, while Title Guaranty believes the legislature vested interpretation of section 16.91(5) with Title Guaranty and also believes that its interpretation of that

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[25] Iowa Code § 17A.19(10)(c), (l).
[26] *Iowa Ass'n of School Board v. Iowa Dept. of Educ.*, ___ N.W.2d ___, 2007WL2811075 * 3 (Iowa 2007). *See also Waterloo Education Association v. Iowa Public Employment Relations Board*, slip op at 3 (Iowa Sup. Ct. October 19, 2007).
[27] Iowa Code § 17A.19(11)(b).
[28] Iowa Code § 17A.19(10)(c); *see also Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004).
[29] Iowa Code § 17A.19(10)(c).
[30] 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).

section will pass muster under either standard, and without waiving the argument, Title Guaranty believes the court should review Title Guaranty's interpretation of section 16.91(5) using the erroneous standard, which is the more difficult standard.

III. The district court should affirm Title Guaranty's interpretation of what constitutes hardship under Iowa Code section 16.91(5) because its interpretation of the statute is not erroneous.

ITLA argues the "board used the Hendricks waiver application as an excuse to gut the statute 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."[31] The board lowered the standard, ITLA argues, by its erroneous interpretation of what constitutes hardship under Iowa Code section 16.91(5). But, for the reasons discussed below, the board's interpretation of hardship is consistent with section 16.91(5).

A. Board's interpretation of "hardship."

Before addressing ITLA's arguments, Title Guaranty wants to put this issue into proper context. 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.

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),

[31] ILTA Brief, pg. 8.

at least under certain circumstances."[32] In this case, 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 concluded that hardship "may include the financial hardship caused by the cost of creating and maintaining a title plant."[33]

In reaching this conclusion, 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 IAPA. While the IAPA 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 <u>any</u> showing of hardship should be sufficient.[34]

In other words, the board found that "hardship" under section 16.91(5) is 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

[32] Record, pg. 252.
[33] Record, pg. 252.
[34] Record, pg. 253.

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)."[35]

B. Overview of ILTA's challenges.

On judicial review, 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.[36] 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.[37] None of these arguments have merit.

C. Section 16.91(5) reflects the legislature's interest in maintaining the integrity of the land-title system but not at any cost.

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 and, as a result, that the board's interpretation of "hardship" is therefore inconsistent with that legislative policy expressed in the statute.

[35] Record, pg. 253.
[36] ILTA's Brief, pg. 9.
[37] ILTA's Brief, pg. 10.

In other words, ILTA argues the legislature wanted to require the use of title plants to prepare abstracts at all costs.

At the outset, ILTA's takes a myopic view of the purpose underlying the 40-year title plant. This view conflicts with the other purposes of the title guaranty program. In particular, the legislative findings in chapter 16 of the Iowa Code explain the underlying purpose 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 adds to the integrity of the land-title transfer system.[38]

That is, the purposes underlying the title 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.

Title Guaranty also disagrees with ILTA's absurd statement that the legislature was not concerned about the maintaining the competitiveness of title guaranties when it enacted section 16.91(5). As ILTA correctly stated in its brief, the legislature has disapproved of title insurance because it has banned its sale in Iowa. What is more, the legislature established the title guaranty program, as a practical matter, to provide a

[38] Iowa Code § 16.15.

competitive alternative to title insurance in Iowa. Unless title insurance remains competitive with title insurance, the title guaranty program will cease to exist, thwarting the express legislative goals of providing additional guaranties of real property titles and facilitating mortgage lenders' participation in the secondary market.

The structure of section 16.91(5) demonstrates that the legislature did not intend to require abstractors to rely on a 40-year title plant to prepare abstracts at all costs to maintain the integrity of the land-title system. First, the statute includes a waiver provision. The existence of a waiver provision is inconsistent with ILTA's argument. 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, or imposed a higher standard of hardship at a minimum. Second, section 16.91(5) also exempts attorneys who were providing services continuously from November 12, 1986 from this requirement. These provisions, when read together, show that the legislature codify the requirement that an abstractor must always use a title plant when preparing an abstract when it enacted section 16.91(5).

What is more, the board found that granting Hendricks's waiver application would also protect the integrity of the land-title system. Granting the wavier, the board found, will protect integrity of the land-title system by ensuring that attorneys solve any title-related problems before the deal closes.[39] As the board found, attorney review is critical

[39] Record, pg. __.

to maintaining the integrity of the land-title system, which is lost if parties use title insurance instead of title guaranty.

ILTA next argues that "hardship" under section 16.91(5) cannot include the capital cost and administrative costs of starting and maintaining a title plant.[40] It contends that section 16.91(5) 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.[41] It further contends that Title Guaranty's interpretation of hardship to include any hardship erases completely the legislative norm for participating as an abstractor and that the use of a forty-year title plant is a mere suggestion.

These arguments lack merit. As previously mentioned in this brief, the board concluded

> That financial hardship alone can 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.[42]

Contrary to ILTA's argument, the board's finding that Hendricks had proven hardship will not erase the title plant requirement and will not result in the requirement being a mere suggestion.

The fact that Hendricks asked the board for a statewide waiver played a critical role in the board's finding of hardship, which limits the impact of the ruling. As noted in the ruling, the board does not impose the geographic limitation on attorneys who provide

[40] ILTA Brief, pg. 10.
[41] ILTA Brief, pg. 10.
[42] Record, pg. 252.

abstracting services.[43] 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.[44]

This means the board's interpretation of hardship exception will not swallow the title plant requirement.

In short, Title Guaranty's interpretation of hardship is not erroneous, nor is it illogical, irrational, or wholly unjustifiable.

IV. The district court should affirm Title Guaranty's finding that Hendricks proved a hardship.

ILTA challenges Title Guaranty's finding that Hendricks had proven hardship. More specifically, it contends that the board's finding 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;
- the product of reasoning that is so illogical as to render it wholly irrational;
- based upon an irrational, illogical, or wholly unjustifiable application of law to fact; and
- was otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.[45]

None of these challenges has merit.

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[43] Record, pg. 253.
[44] Record, pp. 253-54.
[45] ILTA Brief, pp. 20-21.

As discussed above, the 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.[46]

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 an incapability of obtaining a 40-year title plant. But the board disagrees with this argument. .

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 require the board request that information before finding hardship exists. Nor does ILTA cite any authority for this proposition.

Second, a business plan or other financial information was unnecessary to prove hardship when an applicant seeks a statewide waiver. 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.[47]

[46] Record, pp. 253-54.
[47] Record, pg. 254.

In other words, the board, using its experience and common sense as well as 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 noted in the standard of review portion of this brief, the board was not required to provide "evidence" of its experiences and expertise during the meeting. Rather it was only required to include those reasons in its written ruling.

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 that type of information 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. 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.

ILTA next argues the board's finding of hardship is arbitrary or capricious. The board's finding, however, is not arbitrary or capricious because the board considered the law and the facts as shown in this brief. While ILTA disagrees with this finding, the fact remains that the board considered the law and the facts when reaching this finding.

Finally, ILTA argues that the board's finding of hardship is unreasonable. But the board's finding is reasonable. The board acted reasonably because reasonable minds could reach different conclusions from the evidence.

In conclusion, the district court should affirm the board's finding that Hendricks proved hardship.

V. The district court should affirm Title Guaranty's finding that granting the waiver was clearly in the public interest.

In this case, the board concluded the waiver was clearly in the public interest. ILTA, however, contends that the board's finding 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;
- inconsistent with the agency's prior practice or precedents and not justified by stating credible reasons for the inconsistency;
- based upon a determination of fact that is not supported by substantial evidence in the record when that record is viewed as a whole;
- the product of reasoning that is so illogical as to render it wholly irrational;
- based upon an irrational, illogical, or wholly unjustifiable application of law to fact; and
- was otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.[48]

None of these challenges has merit. And the court should reject these arguments and affirm Title Guaranty's decision.

[48] ILTA Brief, pp. 20-21.

A. The board adopted public interest standards that are consistent with 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.[49]
- 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."[50]
- 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."[51] 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.[52]

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 that board lacked the power to "police competition among abstractors and between abstractors and title insurers."[53] As discussed above, the purposes underlying section 16.91(5) are broader than what ITLA suggests.

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[49] Record, pg. 254.
[50] Record, pp. 254-55.
[51] Record, pg. 255.
[52] Record, pp. 254-55.
[53] ILTA's Brief, pg. 14.

By its very nature, "public interest" is a very broad concept. For example, Black's Law Dictionary broadly defines "public interest" as the "general welfare of the public, that warrants recognition and protection", and "[s]omething in which the public as a whole has a stake".[54] 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 that and, as a result, the board could use the more widely used definition of that term, one that is more consistent with the purposes underlying section 16.91(5).

Further, for the reasons discussed above, the public interest also includes 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.

B. The record supports the board's finding that the public interest is served by the waiver.

ILTA next argues that the board's finding that public is served by the waiver is not support by the record. More specifically, it argues, "The glaring flaw in ITG's conclusion that Hendricks's waiver will serve the public interest is that ITG fails to pinpoint how this waiver will serve any public interest."[55] Again, the district court

[54] Black's Law Dictionary 1244 (7th ed. 1999).
[55] ILTA's Brief, pg. 17.

should reject this argument and affirm Title Guaranty's decision that granting the Hendricks waiver was clearly in the public interest.

1. 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 the Hendricks's waiver clearly 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.[56] 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.[57]

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.

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

[56] Record, pp 73-75.
[57] Record, pp. 79-80.

ILTA next argues there is no evidence in record that supports the board's finding that the waiver would serve the "public interest by encouraging the use of Title Guaranty through Iowa."[58] Once again, this argument ignores substantial evidence in the record.

At the outset, Title Guaranty wants to point out that ILTA's quote from the ruling omits important information. The board found, "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."[59]

Contrary to ILTA's argument, there is substantial evidence to support 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.[60] 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 the Title Guaranty will likely lose business to title insurance companies when abstractors refuse to meet their business needs. What is more, this observation makes common sense: If the abstracting community cannot meet a lender's requirements, then the lender may use title insurance instead of title guaranty.

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

[58] ILTA Brief, p. 18.
[59] Record, pp. 254-55.
[60] Record, Tapes of Hearing.

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. This argument ignores evidence in the record and the district court should affirm the board's finding.

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."[61] As a result, these lenders "demand uniform pricing and service, including turn-around time."[62] Due to variances in pricing and turn-around time, "national or regional lenders will often choose to use out-of-state tile insurance companies instead of Title Guaranty if abstractors are unable or unwilling to offer competitive pricing and service."[63]

During the hearing, the board heard from Hendricks and Loyd Ogle, executive director of Title Guaranty, about the changes in the marketplace and the impact those changes are having on title guaranties. As previously noted, Hendricks's 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.

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[61] Record, pg. 255.
[62] Record, pg. 255.
[63] Record, pg. 255.

In addition, Loyd Ogle told the board about the significant changes in the lending industry, with lenders demanding uniform pricing and turnaround times.[64]

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.

IV. The district court should affirm Title Guaranty's finding that the waiver was absolutely necessary to ensure the availability of title guaranty throughout the state.

Finally, ILTA argues the waiver is not absolutely necessary to ensure the availability of title guaranty. For the reasons discussed below, the district court should affirm the board's finding.

In addition to concluding that the wavier was clearly in the public interest, the board also concluded "that granting the waiver is absolutely necessary to ensure the availability of Title Guaranty throughout the state to Hendricks's lender clients and Iowa consumers."[65] In reaching this conclusion, the board reasoned,

> As noted above, the lack of title plants in some counties and changing dynamics in the marketplace have put Title Guaranty at 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

[64] Record, Tapes of Hearing.
[65] Record, pg. 259.

> these issues. As a result, Title Guaranty is effectively not available, or is becoming unavailable, in those counties.[66]

ILTA argues that, by using the terms "effectively not available" and "becoming unavailable," Title Guaranty "admits that title guaranty is available at some level and that this waiver is therefore not 'absolutely necessary to ensure the available [sic] of title guaranties throughout the state.'"[67]

The board did not concede that its finding that granting the Hendricks's waiver application is absolutely necessary to ensure the availability of title guaranties throughout the state when it used those terms. ITLA's arguments seem to be based on an illogical interpretation of this provision—that title guaranty must be unavailable somewhere before the board could grant a waiver under this provision. That is not the case. Nothing in the statutory provision requires the board to wait until title guaranty is unavailable somewhere in Iowa before it could rely on this provision to waive the title plant requirement. In fact, that would be an absurd interpretation of the statutory provision. Without question the board can waive the title plant requirement before a crisis arises.

ILTA also contends that the board's findings are not supported in the record. Again, that is incorrect. For the reasons discussed elsewhere in this brief, substantial evidence in the records supports the board's finding. While ILTA may disagree with this evidence and believes the board could have drawn the opposite conclusion, the fact remains that a neutral, detached, and reasonable person could reasonably conclude that

[66] Record, pg. 259.
[67] ILTA Brief, pg. 19.

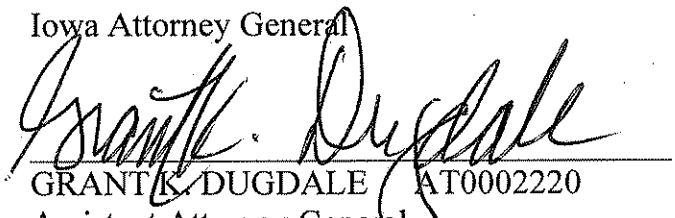
granting Hendricks's waiver application was absolutely necessary to ensure the availibity of title guaranty throughout the state.

Conclusion

Consequently, the district court should affirm the Title Guaranty's decision and dismiss the petition for judicial review.

Respectfully submitted,

THOMAS J. MILLER
Iowa Attorney General



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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 in the above-entitled cause at their respective addresses as disclosed by the pleadings on the 24th day of October, 2007, by:

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Express Mail
- [x] Electronic Mail
- [ ] Other: _____

Signature: _____