BEFORE THE IOWA FINANCE AUTHORITY, IOWA TITLE GUARANTY BOARD

IN RE:	)	
	)	
APPLICATION FOR A TITLE PLANT AND TRACT INDEX WAIVER BY ALEX BERGER.	)))	RULING GRANTING APPLICATION TO WAIVE TRACT INDEX REQUIREMENT

INTRODUCTION

Alex Berger (hereinafter Berger), an attorney licensed to practice law in Iowa, has filed an application (hereinafter Application) for a permanent waiver (hereinafter Waiver) of the 40-year title plant and tract index requirement pursuant to Iowa Code §16.91(5)(b) to become a participating abstractor in the Iowa Title Guaranty (ITG) program. This type of waiver request is described in 265 IAC 9.7(8)"b" "Permanent waivers for attorneys".

Mr. Berger is participating attorney in good standing with ITG. Mr. Berger practices through the firm of Berger & Buchmeyer, Attorneys at Law, and their office in Davenport, Iowa. The individual attorneys do their abstracting d/b/a The Service Abstract Company with offices in Davenport, Cedar Rapids, and Urbandale.

The Iowa Title Guaranty Board (hereinafter Board) having reviewed the record as well as hearing testimony on the matter, grants the permanent title plant waiver, subject to the limitations, restrictions or requirements set out in this ruling.

RECORD

The record before the Board includes the following:

- Berger's Application for Waiver.
- ITG Deputy Director Matt White, Esq.'s legal analysis of Application, law and facts.
- Other documents, including abstracting samples, submitted with the Application.
- Seven letters of support for the grant of a Waiver.
- Nine letters in opposition to the grant of a Waiver.
- Recommendation letter from "mentor" Mr. Raymond Berger.

- Other comments received through oral testimony at the Board meeting.
    - Alex Berger, Applicant
    - Mr. Raymond Berger. (Mentor attorney)
    - Jim Nervig, of Brick Gentry Law Firm (comments at Blue waiver apply to Berger)
    - David Truitt, Title Plant Owner/Abstractor in Davis and Wapello Counties
- Recommendation from the ITG Director Geri Huser to grant the Waiver.
- Audio recording and Minutes from the August 6, 2014 Board meeting and hearing on Berger's Application.
- Supplemental Report.

On August 6, 2014, the Board held a hearing on Berger's Application. The following individuals appeared before the Board: Alexander Berger, Raymond Berger, Jim Nervig (reserved comments at Blue waiver as applicable to Berger), and David Truitt. In addition, the Board adopts the Supplemental Report as part of the record on this Waiver application.

APPLICABLE LAW, ANALYSIS, AND RULING

Abstracting is not regulated in Iowa by any law or other oversight, and anyone can freely abstract with or without a title plant anywhere in the state, in any manner they so choose. Neither the Iowa Land Title Standards nor the Iowa State Bar Association Title Standards require an abstractor to be a participating member of ITG. A Waiver granted by the ITG Board does not grant an abstractor any additional rights or license to allow them to abstract in Iowa. A Waiver simply allows ITG to use the abstracting done by the attorney abstractor without the abstract being produced from the use of a title plant.

The Board may issue a ruling permanently or provisionally waiving the requirement set forth in Iowa Code §16.91(5)(a)(2) of an up-to-date title plant. Pursuant to Iowa Code §16.91(5)(b) and 265 IAC 9.7(7) the Board may grant a Waiver when the Board finds both of the following:

1. The title plant requirement described in Iowa Code Supplement §16.91(5)(a)(2) imposes a hardship to the abstractor or attorney; and
2. The waiver is:

a) Clearly in the public interest; or
b) Absolutely necessary to ensure availability of title guaranties throughout the state.

In addition to meeting the requirements stated in Iowa Code §16.91(5)(b), 265 IAC 9.7(7), for attorney applicants with experience abstracting under the supervision and control of an exempt attorney-abstractor, pursuant to 265 IAC 9.7(8)"b"(4)(1) the Board may grant a Waiver when the applicant provides and the Board considers, at a minimum, the following

1. The applicant's abstract experience. The Board shall give considerable weight to an applicant's experience abstracting under the personal supervision and control of an exempt attorney-abstractor with whom the applicant has had a close working relationship or with whom the applicant is a legal partner or associate.
2. Professional references. The Board shall give considerable weight to a recommendation from the exempt attorney-abstractor or grandfathered attorney who personally supervised the applicant's abstracting for a period of two years or more and who attests in writing or in person before the Board regarding the applicant's ability to abstract.
3. Samples of abstracts prepared by the applicant.
4. The Board shall give consideration to the number of participating abstractors physically located in the county or counties where the applicant seeks to abstract in determining whether a waiver should be granted.

Deputy Director White has a process wherein he reviews an Application prior to it being submitted to this Board and the public. If there are questions that remain unanswered, or that he feels are insufficiently answered for the Board to make their ruling, then Mr. White requests additional information from the Applicant. He then makes his legal determination related to whether the applicable waiver factors have been met. This information is presented to the Director so they can make a Director Recommendation. At the Board meeting, Mr. White reviewed the waiver requirements, and set out how facts in the Application addressed each factor required to be considered by the Board. In addition, Mr. White submitted a Supplemental Report to reflect the information that he relied upon when he recommends the Board grant the Waiver application.

ANALYSIS

A. Berger has established the hardship requirements pursuant to Iowa Code §16.91(5)(b) and 265 IAC 9.7(7)"a"?

The Board concludes that Mr. Berger has established hardship under Iowa Code § 16.91(5)(b) and 265 IAC 9.7(7)"a."

Hardship is defined in 265 IAC 9.7(2). This states that *"Hardship" means deprivation, suffering, adversity, or long-term adverse financial impact in complying with the title plant requirement that is more than minimal when considering all the circumstances. Financial hardship alone may constitute a hardship.*

In his Application and oral testimony, Mr. Berger stated that his hardship was related to having a succession plan in place for the eventuality when his father Raymond Berger is no longer abstracting for ITG. He stated that his abstracting entity has been doing business through three generations of Bergers, and that they have a large client base that demanded there be a succession plan in place. Mr. Berger stated, and ITG staff has verified, that his father's abstracting has been done on a statewide basis, in 98 counties in the last 14 months, without title plants. Related to financial hardship, Mr. Berger provided testimony to establish a title plant in even one county because the cost was estimated to exceed $80,000.

The Board finds that the costs to build a 40-year title plant in a small-sized Iowa county is between $40,000-$75,000 each year for the two years required to build the title plant. Thus, the total cost of building a title plant in a small-sized county ranges between $80,000-$150,000. The Board further finds that that the costs to build a 40-year title plant in a medium-sized Iowa county is between $50,000-$130,000 each year for the two years required to build the title plant.

Thus, the total cost of a building a title plant a medium-sized county ranges between $100,000-$260,000. It also finds that the costs to build a 40-hear title plant in a large-sized Iowa county would be substantially higher than a middle-sized county due to higher labor, rental costs, and the sheer volume of records. The Board used the estimated costs listed below when estimating the costs to build a 40-year title plant for a middle-sized Iowa county:

a. Estimated Year One Costs
   i) $5,000 for records migration.
   ii) $76,800 ($6,400 monthly for two full-time staff members at $20/hour, including benefits and insurance).
   iii) $18,000 office rent ($1,500 monthly).
   iv) $5,000 initial outlay for software.
   v) $5,000 initial outlay for furnishings.
   vi) $12,000 utilities.
   vii) Total: $126,800
b. Estimated Year Two Costs: $88,800
c. Average Costs: $107,800 annually to run office.

Thus, the Board estimates the cost to build a 40-year title plant in each of Iowa's 99 counties. The Board concludes this constitutes a financial hardship to Mr. Berger.

In addition to the financial hardship, the Board finds that the time required to establish and to maintain a title plant in all 99 counties, which would be necessary to abstract statewide, within two years constitutes a hardship.

For these reasons, the Board finds that Mr. Berger has established that complying with the 40-year title plant requirement statewide constitutes a hardship under Iowa Code §16.91(5)(b) and 265 IAC 9.7(7).

B. Berger has established that the Waiver of the up-to-date title plant requirement described in Iowa Code §16.91(5)(a)(2) is either clearly in the public interest; or is absolutely necessary to ensure availability of title guaranties throughout the state pursuant to Iowa Code §16.91(5)(b) and 265 IAC 9.7(7)"b".

The Board concludes that granting a Waiver of the 40-year title plant requirement to Mr. Berger is clearly in the public interest.

Public interest is defined in 265 IAC 9.7(2). This states that *"Public interest" means that which is beneficial to the public as a whole, including but not limited to increasing competition among abstractors, encouraging the use of title guaranties throughout the state, making title guaranties more competitive than out-of-state title insurance, increasing the division's market share, improving the quality of land titles, protecting consumers, and encouraging maximum participation by participating abstractors and participating attorneys physically located in all 99 counties.*

When deciding whether a Waiver of the 40-year title plant is clearly in the public interest, the Board notes that abstracting businesses are not licensed or regulated by any governmental entity, including ITG. Put in other terms, an abstractor need not be a participating abstractor in the ITG program to prepare abstracts in Iowa. Consequently, anyone can operate an abstracting business with or without a title plant. Neither the Iowa Land Title Abstracting Standards nor the Iowa State Bar Association Title Standards requires an abstractor to be a participating member of ITG to prepare abstracts.

The Board finds that many lenders, particularly national lenders, want one-stop abstracting with uniform pricing, quality, and service for their national and local clientele doing business in all Iowa counties. Some lenders would be forced to renegotiate for abstracting services on a county-by-county basis, something that has proven to be difficult by statewide lenders. If there are not enough ITG participating abstractors to provide one-stop shopping for abstract services, then lenders may use abstractors that are not participants in the ITG program to provide abstracting services in all Iowa counties. If this happens, those lenders will use title insurance to insure good title to properties instead of using title guaranties. This will have the effect of reducing the use of title guaranties in Iowa. Moreover, ITG staff is also aware that many customers will not do business with abstractor that is not a participating abstractor in the ITG program. As a result, ITG will be deprived of issuing and Iowa consumers will be deprived of obtaining title guaranties on those properties. This runs contrary to the express public purpose of

maximizing the use of title guaranties.

Thus, granting Mr. Berger's Waiver application is clearly in the public interest because it will maximize the use of title guaranties. Put simply, if the Board denies Mr. Berger's waiver application, he can still provide abstract services to lenders who use title insurance instead of title guaranties. Additionally, a waiver would increase competition, making abstracting more cost effective, timely, and accurate.

In addition, granting Mr. Berger's Waiver application is clearly in the public interest because he provides competent abstracting services. Mr. Berger has demonstrated his competence in performing abstracting services.

Scott County has a "mentorship" system within the Scott County Bar Association. In that system, the abstractor being mentored makes application to that group, and is judged by his peers on the quality of abstracting based on a testing system they devised. The application and test results are reviewed by the Real Estate Committee, and their recommendation is passed on to the Scott County Bar Association Executive Council. Based on a review of the application, the sample/test abstracting, the Committee recommendation, and the personal knowledge and observation of other attorney abstractors in that community, the Executive Council unanimously endorsed Mr. Berger's request to ITG for a Waiver. Mr. Berger also received an endorsement from the Iowa Attorney Abstracting Association based on their independent testing of his ability to abstract in a competent manner. This process required Mr. Berger to produce abstract products in six different counties, and these results were compared against known abstracts, Blue Book, ISBA, and ITG Minimum Standards. Following the review of the abstracts and questions and answers, the members voted to recommend that the ITG Board grant the waiver to Mr. Berger.

The Board finds that Berger has demonstrated his ability to abstract competently in a way that will be in the public interest. This has been shown by the Application, the letters of support, an ITG review of the abstracting samples provided with the Application, the Scott County Bar recommendation, the Iowa Attorney Abstracting Association recommendation, and the testimony provided at the meeting, including the testimony from his mentor, Raymond Berger, that his third generation abstracting entity has been doing business for over 20 years without a claim. The Board also finds that it is in the public interest to have a succession plan in place.

Considering all of these factors, the Board finds that Alex Berger has established that the Waiver of the 40-year plant requirement is clearly in the public interest thus satisfying the requirement found in Iowa Code §16.91(5)(b) and 265 IAC 9.7(7)"b"(1).

C. Berger has established that a waiver of the 40-year plant requirement described in Iowa Code §16.91(5)(a)(2) meets the waiver requirements found in 265 IAC 9.7(8)"b"(4)(1).

The Board may grant a Waiver to an attorney applicant with experience abstracting under the supervision and control of an exempt attorney-abstractor, and in doing so the Board shall consider, at a minimum, the following pursuant to 265 IAC 9.7(8)"b"(4)(1):

- The applicant's abstract experience. The Board shall give considerable weight to an applicant's experience abstracting under the personal supervision and control of an exempt attorney-abstractor with whom the applicant has had a close working relationship or with whom the applicant is a legal partner or associate.
- Professional references. The Board shall give considerable weight to a recommendation from the exempt attorney-abstractor or grandfathered attorney who personally supervised the applicant's abstracting for a period of two years or more and who attests in writing or in person before the Board regarding the applicant's ability to abstract.
- Samples of abstracts prepared by the applicant.
- The Board shall give consideration to the number of participating abstractors physically located in the county or counties where the applicant seeks to abstract in determining whether a waiver should be granted.

The Board finds that Mr. Berger has met the requirements set forth in 265 IAC 9.7(8)"b"(4)(1) pursuant to the following evidence, references, and findings shown in the following paragraphs.

The Board finds and gives considerable weight to the fact that Mr. Berger has provided sufficient evidence that he has ample abstracting experience to be granted a permanent waiver. Mr. Berger provided an employment history from the late 1990's to present when he was working in his families abstracting enterprise and traveling to courthouses and recorders offices, abstracting, and assisting in all aspects of this system, resulting in the creation by him of over 1,000 reports of title, and hundreds of new abstracts or their continuations. This abstracting was personally supervised by his father, Mr. Raymond Berger.

The Board further finds that the professional references attached to his Application are credibly vouching for his ability to competently abstract. In addition to a number of references from other attorneys and lenders, the Scott County Bar Association Executive Council as well as the Iowa Attorney Abstracting Association reviewed Mr. Berger's Application and tested his abstracting experience, resulting in their recommendations that he be given a Waiver.

Further, the Board gives the written recommendation of his supervising attorney, Raymond Berger, considerable weight when he stated to this Board in writing and through oral testimony in his opinion based on his daily observations through many years of supervision and guidance of Mr. Berger, that he possesses the knowledge, precision, accuracy, dedication, and high standards of ethics and professionalism required to be an attorney abstractor and that he supported Mr. Berger in his effort to attain a Waiver.

Sample abstracts were made available to the Board for review and this Board finds them to be of good quality. Additionally, the Board does acknowledge that although there are other

abstractors available to provide abstracting in Iowa, providing a process to replace attorney-abstractors in a family business with another attorney-abstractor will not have an adverse impact on the market. As stated previously, this Board is cognizant of the public harm that might occur if no abstracting-attorneys were available to meet the needs of the public in the Scott County, its surrounding markets, as well as for lenders using a statewide business model. Considering all of these factors, the Board finds that Mr. Berger has established that the Waiver of the 40-year plant requirement meets the guidelines for granting a Waiver set out in 265 IAC 9.7(8)"b"(4)(1).

RULING

For the reasons set forth above, the Board grants Mr. Alex Berger's Application for Waiver of the 40-year title plant and tract index requirement, subject to the following limitations, restrictions or requirements:

1) Submit at least four root of title abstracts prepared and executed by Mr. Alex Berger to ITG staff within the next two years to be reviewed as determined by ITG based upon the abstracting minimum standard requirements and ILTA and ISBA title standards.
2) Attend at least two ITG conferences in the next 2 years.
3) Maintain active membership with the Iowa Real Estate Section List Serve for at least two years.

SO RULED this 7th day of October, 2014.

Patricia Schneider, Iowa Title Guaranty Board Chair

(seal)

David Jamison, Iowa Title Guaranty Board Secretary