BEFORE THE IOWA SUPREME COURT

NO. 19-1672

MARY SUE EARLEY AND BANKERS TRUST COMPANY AS TRUSTEES OF THE MARY SUE EARLEY REVOCABLE TRUST DATED SEPTEMBER 26, 1994,

Plaintiff-Appellant,

vs.

BOARD OF ADJUSTMENT OF CERRO GORDO COUNTY, IOWA,

Defendants-Appellees,

and

GREGORY A. SAUL AND LEA ANN SAUL,

Intervenors-Appellees

APPEAL FROM THE DISTRICT COURT
OF CERRO GORDO COUNTY
HON. RUSTIN DAVENPORT

Petition for Further Review

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Questions Presented

For a board of adjustment to grant a variance from a zoning ordinance, which this Court has said should be done "sparingly," an applicant must prove, among other things, that "the land in question cannot yield a reasonable return if" the ordinance is enforced and that "the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood, which may reflect the unreasonableness of the zoning ordinance itself." *Graziano v. Bd. of Adjustment of City of Des Moines*, 323 N.W.2d 233, 236 (Iowa 1982). In this case, where the board of adjustment granted a variance for a pergola that is 21 inches from the property line (the ordinance requires a six-feet setback), the questions presented are:

1. Is the standard for an *area* variance and a *use* variance (which are governed by the same statutory text) the same or, as held for the first time by the Court of Appeals, does an area variance require "a less onerous burden" and "less rigorous justification" than a use variance?

2. When the board of adjustment considers whether "the land in question cannot yield a reasonable return" if the ordinance is applied, is the *land in question* the property as a whole or is the *land in question* only that portion of the property upon which the non-conforming structure is built?

3. Can the "plight of the landlord" be "due to unique circumstances and not the general conditions of the neighborhood" where the "plight" is that the landowner wants to build a structure too close to the property line to provide shade from the sun on a patio that the owner already constructed?

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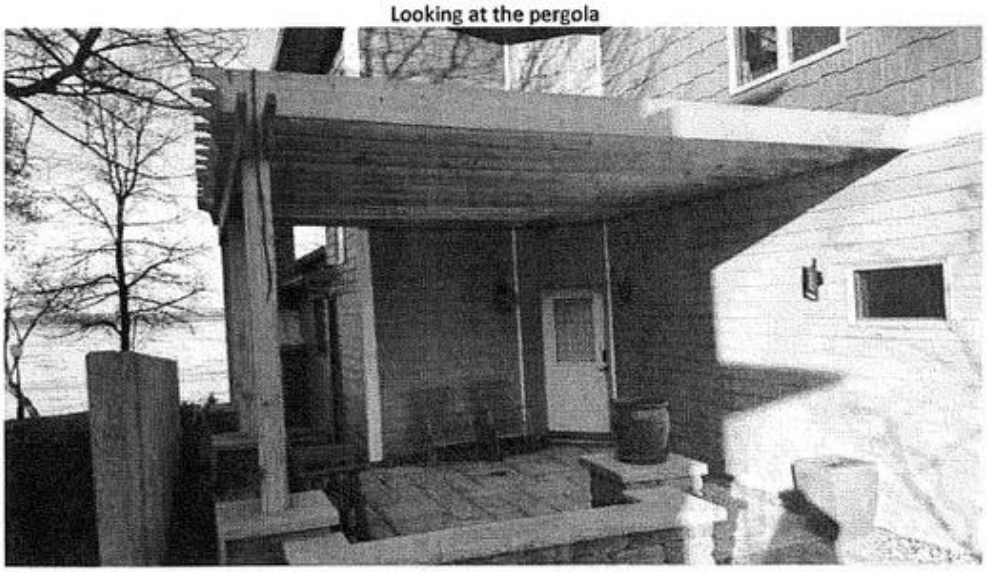
Statement Supporting Further Review

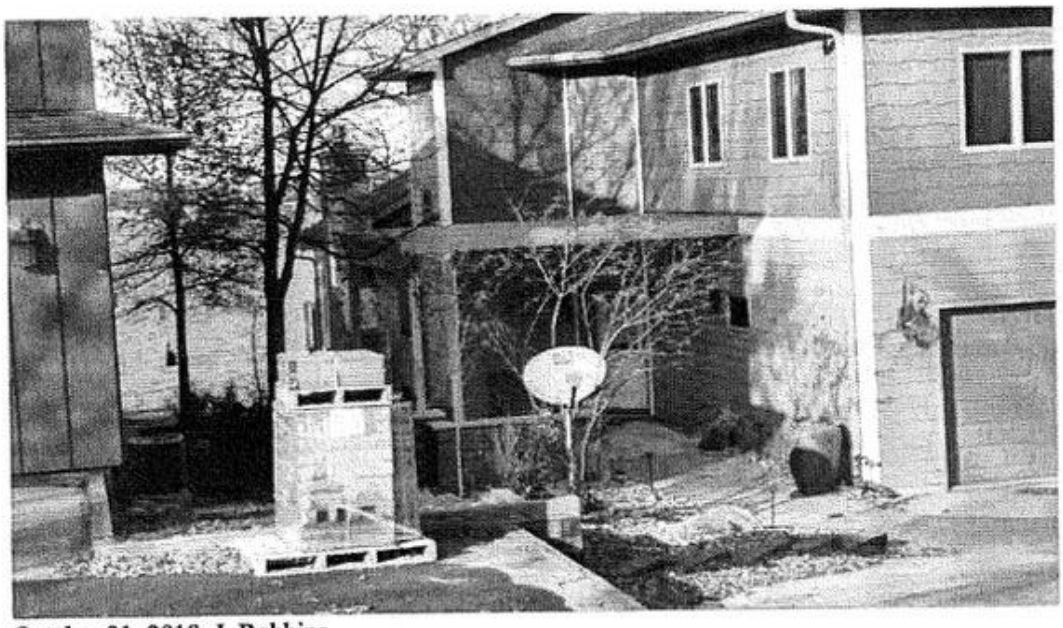
The Cerro Gordo County Board of Adjustment granted a variance of the six-feet setback ordinance to Gregory and Lea Saul for the pergola they had already constructed without a permit (in violation of the County's ordinance) that was only 21 inches away from the property line at their lakeshore home in Clear Lake. The Sauls built the pergola, which is shown in the two images below,[1] to provide shade to a brick patio that the Sauls previously built for grilling. (App. 41, 51). The fence next to the pergola is the property line. (App. 64).

Figure 1
Looking at the pergola



January 8, 2019

[1] The photos are also found at pages 54 and 46 of the Appendix.



October 31, 2018, J. Robbins

In upholding the board of adjustment's decision to grant a variance, and the district court's ruling affirming it, the Court of Appeals created a new, "less onerous" standard for approving an *area* variance (a variance from restrictions on setback requirements, building heights, etc.) as compared to a *use* variance (a variance from the zoned use—e.g., commercial versus residential). (Slip Op. 6). The Court of Appeals did so, despite the fact that this Court has already twice rejected invitations to treat the two types of variances differently,[2] and despite a leading Iowa property-law scholar, Dean N. William Hines, recently concluding that if relaxing Iowa's area-variance standard should happen (which he supports,

[2] *Graziano v. Bd. of Adjustment of City of Des Moines,* 323 N.W.2d 233, 236 (Iowa 1982); *Bd. of Adjustment of City of Des Moines v. Ruble*, 193 N.W.2d 497, 505 (Iowa 1972).

in some form) then "legislative reform," as opposed to judicial reform, "is the best option." N. William Hines, *Difficulties Standard for Area Variances*, 102 Iowa L. Rev. Online 365, 383 (2018); *see also id.* at 381 (noting that this Court has "consistently applied" the same unnecessary hardship standard to use and area variances).

That decision—to relax the area-variance standard, despite this Court's earlier refusal to do so—should be reviewed, and reversed, by this Court. But even if Iowa variance law does need a case-law update (as opposed to a legislative update), and even if the standards for an area variance should be relaxed, that change should come from this Court. And it should not be the standard that the Court of Appeals applied here.

Indeed, if the Court of Appeals' "less onerous" standard, as applied in this case, is the new standard, then "less onerous" effectively means "whatever the board of adjustment wants to do." That cannot (or at least should not) be the law; this Court made that clear in the very first decision interpreting Iowa's variance statute, saying that boards of adjustment are not law-making bodies that can simply "set aside the zoning ordinance under the guise of a variance." *Deardorf v. Bd. of Adjustment of Planning & Zoning Comm'n of City of Fort Dodge*, 254 Iowa 380, 389, 118 N.W.2d 78, 83 (1962).

Finally, in addition to the overall issue of what standard to apply, the Court of Appeals' decision raises questions of how the current "unnecessary burden"

test should be applied, and the resolution of issues would also benefit from this Court's review and decision.

In sum, the Court of Appeals' ruling marks a change in well-established Iowa law, and that change—at least as established by the Court of Appeals' ruling—is a bad one that will have a significant effect on how boards of adjustment go about making the thousands of variance decisions each year. Further review is warranted.

I. The status of Iowa variance law before the Court of Appeals' decision in this case.

Under Iowa Code section 335.15(3) (which applies to counties) and Iowa Code section 414.12(3) (which applies to cities,) a board of adjustment cannot grant a variance from the restrictions of a zoning ordinance unless "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." *Id.* That language comes directly from the Standard State Zoning Enabling Act, so when this Court was asked to interpret that phrase for the first time in *Deardorf*, it looked to decisions from other states, and it looked specifically at New York. 118 N.W.2d at 81.

Under New York case at law the time (the state's statute has since been amended), a board of adjustment could not find "unnecessary hardship," and thus could not grant a variance, unless the applicant could show that "(1) the land in question cannot yield a reasonable return if used only for a purpose

allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) the use to be authorized by the variance will not alter the essential character of the locality." *Id.* This Court found that test persuasive, as had other state supreme courts across the country, and so it adopted it as its own. *Id.*

Using that test in *Deardorf*, this Court granted the writ of certiorari and annulled the variance, which had allowed the applicant to build a seven-story apartment building when the ordinance allowed for a maximum of three stories. The Court stated it "cannot find substantial evidence before the board or in that taken by the district court of unnecessary hardship," and it reminded the board of adjustment that "may not legislate." *Id.* at 82–83. The board's job—and indeed, its only role in this area—is to grant a variance in the *limited* circumstance where the unnecessary-burden requirement is met. This Court understood full well that its new test was difficult to meet, stating that the board should grant variances "sparingly and with great caution or in exceptional instances only." *Id.* at 83. In other words, getting a variance should be difficult and rare, not easy and the norm.

Ten years later, this Court took up the topic again in *Board of Adjustment of City of Des Moines v. Ruble*, 193 N.W.2d 497, 503 (Iowa 1972). The landowner requested and received a variance to build a house on a residential lot that did

not meet the ordinance's minimum square-footage requirement because the owner had divided the lot. *Id.* at 500. The board of adjustment, likely understanding that the facts did not meet *Deardorf's* unnecessary-burden test, urged this Court to lessen the standard for an area variance (setbacks, square footage minimums, height requirements, etc.) and apply *Deardorf's* stringent test to use variances only (e.g., commercial versus industrial). *Id.* at 505. This Court rejected the invitation. Noting that *Deardorf* itself was an area-variance case, the Court stated that "in no way" had it "indicated an intention to limit application to instances where legitimacy of use variances is in issue." *Id.* at 505.

Another ten years after that, this Court reaffirmed that principle in *Graziano v. Board of Adjustment of City of Des Moines*, 323 N.W.2d 233, 236 (Iowa 1982). The board of adjustment in that case again urged this Court to adopt a less-onerous standard for area variances than use variances. And again, this Court declined. As the Court explained, the very same statute applies to both use and area variances, so there is no reason to treat them differently. *Id.* Indeed, the statute does not recognize the difference between a use variance and an area variance; there is only a "variance" and every variance "requires a showing of unnecessary hardship," so every variance must meet the standards set out by the Court in *Deardorf*. *Id.*

Since that time, the law hasn't changed. For almost 60 years, Iowa courts have applied the same standard to determine whether a variance applicant has

shown unnecessary hardship. And in doing so, no Iowa appellate court has ever treated a use variance differently from an area variance—at least not until the Court of Appeals' decision in this case.

In 2006, in *City of Johnston v. Christenson*, 718 N.W.2d 290, 293 (Iowa 2006)—a case about issue preclusion—this Court did discuss the difference between an area variance and use variance, and in doing so (in a footnote that was purely for background), cited a treatise for the proposition that "[a]n 'area variance' is normally unrelated to a change in use and traditionally justifies a slightly lesser showing than required to justify a 'use variance.'" *Christenson*, 718 N.W.2d at 299 n.4. But this Court was not reviewing the legality of the board of adjustment's decision to grant a variance (it was only considering issues related to issue preclusion), and thus in no way was this Court reversing earlier case law that held the two variances should be treated the same under the necessary-burden requirement. The statement was dicta, if it can even be called that.[3]

But as discussed further below, the Court of Appeals in this case plucked that dicta and used it to create a new standard that is inconsistent with this Court's prior holdings. In doing so, the Court of Appeals ignored the fact that

[3] *Westinghouse Credit Corp. v. Crotts*, 98 N.W.2d 843, 848 (Iowa 1959) (noting statements in opinion not necessary to determination of the case are "mere dicta and not authority to be followed"); *see also The Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 427 (Iowa 2010) (rejecting reliance on dicta and collecting cases doing same).

the *Christenson* statement was simply background from a treatise that was talking about variance law generally (and not Iowa law specifically) and showed how even the most benign-seeming, FYI-style footnote can change the law—even years later.

II. The Cerro Gordo Board of Adjustment's decision to grant a variance in this case and the Court of Appeals' opinion affirming it.

In 2018, the Sauls decided to construct a pergola over top of a brick patio they use for grilling at their lakeshore home at 3670 240th Street in Clear Lake. (App. 63). The Sauls did so without applying for a permit, in violation of a county ordinance. (App. 43). Upon finding out that a permit was required, the Sauls submitted an application to the zoning commission, which was denied. (App. 41, 45). As explained by the Zoning Administrator, the pergola is 21 inches away from the property line, but the zoning ordinance requires six feet. (App. 45).

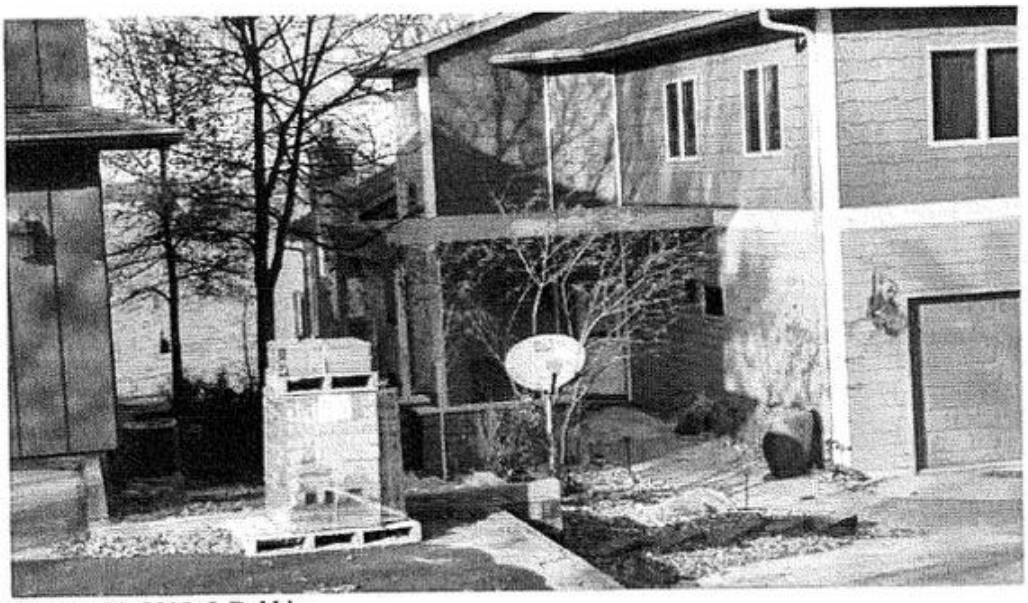
The Sauls appealed to the board of adjustment, asking the board to grant a variance. The Sauls' justification for the variance, as described in their application and as presented at the board of adjustment meeting, essentially amounted to: We already built it, so we would like to keep it. (App. 49, 63–64). On the variance application, when asked how "the land in question cannot yield a reasonable use"—a question that somewhat parrots the first prong of the unnecessary-burden requirement—the Sauls left the answer blank. (App. 50). And when asked "[w]hat is unique about this property compared to other

properties in the area," which alludes to the second requirement of the unnecessary-burden requirement, the Sauls said, "None." (App. 50).

The only thing approaching a justification for the variance (other than "we built it and want to keep it") was a statement on the appeal form that the pergola "is a great use of space and shades the front from the hot summer sun which saves energy." (App. 51). The Sauls also said that the pergola "is pleasant to view and adds character to the entrance." (App. 52). At no time during the process—not in any written materials or at the hearing, which covers just two pages (App. 63 and 64)—did the Sauls present evidence of or even explain *in any way* how "the land in question cannot yield a reasonable return if" the ordinance was followed, which they are required to show to establish unnecessary burden. *Graziano*, 323 N.W.2d at 236. The board of adjustment voted to grant the variance anyway, immediately after hearing that the pergola "is very nice." (App. 64).

Plaintiff Mary Sue Early, the owner of the neighboring property that the pergola is 21 inches away from, brought a petition for writ of certiorari challenging the variance, but the district court dismissed the writ. Writing that the "Board of Adjustment was apparently satisfied that there was sufficient setback between the Early property and Saul Property"—an assumption that, even if true, does not equate to unnecessary hardship—the district court affirmed the board of adjustment's ruling, concluding it was supported by substantial

evidence. In the district court's view, "the closest issue" was "whether or not the Saul's property can yield a reasonable return if used only for a purpose permitted in the zone." (Dist. Ct. Order 6). The court concluded that the Sauls met their burden, saying that there was "evidence before the Board that the Sauls could not fully utilize their side yard area, which would diminish the value of the property." (Dist. Ct. Order 6–7). Thus, the district court ruled that the "Board could conclude" that "a reasonable return could not be obtained on the property"—which, as can be seen in the picture below, is a large home on the shoreline of Clear Lake—"without covering of the patio and the side yard area with the pergola." (*Id.* at 7).



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The district court did not explain how the board of adjustment could reasonably come to such a conclusion, or what evidence the Board could possibly have relied on.

Neither did the Court of Appeals. Like the district court, it quoted the relevant test for finding unnecessary hardship, including the requirement that the applicant prove the land in question cannot yield a reasonable return without a variance. (Slip Op. 6–7). But the Court of Appeals did not apply that test, at least not how this Court has directed. Instead, the Court of Appeals added a new gloss on the 60-year-old interpretation of the unnecessary-hardship requirement that has been "consistently endorsed" by this Court. Hines, *Difficulties Standard for Area Variances*, 102 Iowa L. Rev. Online at 372. Quoting from the dicta in footnote 4 of *Christenson* (the case that was about issue preclusion, not whether a variance was properly granted), the Court of Appeals held that "a less onerous burden is required," and a "less rigorous justification is needed," to grant an area variance, as compared to a use variance. (Slip Op. 6).

The Court of Appeals then applied its new, never-before-used standard, concluding that because a "lesser showing" is required for an area variance, and because there was evidence that the pergola "allowed the Sauls to fully use the patio," there was substantial evidence to support the board of adjustment's apparent decision that the property could not obtain a reasonable return without a variance. (Slip Op. 8). The Court of Appeals also held that the plight of the

Sauls was due to unique circumstances of the property and not to the general conditions in the neighborhood because the patio over which the pergola was built was already there and (apparently) the need for shade was unique to this piece of property. (Slip Op. 8).

Finding there was substantial evidence to show unnecessary hardship under the "less onerous" standard, the Court of Appeals affirmed the district court.

III. The Court of Appeals' "less onerous" standard is inconsistent with this Court's precedent and creates a new test that is not faithful to Iowa Code.

The Court of Appeals decision is wrong; that much is clear. There was *no* evidence upon which the board of adjustment could have found unnecessary hardship—at least not under this Court's precedent. But that is exactly why further review is warranted: because the Court of Appeals did not simply apply existing precedent and get it wrong; it created a new standard that, when followed by boards of adjustment and district courts across the state, will be used to justify an area variance in almost every case.

Saying that there is a "less onerous burden" for an area variance than a use variance might seem to be fairly benign. What is "less" anyway? But as applied by the Court of Appeals, and in the larger context and debate over whether the unnecessary-burden requirement should be relaxed for area variances, this is a significant decision. Consider this: To show an unnecessary

burden, the Sauls had to submit substantial evidence showing that, without the variance, their property could not yield a reasonable return. And to do that, even for a non-profit property like a lake house, the Sauls had to show the application of the setback requirement would "equal a denial of all beneficial use" of the property. *Greenawalt v. Zoning Bd. of Adjustment of City of Davenport*, 345 N.W.2d 537, 543 (Iowa 1984). So, according to the Court of Appeals, under this "less onerous burden" standard, a board of adjustment can reasonably conclude that, without a pergola to provide shade to their lake-house patio at certain times of the day, the Sauls would be denied "all beneficial use" of their property. That is a dramatic change from the standard that this Court has applied to variances. Indeed, it does not take much forethought to see that this case, if not reviewed by this Court, will become the rubber stamp by which Iowa courts will affirm virtually every area-variance challenge that comes their way.

As Dean Hines' recently wrote, if courts are faithfully applying the first prong of the "unnecessary hardship" requirement—i.e., that the property cannot yield a reasonable return without a variance—then most area variances "must inevitably be reversed by a reviewing court." Hines, *Difficulties Standard for Area Variances*, 102 Iowa L. Rev. Online at 374. That is a feature, not a bug: This Court said time and again that "the power to grant a variance should be exercised sparingly and with great caution or in exceptional instances only." *Deardorf*, 118 N.W.2d at 83; *Ruble*, 193 N.W.2d at 503; *see also Graziano*, 323 N.W.2d at 237

("[T]he power to grant variances should be used sparingly."). But it is a feature the Court of Appeals decided to do away with. Through the use of just three words—"less onerous burden"—the Court of Appeals took Iowa from a standard where variances are sparingly granted to a standard where a variance is warranted to give shade to a patio at a large lake house. That is a significant change. One that needs this Court's attention.

It is possible that Dean Hines is right: that Iowa should lessen the burden for area variances in some way. But two things counsel against doing so by judicial opinion. First, this Court has twice rejected a differing standard for use and area variances[4] and has, again and again, (even in area-variance cases) said that variances should be granted sparingly.[5] And second, in the last decade, legislation has been introduced to lower the standard for an area variance, but the legislature chose not to move it forward. Hines, *Difficulties Standard for Area Variances*, 102 Iowa L. Rev. Online at 386 (citing H.F. 357, 84th Gen. Assemb., Reg. Sess. (Iowa 2011)). Thus, given the long-standing interpretation of "unnecessary burden" and principles of stare decisis, and because policy issues like this are best debated in the legislature, which is better suited to consider the

[4] *Graziano*, 323 N.W.2d at 236; *Ruble*, 193 N.W.2d at 503.

[5] *Graziano*, 323 N.W.2d at 237; *Ruble*, 193 N.W.2d at 503; *Deardorf*, 118 N.W.2d at 83.

opinions and circumstances of multiple stakeholders (not just the parties to this case), a change to area-variance law should happen, if at all, in the Iowa General Assembly. *See id.* at 383 (stating that "legislative reform is the best option" for changing the standards for area variances).

But even if this Court were inclined to tinker with its precedent, there is no standard that can be faithful to the statutory text ("unnecessary burden") and approving of the board of adjustment's decision in this case. If the justification here—that the Sauls want shade for their grilling patio—is enough to approve an area variance, then what area variance can't a board of adjustment grant? Zoning ordinances will simply become whatever the members of the board of adjustment believe they should be in any individual case. That's one way to do it, but it's not what Iowa Code sections 335.15(3) and 414.12(3) require.

IV. The Court should also grant further review to consider the Court of Appeals' definition of the "property at issue" and its application of the "unique circumstances" requirement.

When this Court in *Deardorf* said that to prove unnecessary burden, the applicant must show the "land in question cannot yield a reasonable return" if a variance is not granted, what is the "land in question"? The Sauls' property holds a large house and goes all the way to the shore of Clear Lake. The patio is just a small segment of the lot, as shown in the plot survey on appendix page 40 and in the photo at appendix page 37, yet the Court of Appeals considered the "property in question" to be the patio only. In other words, because the sun

shines on the patio at certain times of day, the Court of Appeals concluded the patio could not yield a reasonable rate of return if the Sauls were not allowed a variance to build a pergola (which was then 21 inches from Early's property) over the top of it.

The Court should clarify that the "property in question" cannot be whatever small segment of the property upon which the non-conforming structure is built; instead, it is the entire property. Otherwise, a variance can be granted for every setback requirement, as the owner will always be prohibited from "fully using" the land within the setback. *See* Slip Op. 8 (concluding that there is substantial evidence supporting the reasonable-return factor because the Sauls cannot "fully use" their patio without a pergola to provide shade).

The Court should also clarify that sunlight is not a "unique circumstance" under the second unnecessary-hardship factor. Nor is the plight of the landowner unique when the plight (lack of shade over a patio) is one that is not caused by the uniqueness of the land but instead by an intentional choice to build a patio within the setback distance.

That the Court of Appeals created a new standard for area variances is reason enough to grant further review in this case. But these other factors also demonstrate the need for this Court's attention to the law of variances.

Conclusion

Zoning ordinances, especially those that govern relations among neighbors and spark conflict between them, are not trivial. Neither is the case law governing them. The Court of Appeals' decision to change the standard for area variances marks a dramatic change in this Court's precedent and is something that this Court should review. Mary Earley therefore respectfully requests that the Court grant this petition, vacate the Court of Appeals' decision, reverse the district court's order, and annul the variance granted to the Sauls for a pergola that is 21 inches from Earley's property.

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Proof of Service

I hereby certify that on the 11th day of August, 2020, I electronically filed the foregoing Appellant's Petition for Further Review with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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Certificate of Compliance

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1@)(g)(1) because this brief contains 3,828 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Garamond 14 pt.

Dated: August 11, 2020

/s/ Lori McKimpson

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