IN THE IOWA SUPREME COURT

SUPREME COURT NO. 19-1672

MARY SUE EARLY AND BANKERS TRUST COMPANY AS TRUSTEES OF THE MARY SUE EARLY REVOCABLE TRUST DATED SEPTEMBER 26, 1994, Petitioners-Appellants,

vs.

BOARD OF ADJUSTMENT OF CERRO GORDO COUNTY, IOWA, Respondent-Appellee,

and

GREGORY A. SAUL, and LEA ANN SAUL, Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE JUDGE RUSTIN DAVENPORT
NO. CVCV071546

INTERVENORS-APPELLEES' RESISTANCE TO PETITION FOR FURTHER REVIEW

/s/ Mark S. Rolinger AT0006713
/s/ Adam J. Babinat AT0013359
Redfern, Mason, Larsen & Moore, P.L.C.
415 Clay Street, P.O. Box 627
Cedar Falls, IA 50613
Phone: (319) 277-6830
Fax: (319) 277-3531
Email: mrolinger@cflaw.com; babinat@cflaw.com
ATTORNEYS FOR INTERVENORS-APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

County Ordinances

Rules

STATEMENT RESISTING FURTHER REVIEW

Greg and Lea Ann Saul were granted a variance from the six-feet setback ordinance by the Cerro Gordo County Board of Adjustment on January 22, 2019. App. at 65. The variance allowed the Sauls to maintain a pergola constructed 21 inches away from their west side lot line onto a pre-existing patio. App. at 38, 53-55, 63-64. Adjoining the west side lot line of the Sauls' property is a fence on the Petitioners' property. App. at 53-55.

The Board gave several reasons for approving the Sauls' variance request; among them was how the pergola was built over a pre-existing patio. App. at 62-65. The district court affirmed the Board's decision after determining it comported with the "unnecessary hardship" test first described in *Deardorf v. Board of Adjustment of Planning and Zoning Commission of City of Fort Dodge*, 118 N.W.2d 78, 81 (Iowa 1962). *See* Dist. Ct. Order 3-4. The Court of Appeals then affirmed the districts courts' ruling after using the same "unneccessary hardship" test. *See* Slip. Op. 6-7.

Petitioners' claim the Court of Appeals' acknowledgment of the difference between a use variance and an area variance is grounds for further review, despite the Court of Appeals and the district court both applying the "unnecessary hardship" test. It is this acknowledgment that Petitioners allege creates an entirely new standard of review for area variances which "will be

used to justify an area variance in almost every case." Pet. for Further Review 16. Petitioners' contention, however, overstates the effect of the Court of Appeals' decision. Further review is not warranted.

I. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD TO REACH ITS DECISION.

Iowa Code Chapter 335 vests in the Board the authority to grant variances like the one at issue here. *See* Iowa Code Ann. § 335.1-.16 (West 2020). In determining whether a variance is warranted, the Board must determine whether the applicant satisfies the "unnecessary hardship" test created by the Iowa Supreme Court. *See Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 236 (Iowa 1982). This test provides:

> In order to establish unnecessary hardship, an application must show (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. A failure to prove a single element requires denial of the application. *Id.*

The Sauls constructed a pergola in 2018 atop a pre-existing patio. App. at 63-64. The patio and pergola were constructed approximately 21 inches away from the west side lot line. App. at 63. After the pergola was constructed, Cerro Gordo County Planning and Zoning Administrator John

Robbins advised the Sauls that a permit was required to build the pergola, and afforded them an opportunity to cure this defect. App. at 36-37.

Robbins subsequently denied the Sauls' zoning permit application due to the setback requirement. App. at 45-46. The Sauls' appealed and requested a variance. In their application for a variance the Sauls explained how the pergola was constructed within the same footprint as the pre-existing patio. App. at 51. Due to the existence of the patio, there was (and is) no other place to install the support posts necessary for the pergola's crossbeams. App. at 51. The Sauls' also noted how the "pergola will not change the spirit of the neighborhood or infringe on any neighboring property rights, use, or enjoyment of their land." App. at 51.

At the January 22, 2019 hearing on the Sauls' application, the Board heard testimony about how the pergola was designed, and constructed to be incorporated into the existing posts which were already installed as part of the patio's half-wall. App. at 63-64. It was also confirmed at the hearing that the patio pre-existed the pergola, and that the patio did not need a permit for its construction. App. at 64. These were among the facts considered by the Board in granting the variance request. App. at 62-65. The Board did not prepare written factual finding regarding its decision.

The Petitioners filed their Petition for Writ of Certiorari challenging the Board's decision on February 19, 2019. App. at 27-30. In a certiorari proceeding, relief "is strictly limited to questions of jurisdiction or illegality of the challenged acts." *Barnhill v. Iowa Dist. Court for Polk Cty.*, 765 N.W.2d 267, 272 (Iowa 2009) (internal quotations omitted). The Board's factual findings were not reviewable on certiorari, other than to determine whether said findings were supported by substantial evidence. *Smith v. City of Fort Dodge*, 160 N.W.2d 294, 295 (Iowa 1968). The reviewing court in certiorari proceedings must not substitute the inferior tribunal's judgment of the facts for its own, even if it disagrees with the conclusion, if there is substantial evidence to support the conclusion. *See Staads v. Board of Trs. of Fireman's Ret. Pension Fund of Sioux City*, 159 N.W.2d 485, 490 (Iowa 1968).

With this standard of review, the district court applied the "unnecessary hardship" test and annulled the writ of certiorari. Dist. Ct. Order 5. While the district court acknowledged that "differing and inconsistent conclusions can be drawn from the evidence presented to the Board of Adjustment," the district court found "[t]he Board could have concluded, based upon the evidence, that the Sauls established their burden of proof for undue hardship requiring a variance." Dist. Ct. Order 7.

Similarly, the Court of Appeals used the "unnecessary hardship" test in its review of this case. Slip Op. 6-8. And in doing so, the Court of Appeals found the district court "reviewed the evidence using the correct standard of review and properly applied the law." Slip Op. 9. The record shows both the district court and the Court of Appeals applied the correct standard of review.

II. THE COURT OF APPEALS' DECISION DID NOT CREATE A NEW STANDARD FOR AREA VARIANCES.

Petitioners contend further review is warranted, though, because the Court of Appeals' distinction between an area variance and a use variance creates a new standard which amounts to "whatever the board of adjustment wants to do." Pet. for Further Review 7 (internal quotations omitted). Petitioners drastically overstate the impact of the Court of Appeals' decision.

What the Court of Appeals did was note how there is an important distinction between an area variance and a use variance. *See* Slip Op. 6. "A use variance permits a use of land for purposes other than those prescribed by the zoning ordinance, and is based on the standard of unnecessary hardship." *City of Johnston v. Christenson*, 718 N.W.2d 290, 299 fn. 4 (Iowa 2006). Conversely, area variances have no relation to a change in use. *See id.* As this Court has previously acknowledged, "[A]n area variance presumes the legality of the use that prompts the need for a variance from dimensional

restrictions." *Id.* at 300. "When presented with an application for an area variance, a board of adjustment can normally presume the contemplated use is permitted, and consequently, a determination of the legality of the use is unnecessary and collateral to the board's primary function to determine the need for the variance." *Id.*

In other words, the first prong of the "unnecessary hardship" test—whether the land in question cannot yield a reasonable return if *used* only for a purpose allowed in that zone—can be viewed through a less onerous lens for an area variance because the board of adjustment can "presume the contemplated use is permitted." *Id*. Petitioners exaggerate the impact of this less onerous lens, because even with it the Court of Appeals noted how an application must still show unnecessary hardship if the request for a variance to be granted. *See* Slip Op. 6.

Here, the Court of Appeals reviewed each element of the "unnecessary hardship" test. For the first prong it assumed the contemplated use was permitted, but still conducted an analysis to determine "whether denial of the variance would result in 'the infringement of peaceful enjoyment' of the property such that it is 'equal to a denial of all beneficial use.'" Slip Op. 7 (citing *Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 542 (Iowa 1984)). From there it reviewed the second and third

prong of the test before ultimately concluding substantial evidence existed to support the Board's decision, that the district court applied the correct standard of review, and properly applied the law. Slip Op. 8-9.

Petitioners decry the Court of Appeals' decision as a rubber stamp for local boards of adjustment to approve any area variance. What Petitioners fail to recognize is how, even if it is assumed the Court of Appeals created a new standard, an applicant must still prove each prong of the "unnecessary hardship" test. By focusing on the Court of Appeals' comment on the distinction between the two types of variance (a distinction previously recognized by this Court), Petitioners ignore how the Court of Appeals was required to review each prong of the "unnecessary hardship" test in order to affirm the Board's decision in this case. *See* Slip Op. 8. And just as the Court of Appeals was required to review each prong of the "unnecessary hardship" test, so too do boards of adjustment through the State of Iowa.

The unusual circumstances of this case also reflect why the Petitioners' fears are misguided. Petitioners have repeatedly tried to characterize the Sauls' justification for the variance as, "We already built it, so we would like to keep it." Pet. for Further Review 12. However, the facts are more nuanced. After all, the Board heard evidence that the patio pre-existed the pergola, that the patio was 21 inches from the west side lot line,

that there was nowhere else to construct the pergola due to the patio and the fence which sat on the border between the two properties, and decided that the patio did not require a variance. *See* App. 51, 63-64. Without the variance, no other appurtenances (such as the pergola) could be constructed in this portion of the Sauls' property due to the pre-existing condition. *See* Cerro Gordo Cty. Ordinance No. 15, art. 22(A) (revised Dec. 5, 2019).

This case is also a stark contrast from the other instances where the Iowa Supreme Court rejected requests for area variances. While this case involved construction atop an existing structure within the setback area, each of the cases Petitioners' cite to in their Petition involved requests for area variances in order to construct entirely new structures. *Graziano*, 323 N.W.2d at 235 (involving a requested area variance for applicant to construct a new duplex); *City of Des Moines v. Ruble*, 193 N.W.2d 497, 503 (Iowa 1972) (involving a requested area variance for the construction of a new residential home); *Deardorf*, 118 N.W.2d at 80 (involving a requested area variance for applicant to construct a seven-story building rather than a three-story building). Prior precedent still serves as a hindrance for boards of adjustment from arbitrarily granting area variances, particularly for new construction. The Court of Appeals' decision does not materially alter or impact prior precedent on the issue of area variances.

III. THE COURT OF APPEALS PROPERLY DETERMINED THE "LAND IN QUESTION" WAS THE AREA SUBJECT TO THE VARIANCE REQUEST.

Petitioners also seek further review for this Court to make the determination as to what "the land in question" is under the "unnecessary hardship" test. *See* Pet. for Further Review. 19-20. As the Petitioners' note, the Court of Appeals considered the "land in question" to be the patio on which the pergola was constructed. Petitioners' contend this was an error, and that the Court of Appeals' should have looked to analyze whether the entire property satisfied the "unnecessary hardship" test. *See id.* at 20.

Petitioners' contention that the "land in question" cannot be "whatever small segment of the property" omits a pertinent detail of the Sauls' application. Here, the Sauls' only sought a variance over this specific portion of the property for the express purpose to construct a pergola over a pre-existing structure. App. 41-42, 48-49. The Sauls' variance request did not impact any other portion of their property; as such, the Court of Appeals properly considered only the pertinent portions of the property (i.e., the patio). Petitioners fail to elaborate how it would be appropriate to evaluate an area variance such as this by reviewing the entirety of the subject property. There is no reason for further review to address this issue.

CONCLUSION

The granting of this area variance was supported by substantial evidence. This was a fact recognized by both the district court and the Court of Appeals, and each reviewing court used the correct standard—the "unnecessary hardship" test—to reach their conclusions. Despite this, Petitioners seek further review based on a supposed "new standard" created by the Court of Appeals' decision. Yet, for the reasons set forth above, Petitioners' concern is misguided and ignores the unique factual circumstances of this case. Thus, Greg and Lea Ann Saul respectfully request the Court deny Petitioners' Petition for Further Review and allow the Court of Appeals' decision to stand.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS

The brief complies with the typeface requirements and type-volume limitations of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

[X] This brief has been prepared in a proportionally spaced typeface using Times New Roman in font size 14 and contains 2,209 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1); OR

[ ] This brief has been prepared in a monospaced typeface using _____ in _____ and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

Dated August 20, 2020.

/s/ Adam J. Babinat AT0013359
Redfern, Mason, Larsen & Moore, P.L.C.
415 Clay Street, P.O. Box 627
Cedar Falls, IA 50613
ATTORNEYS FOR INTERVENORS-APPELLEES

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Intervenor-Appellee's Proof Brief was served on the 20th day of August, 2020, electronically upon the clerk of the clerk of the Supreme Court pursuant to Iowa R. Civ. P. 1.442(2) and that all of the below parties in this case electronic filers.

Appellant/Petitioner: Mary Sue Early and Bankers Trust Company as Trustees of the Mary Sue Earley Revocable Trust Dated September 26, 1994	Scott D. Brown Brown, Kinsey, Funkhouser & Lander, P.L.C. 214 North Adams PO Box 679 Mason City, IA 50402 Phone: 641-423-6223 sdbrown@iabar.org
Appellee/Respondent: Board of Adjustment for Cerro Gordo County, Iowa	Randall Nielson Pappajohn, Shriver, Eide & Nielson, P.C. 100 East State Street Mason City, IA 50401 Phone: 641-423-4264 nielsen@pappajohnlaw.com Carlyle D. Dalen Cerro Gordo County Attorney 220 North Washington Mason City, IA 50401 cdalen@cgcounty.gov

/s/ Adam J. Babinat AT0013359
Redfern, Mason, Larsen & Moore, P.L.C.
415 Clay Street, P.O. Box 627
Cedar Falls, IA 50613
ATTORNEYS FOR INTERVENORS-APPELLEES