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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19–1672

Cerro Gordo County Case No. CVCV071546

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

VS.

BOARD OF ADJUSTMENT OF CERRO GORDO COUNTY, IOWA

AND

GREGORY A. SAUL AND LEA ANN SAUL (INTERVENORS)

APPEAL FROM THE IOWA DISTRICT COURT FOR
CERRO GORDO COUNTY
THE HONORABLE JUDGE RUSTIN DAVENPORT

APPELLANT'S FINAL BRIEF

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I certify that on this 11th day of February, 2020 I served the Appellant's Final Brief by filing the same in the electronic document management system (EDMS) for the Iowa Supreme Court to the attorneys for the Appellees in this matter listed below and no party has been exempted therefrom.

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I certify that on this 11th day of February, 2020, I filed this document, Appellant's Final Brief, by electronically filing the same through the Iowa Supreme Court EDMS.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. STANDARD OF REVIEW AND PRESERVATION OF ERROR.

AUTHORITIES:

Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988)
Denison Mun. Util's v. Iowa Workers' Compensation Comm'r, 857 N.W.2d 230, 234 (Iowa 2014)
Fisher v. Chickasaw Cnty., 553 N.W.2d 331, 333 (Iowa 1996)

II. THE DISTRICT COURT ERRED BY AFFIRMING THE BOARD OF ADJUSTMENT'S GRANTING OF A VARIANCE TO THE INTERVENORS AND THE WRIT SHOULD HAVE BEEN SUSTAINED

A. THE LAW

AUTHORITIES

Iowa Code § 414.12(3)
Bd. of Adjustment v. Ruble, 193 N.W.2d 497, 503 (Iowa 1972)
Deardorf v. Bd. of Adjustment, 118 N.W.2d 78, 83 (Iowa 1962)
Graziano v. Bd. of Adjustment, 323 N.W.2d 233, 237 (Iowa 1982)
Greenawalt v. Zoning Bd. of Adjustment of City of Davenport, 345 N.W.2d 537, 541–542 (Iowa 1984)
Office of Consumer Advocate v. Iowa State Commerce Comm'n, 432 N.W.2d 148, 154 (Iowa 1988)
Stratford Holding v. Des Moines, 2018 WL 739271, at *5 (Iowa App. 2018)
Cerro Gordo Cnty. Ord. No. 15, Art. IV

B. THE INTERVENORS DID NOT SHOW THAT THE PROPERTY IN QUESTION CANNOT YIELD A REASONABLE RETURN IF USED ONLY AS A RESIDENTIAL DWELLING

AUTHORITIES

Des Moines v. Bd. of Adjustment, 448 N.W.2d 696, 698–99 (Iowa App. 1989)

Graziano v. Bd. of Adjustment, 323 N.W.2d 233, 237 (Iowa 1982)
Greenawalt v. Zoning Bd. of Adjustment of City of Davenport, 345 N.W.2d 537, 543 (Iowa 1984)

C. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD

AUTHORITIES

Graziano v. Bd. of Adjustment, 323 N.W.2d 233, 237 (Iowa 1982)
Greenawalt v. Zoning Bd. of Adjustment of City of Davenport, 345 N.W.2d 537, 542–543 (Iowa 1984).
USCOC of Greater Iowa v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F.3d 817, 824 (8th Cir. 2006)
3 Anderson, *American Law of Zoning* § 18.17, at 179–83

D. THERE ARE NO UNIQUE CIRCUMSTANCES JUSTIFYING VARIANCE

AUTHORITIES

83 Am. Jur. 2d §§ 791 & 793 (2003)
POA Co. v. Findlay Tp. Zoning Hearing Bd., 713 A.2d 70 (Pa. 1998)
Reid v. Zoning Bd., 670 A.2d 1271 (Conn. 1996)
Rowe v. North Hampton, 553 A.2d 1331 (N.H. 1989)
Umerley v. People's Counsel for Baltimore Cnty., 672 A.2d 173 (Md. App. 1996)
Zoning Bd. v. Pasha, 544 A.2d 1101 (Pa. 1988)

E. THE DECISION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS

AUTHORITIES

Office of Consumer Advocate v. Iowa State Commerce Comm'n, 432 N.W.2d 148, 154 (Iowa 1988)

III. CONCLUSION

STATEMENT OF THE CASE

Under Iowa Rule of Appellate Procedure 6.103 and Iowa Rule Civil Procedure 1.1412, the applicants for writ of certiorari appeal the decision of the Iowa District Court for Cerro Gordo County entered September 19, 2019 in Case No. CVCV071546 which decision annulled[1] the writ issued to the Board of Adjustment for Cerro Gordo County from its decision granting a variance to the intervenors on January 22, 2019.

COURSE OF PROCEEDINGS

In a letter dated November 21, 2018, John Robbins, the Cerro Gordo County Zoning Administrator ("the Administrator") denied an application for a permit to construct a pergola above a patio area abutting the home of Lea Ann and Greg Saul which exceeded the setback requirement of the Cerro Gordo County Zoning Ordinance ("the Zoning Ordinance"). Return to the Writ of Certiorari and Verification (hereinafter cited as "Return"), p. 10–11. App. at 45-46. The Sauls filed an appeal of that denial on November 30, 2018 seeking a variance from the Zoning Ordinance. Return, p. 13–16. App. at 48-51. A public hearing was held on January 22, 2019 by the Board of Adjustment for Cerro Gordo County ("the Board"). Return, p.

[1] The district court's order "affirms" the decision of the Board of Adjustment and "denies" the petition but Iowa Rule of Civil Procedure 1.1411 limits the judgment from such a proceeding to "annulling the writ or sustaining it." Iowa R. Civ. P. 1.1411. *See*, Order dated September 19, 2019, p. 8.

27–43. App. at 62-78. The Board granted a variance from the Zoning Ordinance at the hearing. Return, p. 30. App. at 65. On February 19, 2019 the Appellants, as trustees of the trust which owns the property adjacent to the pergola, filed a Petition for Writ of Certiorari challenging the legality of the Board's decision. Pet. for Writ of Cert. App. at 27. The Petition was "denied" by the Iowa District Court for Cerro Gordo County on September 19, 2019. Order dated September 19, 2019, p. 8. The Appellants timely filed a Notice of Appeal on October 1, 2019. App. at 126.

STATEMENT OF THE FACTS

The Sauls live in a residential neighborhood in Cerro Gordo County, near Clear Lake, Iowa which is zoned as "R-3, Residential"—a designation suitable for single-family dwellings. Petitioner's Ex. No. 121. App. at 128. In the fall of 2018, the Sauls hired a construction worker to build a pergola[2] above an already-existing patio area which extended off the west side of their home and into the lot's side yard. Return, p. 28. App. at 63. The setback requirement under the Zoning Ordinance required six feet (6') of side yard width for the lot. Return, p. 47. App. at 82. Where the pergola stands, the side yard is reduced to one foot, nine inches (1' 9'')—a distance in violation of the Zoning Ordinance. Return, p. 28. App. at 63.

[2] A pergola can be defined as "a structure usually consisting of parallel colonnades supporting an open roof of girders and cross rafters." The Merriam-Webster.com Dictionary, *available at* https://www.merriam-webster.com/dictionary/pergola?src=search-dict-box.

To the west, and in the direction the pergola and patio jut, is another single family dwelling owned by the Mary Sue Earley Revocable Trust Dated September 26, 1994. Petition, p. 1. App. at 27. While there is a fence between the pergola and the residence on the Earley property, the posts supporting the pergola are approximately twice as tall as the fence, making the structure loom conspicuously over the lot line. Return, p. 19. App. at 54. Notice of the application for variance was mailed to Mary Sue Earley (and not to the other trustee) at a Key Largo, Florida address. Return, p. 21–22. App. at 56-57.

The construction of the pergola was done without first obtaining a zoning permit and the after-the-fact permit application was correctly denied by the Administrator as its construction violated the setback requirement. Return, p. 10. App. at 45. The Sauls then appealed that decision to the Board. Return, p. 13–16. App. at 48-51. The Application/Appeal Form promulgated by the Board lays out the legal requirements for the granting of a variance which, in relevant part, explains that hardship must be shown and that:

> "hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the provisions of the Ordinance, the plight of the landowner is due to circumstances unique to his property not created by the

> landowner; and the variance, if granted will not alter the essential character of the locality."

Return, p. 15. App. at 50. The applicants, despite the hardship definition provided, identified zero facts upon which the Board could grant the variance on the issues of reasonable return and uniqueness of the property. Return, p. 15. App. at 50.

The Administrator, who had denied the late-filed application for permit, could likewise point to no evidence to support the idea that the construction of the pergola could somehow fit into the requirements for the granting of a variance. Return, p. 24. App. at 59. In his letter to the Board for purposes of explaining the situation prior to the public hearing, he wrote: "**There is an existing reasonable use of the property. The Zoning Ordinance is not causing a hardship by limiting the pergola**." Return, p. 24. App. at 59 (emphasis added).

Despite the Administrator's determination that the Zoning Ordinance was not causing a hardship, the Sauls' inability to identify how the ordinance was causing a hardship, and the lack of evidence presented at the hearing, the Board approved the variance. Return, p. 30. App. at 65. To do so, it had to determine that the ordinance caused a hardship to the Sauls such that they had essentially lost all use of the property. Return, p. 30. App. at 65.

No fact was presented which would establish anything even approaching the required finding. The reasons given at the Board's public hearing were that:

- Although the construction of the patio and pergola violated the setback requirement, "this was constructed already."
- "It looks nice . . ."
- "the neighbors haven't complained . . ."
- "It is very nice."

Return, p. 28–29. App. at 63-64.

There was nothing before the Board which could have justified a finding of hardship on the lack of reasonable return or special circumstances issues. These issues were then properly presented to the district court through a writ of certiorari. Petition, App. at 27. No evidence was before the Board that was not before the district court on the writ of certiorari. The district court approved the hardship finding despite the dearth of evidence. Order dated September 19, 2019, p. 6–7. The decision seems to assume there was evidence of hardship before the Board. Order dated September 19, 2019, p. 7. (justifying the inability to identify evidence of lack of reasonable return by stating: "Iowa law does not require the Board to account for every fact they accepted or rejected in the record."). With no evidence to support its conclusion, the district court surprisingly ruled that

there was (or perhaps, must have been) *substantial* evidence to support the finding of hardship.

ROUTING STATEMENT

The Appellants request that the Supreme Court transfer this case to the Iowa Court of Appeals based on the criterion found in Iowa Rule of Appellate Procedure 6.1101(3)(a).

I. STANDARD OF REVIEW AND PRESERVATION OF ERROR.

Review from a district court's judgment regarding a certiorari petition is for errors at law and, when the district court's findings of fact are not supported by substantial evidence, the inferior tribunal acted illegally and reversal is necessary. *Denison Mun. Util's v. Iowa Workers' Compensation Comm'r*, 857 N.W.2d 230, 234 (Iowa 2014) (citing *Fisher v. Chickasaw Cnty.*, 553 N.W.2d 331, 333 (Iowa 1996) & *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 138 (Iowa 1988)). Error was preserved by the filing of a Notice of Appeal within the time allowed by Iowa Rule of Appellate Procedure 6.101(1)(b). App. at 126.

II. THE DISTRICT COURT ERRED BY AFFIRMING THE BOARD OF ADJUSTMENT'S GRANTING OF A VARIANCE TO THE INTERVENORS AND THE WRIT SHOULD HAVE BEEN SUSTAINED.

A. THE LAW

The Iowa Code gives a Board of Adjustment the power to grant variances to zoning ordinances where such variance will not be contrary to the public interest and where the granting thereof will not result in unnecessary hardship. Iowa Code § 414.12(3). "[T]he power to grant variances should be used sparingly." *Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 237 (Iowa 1982) (citing *Bd. of Adjustment v. Ruble*, 193 N.W.2d 497, 503 (Iowa 1972) & *Deardorf v. Bd. of Adjustment*, 118 N.W.2d 78, 83 (Iowa 1962)). A Board of Adjustment acts "illegally," thereby justifying the sustaining of a writ of certiorari challenging the Board's action, where a variance is granted but the applicant fails to make the "unnecessary hardship" showing. *Id.* (citing *Ruble*, 193 N.W.2d at 502 (Iowa 1972) & *Deardorf*, 118 N.W.2d at 80 (Iowa 1962)). The applicant must prove hardship by substantial evidence. *Greenawalt v. Zoning Bd. of Adjustment of City of Davenport*, 345 N.W.2d 537, 541–542 (Iowa 1984). The Board also acts illegally if its decision is arbitrary and capricious. *Stratford Holding v. Des Moines*, 2018 WL 739271, at *5 (Iowa App. 2018) (citing *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 154 (Iowa 1988)).

The elements of hardship appear in the Zoning Ordinance, Iowa case law, and even the Application/Appeal form signed by the Sauls challenging

the denial of their permit. *Greenawalt*, 345 N.W.2d at 541–542 (Iowa 1984) (citing *Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 236 (Iowa 1982); *Bd. of Adjustment v. Ruble*, 193 N.W.2d 497, 504 (Iowa 1972); *Deardorf v. Zoning Bd. of Adjustment*, 118 N.W.2d 78, 81 (Iowa 1962)); Return, p. 15. App. at 50. The Zoning Ordinance even defines "variance" with reference to hardship. Cerro Gordo Cnty. Ord. No. 15, Art. IV. App. at 129. (defining "variance" as "[a] device which grants a property owner relief from certain provisions of a zoning ordinance when, because of unusual topography or other extenuating circumstances, compliance would result in a *particular hardship* upon the owner.") (emphasis added). In all of these sources, the hardship showing is the same and requires proof that:

> 1. The property cannot yield a reasonable return if used for a purpose allowed by the zone in which it is found;
>
> 2. The plight of the landowner is due to unique circumstances; and
>
> 3. The requested variance does not alter the essential character of the locality.

Cerro Gordo Cnty. Ord. No. 15, Art. IV. App. at 129; *Greenawalt v. Zoning Bd. of Adjustment of City of Davenport*, 345 N.W.2d 537, 541–542 (Iowa 1984); Return, p. 15. App. at 50. A failure to prove any one of these

elements requires denial of the application. *Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 236 (Iowa 1982) ("it is clear that [the zoning ordinance] requires a showing of all its conditions. They are linked by the 'and' conjunction.").

The applicants failed to prove by substantial evidence that their application met all three elements and the district court's upholding of that decision was error because it applied a legal standard not applicable to the case and did not have the necessary evidence before it. Order dated September 19, 2019, p. 6–7. The Order annulling the writ discusses the "reasonable return" element but the incorrect legal standard is applied and the court found substantial evidence where no evidence was presented to meet the correct (or even incorrect) standard. Order dated September 19, 2019, p. 6–7.

B. THE INTERVENORS DID NOT SHOW THAT THE PROPERTY IN QUESTION CANNOT YIELD A REASONABLE RETURN IF USED ONLY AS A RESIDENTIAL DWELLING

The burden was on the applicants for the variance to produce evidence that their property had essentially been taken and rendered useless as a residential dwelling. *Greenawalt*, 345 at 543 (Iowa 1984) (a lack of reasonable return is tantamount to "a denial of all beneficial use"). In their

application, the applicants answered as follows when asked to identify facts which could meet this requirement:

1. The land in question cannot yield a reasonable use for the following reasons:

Return, p. 15. App. at 50.

Despite no evidence on this issue being presented to the Board or to the district court on the writ of certiorari, the district court saw this as "the closest issue." Order dated September 19, 2019, p. 6. In that part of the decision, the district court itself begins with a recognition that the Board could "have *easily* concluded that the Saul's property yields a reasonable return without any pergola." Order dated September 19, 2019, p. 6. (emphasis added). That is to say, the Board could have easily denied the application on this basis. This thinking is in line with the Administrator who, in a memorandum to the Board dated ten days before the public hearing on the variance, advised: "**There is an existing reasonable use of the property. The zoning ordinance is not causing a hardship by limiting the pergola.**" Return to Writ, p. 24. App. at 59. (emphasis added). In other words: there was and remains no basis for granting the variance.

There are simply no facts upon which the Board or the district court could have relied to grant and uphold the variance. Perhaps worse, the legal standard on which the district court relied was well wide of the mark.

C. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD

The district court reasoned, without reference to evidentiary support, that "[t]he Board could conclude that a reasonable return could not be obtained on the property, without the covering of the patio and side yard area with the pergola." Order dated September 19, 2019, p. 7. The district court refers to (but does not (and could not) identify) evidence that "the Saul's [sic.] could not fully utilize their side yard area, which would diminish the value of the property." Order dated September 19, 2019, p. 6–7. That assertion is hypothetical, absent from the record, and irrelevant because*, even if that evidence existed,* it could not justify the granting of the variance on this issue as this is not the legal standard the district court was to apply. *See, e.g.*, *Des Moines v. Bd. of Adjustment*, 448 N.W.2d 696, 698–99 (Iowa App. 1989) (denying appeal by city challenging adjustment board's granting of use variance to applicant salvage yard on the issue of reasonable return even where applicant had expert witness testify that the highest and best use of property was as salvage yard, stating "**A reasonable return is not shown by proving a greater profit can be made if the variance is**

granted. Appellant has applied the wrong standard.") (emphasis added). *See also*, *Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 237 (Iowa 1982) (the legal standard is "**not that more profit could be made if a variance is granted. The standard is that a reasonable return *could not* be garnered from a permitted use.**") (emphasis added). That is, even if some evidence[3] were presented that the lack of a pergola would decrease the value of the property or hurt the resale thereof, the Board still had to deny the application because a reasonable return could be garnered from the property if used as a residential dwelling—its permitted use.

Tellingly, the district court's decision made no mention of the law on the issue of reasonable return. The law is crystal clear on the legal standard to be applied as described in *Greenawalt v. Board of Adjustment*, which decision is primary, mandatory, and binding precedent. *Greenawalt v. Zoning Bd. of Adjustment of City of Davenport*, 345 N.W.2d 537 (Iowa 1984). The application of the erroneous legal standard becomes abundantly clear when examining the way in which the Iowa Supreme Court defines and understands the concept of "cannot yield a reasonable return" in *Greenawalt*

[3] No such evidence appears in the record. The Appellees presented no evidence whatsoever (e.g. an expert opinion about the value of the Sauls' Property with and without the pergola) upon which the Board or district court could rely to grant (or affirm the granting of) the variance. Again, however, the case law is clear that such an expert would have had to testify that there was absolutely no use for the property *for any purpose* allowed in that zone, not simply that the lack of a pergola decreased the value of the property—the incorrect legal standard applied at the district court level.

as compared to the understanding shown in the district court's order. *Compare*, *Greenawalt v. Zoning Bd. of Adjustment of City of Davenport*, 345 N.W.2d 537, 542–543 (Iowa 1984) *with* Order dated September 19, 2019, p. 6–7. The Iowa Supreme Court, quoting a treatise, states:

> An explanation of the meaning of "cannot yield a reasonable return" is set forth in 3 Anderson § 18.17, at 179–83 (emphasis added):
>
>> **A zoning regulation imposes unnecessary hardship if property to which it applies cannot yield a reasonable return from *any* permitted use.** Lack of a reasonable return may be shown by proof that the owner has been **deprived of *all* beneficial use of his land.** All beneficial use is said to have been lost **where the land is not suitable for any use permitted by the zoning ordinance.** For example, where land is located in a district limited to residential or commercial use, and where lack of transportation, sparse development, and the refusal of lending institutions to advance money for residential or commercial uses render development consistent with the ordinance unfeasible, unnecessary hardship is said to result from literal application of the ordinance.
>>
>> . . .
>>
>> **An ordinance deprives a landowner of a reasonable return if all "productive use of the land" is denied. Such deprivation is shown where the land in issue has so changed that the uses for which it was originally zoned are no longer feasible.**
>>
>> . . .
>>
>> The burden of proving that a literal application of the ordinance will deprive the owner of a reasonable return is upon the owner of the land in question. No variance for unnecessary hardship may be granted if he fails to demonstrate loss of beneficial use. **His burden is not sustained if it is shown the land is zoned for**

> **residential use, and that it is yielding a substantial return from such permitted use. It is not sufficient to show that the value of his land has been depreciated by the zoning regulations, or that a variance would permit him to maintain a more profitable use.**

Greenawalt, 345 N.W.2d at 542–43 (Iowa 1984) (citing 3 Anderson, *American Law of Zoning* § 18.17, at 179–83) (emphasis added).

As stated above, the district court seems to have relied on the idea that there *must have been* some evidence before the Board that the lack of a pergola would diminish the value of the property and therefore eliminate any reasonable return on the property. Order dated September 19, 2019, p. 6–7. (stating there was evidence before the Board on the issue of diminution of value where no such evidence appears in the record). Even in *Greenawalt* there was some evidence that, without variance from the zoning ordinance, the property owner would incur costs and a possible diminution in value of his property. *Greenawalt*, 345 N.W.2d at 542 (Iowa 1984) (without 6-foot high fence, the property owner would "suffer adverse economic impact due to vandalism and inability to obtain insurance").

In *Greenawalt*, in response to the argument that the application of the zoning ordinance to the property would decrease the value of the property, the Iowa Supreme Court referred to an earlier decision even more on point with the situation presented by the case before this Court. *Id.* (citing

Graziano v. Bd. of Adjustment, 323 N.W.2d 233, 237 (Iowa 1982). In *Graziano v. Board of Adjustment*, the Board of Adjustment, the district court, and the Iowa Court of Appeals all determined that a variance should be granted to the owner of property attempting to build a duplex in a single-family, residential zone because it would be more economically desirable to have a duplex and that the current real estate market favored duplexes in that area and, therefore, there was an "obvious economic hardship" and "granting a variance would allow intervenor 'to make a reasonable return on his property.'" *Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 237 (Iowa 1982) (quoting district court and appellate court rulings).

The Iowa Supreme Court admonished all three tribunals for failing to apply the proper standard: "Obviously, the legal standard is not that more profit could be made if a variance is granted. The standard is that a reasonable return could not be garnered from a permitted use." *Id.* at 237. Like the case before this court, the intervenors in *Graziano* presented no evidence whatsoever that the land could not yield a reasonable return. *Id.* In both situations, the burden being on the applicant for the variance and the intervenor at the district court level, the evidence that it could yield a reasonable return was apparent simply because "a single-family residence could be built" on the property. *Id.* The same applies to the case before this

appellate court: the property yields a reasonable return because it can be used as a single-family dwelling. "The use of [the] land can remain exactly the same as it is" without the pergola and therefore the property owner does not lose all beneficial use of the land. *USCOC of Greater Iowa v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 824 (8th Cir. 2006). The authority in favor of the argument that an incorrect legal standard was applied is superabundant and at odds with the district court's decision. Order dated September 19, 2019, p. 6–7.

In their trial brief, the Intervenors also failed to identify any evidence whatsoever which would justify the finding that they had completely lost the use of their property. Intervenors' Trial Br., p. 7–9. App. at 97-99. They did attempt to skirt the issue by arguing that the legal standard could be applied only to a portion of a parcel—an argument not supported by any authority. Intervenors' Tr. Br., p. 7. App. at 97. They also made the argument that preventing the construction of the pergola would deprive the Sauls of the peaceful enjoyment of the property. Intervenors' Tr. Br., p. 8. App. at 98. This flies in the face of *Greenawalt*, which assumed, for the sake of argument, that infringement of peaceful possession of a personal residence could amount to interference with a fundamental right, but that such an infringement would not change the legal standard—"the

infringement of peaceful enjoyment must equal a denial of *all* beneficial use." *Greenawalt*, 345 N.W.2d at 543 (Iowa 1984). Wherever anyone looks, they cannot find evidence of a lack of reasonable return without variance and the district court's decision is plainly without evidentiary support.

D. THERE ARE NO UNIQUE CIRCUMSTANCES JUSTIFYING VARIANCE

As was the case on the issue of reasonable return, the applicants could present no evidence that their plight was due to special circumstances and, in their application appealing the denial of their request for permit, admitted there was no such evidence:

2. What is unique about this property compared to other properties in the vicinity?

None

Return, p. 15. App. at 50. Of course, there is nothing unique about the Sauls' residence which would allow the Board or district court to determine that this element of hardship was met unless the desire for shade is a circumstance unique only to the Sauls.

There is little Iowa case law on the uniqueness requirement. Outside of Iowa, the requirement has been described as:

> "In other words, a zoning authority must determine whether the subject property is unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness or peculiarity of the property causes a zoning provision to have a disproportionate impact upon the property. More specifically, hardship must be shown to be unique or peculiar to the property for which a variance is sought, as distinguished from a hardship arising from the impact of zoning regulations on an entire district. It is the uniqueness of the land, not the plight of the owner, which determines whether a hardship exists.

83 Am. Jur. 2d § 791 (2003) (citing *Umerley v. People's Counsel for Baltimore Cnty.*, 672 A.2d 173 (Md. App. 1996); *Reid v. Zoning Bd.*, 670 A.2d 1271 (Conn. 1996); *POA Co. v. Findlay Tp. Zoning Hearing Bd.*, 713 A.2d 70 (Pa. 1998); and *Rowe v. North Hampton*, 553 A.2d 1331 (N.H. 1989)). The unique character of the property must still be such that, without a variance, the property could not be put to any reasonable use. *Id.* at § 793 (2003) (citing *Zoning Bd. v. Pasha*, 544 A.2d 1101 (Pa. 1988)).

No evidence was presented that the Sauls' property is different, special, or unique from the other property in the area. Because of that, no substantial evidence could have been presented and the district court's annulling of the writ of certiorari on this count cannot stand.

E. THE DECISION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS

Because the Board did not apply the correct legal standard on the issue of reasonable return and approved a variance without evidence which

could have satisfied that standard or the uniqueness requirement, the Board's decision was arbitrary and capricious. Those terms are "practically synonymous" and both are taken to mean that the Board acted without regard to the law or facts of a matter. *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 154 (Iowa 1988) (citations omitted). The argument in favor of such a finding mirrors that of correcting errors at law and showing a lack of substantial evidence supporting the Board's decision described above. This appellate court could determine, even if it somehow found the district court's decision sound, that the Board's action was arbitrary and capricious based on the same lack of evidence and misapplication of the law described above. *See id.* at 154 & 156.

III. CONCLUSION

The Board did not refer to the law which required there be a much greater showing of hardship than was presented. The district court ignored mandatory and controlling Iowa Supreme Court precedent as it relates to reasonable return or the unique character of the property to come to a decision which is simply incorrect. The wrong legal standard was applied and substantial evidence did not support the Board's decision, thereby making it arbitrary and capricious. There is no evidence to justify a finding

of hardship. Because of that, the decision of the Board is illegal and the district court's decision must be overturned.

REQUEST FOR ORAL ARGUMENT

The Appellants hereby request to be heard in oral argument.

CERTIFICATE OF COSTS

I hereby certify that the actual cost of printing the foregoing Appellant's Final Brief was in the sum of $0.00.

Respectfully Submitted,

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