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' FINAL BRIEF

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STATEMENT OF THE CASE

The Sauls agree with the Petitioners' Statement of the Case.

STATEMENT OF THE FACTS

The facts surrounding this writ of certiorari proceeding are largely not in dispute. Gregory and Lea Ann Saul own the real property locally known as 3676 240th Street, Clear Lake, Iowa. Order p. 1; *see* App. at 17. West of the Sauls' property is real estate locally known as 3670 240th Street, Clear Lake, Iowa, which is owned by the Petitioners. Order p. 1; *see* App. at 17.

Prior to 2018, a brick patio was constructed on the Sauls' property. App. at 63-64. The patio is surrounded by a brick half-wall. App. at 53-55. The entire patio structure was constructed less than 21 inches away from the west side lot line. App. at 38, 53-55. Adjoining the west side lot line of the Sauls' property is a fence which sits on the Petitioners' property. App. at 53-55.

In 2018, the Sauls asked Mark DeMaris to construct a pergola[1], and asked him to incorporate the pergola into the existing patio structure. App. at 63-64. The pergola was constructed approximately 21 inches away from the west side lot line. App. at 38 and 63. The Sauls' property is zoned in an "R-

[1] The Sauls have no dispute with the definition used for the word "pergola" contained in footnote 2 of Petitioners' Brief.

3" zoning district. App. at 45. An "R-3" zoning designation requires a six-foot side yard setback. App. at 128.

Cerro Gordo County Planning and Zoning Administrator John Robbins sent the Sauls a letter dated November 6, 2018 which informed the Sauls a zoning permit[2]—which was not obtained at the time of construction—was required to build their pergola. App. at 36-37. Robbins letter provided the Sauls 10 days to file a curative zoning permit application. App. at 36. Lea Ann Saul noted via an email to Robbins on November 15, 2018 that the failure to obtain a permit was inadvertent, and that a zoning permit application had been deposited with United Parcel Service. App. 44. Cerro Gordo County received the Sauls' zoning permit application on November 20, 2018. App. at 38-42.

Robbins denied the Sauls' zoning permit application due to the setback requirement. App. at 45-46. The Sauls timely appealed Robbins' decision to the Cerro Gordo County Board of Adjustment (the "Board").

[2] A "zoning permit" is a defined term within the Cerro Gordo County Zoning Ordinance which means: "Written statement issued by Cerro Gordo County authorizing the construction and use of land, buildings, or structures consistent with the terms of the Cerro Gordo County Zoning Ordinance." Cerro Gordo Cty. Ordinance No. 15, art. 4 (revised Dec. 5, 2019), https://www.cgcounty.org/home/showdocument?id=466 [hereinafter "Cerro Gordo Cty. Ordinance No. 15"]. It possesses the same definition under the Cerro Gordo County Zoning Ordinance as the term "building permit" does. *See id.*

App. at 48-64. In the application, the Sauls explained how the pergola was constructed within the same footprint as the preexisting patio. App. at 51. Due to the existence of the preexisting patio, there was (and is) no other place to install the support posts necessary for the pergola's crossbeams. App. at 51. Lastly, the Sauls noted 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.

Sauls' appeal was set for a January 22, 2019 hearing, with notice provided to the public and all interested property owners on January 11, 2019. App. at 56-58. The Board received a copy of the Sauls' application, photographs of the pergola in question, and a letter from Robbins. App. at 48-52, 59-60. Robbins' letter stated, "While the pergola is closer than is usually permitted or granted by the Board on side yard setbacks (3 feet), the neighboring house has a significant separation from the structure (See Figure 3)." App. at 59-60. "Figure 3" is a photograph taken on the Sauls' property which shows significantly more than six-feet separate the Sauls' property from any structure located on the Petitioners' property. App. at 53.

DeMaris attended the hearing on behalf of the Sauls. App. at 63. He testified how he constructed the pergola, and that the pergola was designed, constructed, and installed to incorporate into the existing posts which were

previously installed as part of the patio's half-wall. App. at 63-64. He confirmed that the patio structure preexists the pergola. App. at 64. When the Board asked Robbins whether the patio or half-wall needed a zoning permit, Robbins stated: "I would call that borderline. Probably they would but we could grant that with the pergola. I mean it is more or less the same setback." App. 64.

The Board gave several reasons for its approval of the Sauls' variance request. App. at 62-65. For starters, the fact the pergola was built over an existing patio structure on the Sauls' property was an important consideration for the Board. App. at 62-65. The Board also noted that the fence immediately adjacent to the patio structure impeded foot traffic. App. at 64. Finally, the Board was also satisfied that there is sufficient setback between the Petitioners property and the Saul property, even when accounting for the pergola and the patio structure. App. at 64. Sauls' variance application was approved as requested by a 4-0 vote of the Board. App. at 65.

Petitioners filed their Petition for Writ of Certiorari challenging the legality of the Board's decision on February 19, 2019. App. at 27-30. The Sauls moved to intervene on May 16, 2019. App. at 87-90. The matter came before the Honorable Judge Rustin Davenport on July 31, 2019 on

substantially the same record as what was before the Board. Order (Sept. 19, 2019); *see* App. at 17.

On September 19, 2019, the District Court annulled the writ of certiorari and upheld the Board's decision. Order p. 8 (Sept. 19, 2019); *see* App. at 17. After conducting an analysis to determine whether unnecessary hardship existed, the District Court specifically stated:

> While differing and inconsistent conclusions can be drawn from the evidence presented to the Board of Adjustment, it does not appear from the record that the Board ignored any of the evidence when drawing their conclusion. Rather, the opposite inference is apparent from the record. The Board considered evidence of the existing structure, the lack of apparent zoning permits for the existing patio, the additional setback between the properties, and each parties' arguments in relation to the current Iowa law and testimony given at the public hearing. Further, Iowa law does not require the Board to account for every fact they accepted or rejected in the record. Therefore, there was substantial evidence that permitted the Board to attribute stronger credibility to some arguments and not others. The Board could have concluded, based upon the evidence, that the Sauls established their burden of proof for undue hardship requiring a variance.

Order p. 7 (Sept. 19, 2019); *see* App. at 17.

ROUTING STATEMENT

The Appellees request that the Supreme Court transfer this case to the Iowa Court of Appeals as it concerns "the application of existing legal principles." Iowa R. App. P. 6.1101(3)(a).

ARGUMENT

I. PRESERVATION OF ERROR.

Despite not explaining how they preserved error in this matter, the Sauls would agree the Petitioners preserved error on their sufficiency of evidence arguments (i.e., Parts II.B, II.D, and II. E of their Brief). *See Shams v. Hassan*, No. 18-2158, 2020 WL 110307, at *1 (Iowa Ct. App. Jan. 9 2020) ("[Appellant] states that he preserved error by filing a timely notice of appeal, but this is insufficient."); Thomas A. Mates & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (2006) ("However error is preserved, it is not preserved by filing a notice of appeal. While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation."). However, as the Petitioners note in their brief, the District Court did not specifically outline the law it used on the issue of reasonable return. Order pp. 3-6 (Sept. 19, 2019); *see* App. at 17. Petitioners did not request the District Court to enlarge or amend its analysis on the issue of reasonable return, and now seek to benefit from this ambiguity by contending the District Court applied the wrong standard without providing the District Court the ability to cure this alleged error. *See* Pets.' Brief pp. 16-20; *see also* Iowa R. Civ. P. 1.904(2). Accordingly, that

issue has not been preserved for appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

II. STANDARD OF REVIEW.

"An appeal from an order or judgment of the district court in a certiorari proceeding is governed by the rules of appellate procedure in ordinary civil actions." Iowa R. Civ. P. 1.1412. Thus, the appellate court's review is limited to correction of errors at law, and Iowa Supreme Court is bound "by the findings of the trial court if they are supported by substantial evidence.[3]" *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S DECISION TO ANNUL THE WRIT OF CERTIORARI AND UPHOLD THE CERRO GORDO COUNTY BOARD OF ADDJUSTMENT'S GRANTING OF AN AREA VARIANCE.

Both the Iowa Code and the Cerro Gordo County Ordinances ("Ordinances") provide authority to the Board to grant variances like the one provided here. Petitioners assert that it is Chapter 414 of the Iowa Code which provides the Board its authority to grant variances. Pets.' Brief p. 13.

[3] Substantial evidence exists when "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007) (internal quotations omitted).

This is a misstatement, as it is actually Iowa Code Chapter 335 which vests in local counties, such as Cerro Gordo County, the power to govern local zoning issues and for the creation of the Board. *See* Iowa Code Ann. §§ 335.3, .10, .15 (West 2020). The powers provided to the Board pursuant to the Iowa Code echo those provided to the Board via the Ordinances. *See* Iowa Code Ann. § 335.15; Cerro Gordo Cty. Ordinance No. 15 art. 24.4. The Ordinances provide, in relevant part, that:

> The Board of Adjustment shall have the following powers and it shall be its duty: . . .
>
> 3. To authorize upon appeal in specific cases, such as variances from the terms of this Ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of this Ordinance will result in unnecessary hardship, and so that the spirit of the Ordinance shall be observed and substantial justice done.

Cerro Gordo Cty. Ordinance No. 15, art. 24.4(A)(3); *see* Iowa Code Ann. § 335.15(3) (describing how boards of adjustment have authority to grant variances from zoning ordinances). So long as the variance meets the requirements outlined by the Ordinances—which are consistent with the requirements set forth by the Iowa Code—the Board's granting of a variance is within its scope of authority.

Article 24.4 of the Ordinances outlines a three-prong test which guides the Board in its review of an application for a variance. *See* Cerro

Gordo Cty. Ordinance No. 15, art. 24.4(A)(3). This three-prong test, which is consistent with the "unnecessary hardship" test created by the Iowa Supreme Court, provides:

> No variation in the application of the provisions of this Ordinance shall be made unless and until the Board of Adjustment shall be satisfied that all of the following have been established:
>
> a. The land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.
>
> b. 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.
>
> c. The use to be authorized by the variance will not alter the essential character of the locality.

Cerro Gordo Cty. Ordinance No. 15, art. 24.4(A)(3); *see also Graziano v. Bd. of Adjustment*, 323 N.W.2d 233, 236 (Iowa 1982) ("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 purposed 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."). As Petitioners note in their brief, a failure to prove a single one of

these elements requires denial of the application. *See Graziano*, 323 N.W.2d at 236.

Implicit in the Board's decision to grant the Sauls' application variance is a factual finding that the Sauls offered substantial evidence that each of the requirements the Ordinances was met. Moreover, the District Court's decision to annul the writ not only confirms that substantial evidence existed to support the Board's decision, but that the Petitioners failed to meet their burden to show that the Board "exceeded its jurisdiction or otherwise acted illegally." *Smith v. City of Fort Dodge*, 160 N.W.2d 492, 495 (Iowa 1968).

A. IOWA RECOGNIZES THE MODERN TREND THAT AREA VARIANCES WARRANT A MORE LENIENT STANDARD OF REVIEW THAN USE VARIANCES.

Petitioners, throughout their Brief, put a special emphasis on the "use" component of the unnecessary hardship test. Specifically, the Petitioners contend that the Board and the district court erred in finding the property is unable to yield a reasonable return "because it can be used as a single-family dwelling." Pets.' Brief p. 20. What Petitioners fail to recognize is that "courts have traditionally developed a distinction between 'use variances' and 'area variances' for the purpose of recognizing and imposing different standards for granting each type of variance." *City of Johnston v.*

Christenson, 718 N.W.2d 290, 299 fn. 4 (Iowa 2006) (citing 3 Kenneth H. Young, *Anderson's American Law of Zoning* § 20.02, at 424 (4th ed. 1996) [hereinafter Young]); *see* 101A C.J.S. *Zoning and Land Planning* § 306, Westlaw (database updated Dec. 2019); 83 Am. Jur. 2d *Zoning and Planning* § 714, Westlaw (database updated Nov. 2019).

"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." *Christenson*, 718 N.W.2d at 299, fn. 4 (citing 3 Young § 20.07, at 425). Conversely, area variances (such as the one at issue) have no relation to a change in use, but rather seek a modification of area, yard, height, frontage, setback, and similar restrictions. *See Christenson*, 718 N.W. at 299 fn. 4 (citing 3 Young § 20.07, at 426-27). "That is, an area variance is an authorization to use land in a manner which is not allowed by the dimensional or physical requirements of the zoning regulations, . . ." 101A C.J.S. *Zoning and Land Planning* § 306, Westlaw (database updated Dec. 2019).

"[A]n area variance presumes the legality of the use that prompts the need for a variance from dimensional restrictions." *Christenson*, 718 N.W.2d at 300 (internal citations omitted). "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.* As Professor N. William Hines recently opined:

> The case for an area variance is usually based on the claim that an area variance is needed so that the proposed development will be better adapted to the specific tract of land, the project will be significantly less expensive, or perhaps it will be made more environmentally sensitive or aesthetically pleasing to neighbors.

N. William Hines, *Difficulties Standard for Area Variances*, 102 Iowa L. Rev. Online 365, 373 (2018), Westlaw [hereinafter "Hines"].

The Sauls were not (and are not) asking to change the use of their property. The Sauls use the property in question as a residential property. What the Sauls requested in their application to the Board was for an area variance from the six-foot side yard setback requirement so that this specific portion of their property could be used for a pergola that conforms to the preexisting patio structure. App. at 38-40. It was through this lens, and not the much narrower lens Petitioners asked of the District Court and this Court, that the Board's grant of a variance should be viewed. *See Christenson*, 718 N.W.2d at 299-300.

B. THE SAULS' REQUEST FOR AN AREA VARIANCE IS NECESSARY, AS STRICT ENFORCEMENT OF THE ORDINANCES WOULD DEPRIVE THEM OF PEACEFUL ENJOYMENT OF THEIR PREMISES AND THE VARIANCE WAS NEEDED TO CONSTRUCT THE PERGOLA.

When the Sauls' request for variance is viewed in the proper light (i.e., as an area variance), substantial evidence supports the Board and the District Court's decision that absent a variance, the Sauls would be deprived a reasonable return on the property at issue. In *Greenawalt v. Zoning Board of Adjustment of City of Davenport*, 345 N.W.2d 537, 542 (Iowa 1984), the Iowa Supreme Court explained, "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."

i. Without the area variance granted by the Board, the Sauls would be unable to construct their pergola or other, similar common appurtenances.

Petitioners erroneously allege that the Sauls presented no evidence on this issue before the Board or to the District Court. Pets.' Br. p. 16. Such a contention necessarily requires one to ignore all of the evidence in the record. When the Board considered the Sauls' variance application, it knew the pergola was constructed atop an existing brick patio. App. at 63-64. The Board knew that existing brick patio was 21 inches from the west side lot

line. App. at 63-64. And, due to the location of the preexisting brick patio, there was nowhere else to construct the pergola in question. App. at 51. Lastly, from Robbins' comments and the photographs it was provided, the Board knew there was sufficient setback if it granted the Sauls' variance request. App. at 52-55, 59.

Without the variance, any further construction of appurtenances such as or similar to the pergola would effectively be precluded. Article 22(A) of the Ordinances requires a zoning permit for construction of a "building" or "structure". Cerro Gordo Cty. Ordinance No. 15, art. 22(A). The term "structure" is broadly defined by the Ordinances to encompass, "Anything constructed or erected with a rigid or fixed location on the ground, or attached to something having a permanent location on the ground, including buildings, walls, fences, decks, signs, light standards, towers, tank and billboards." Cerro Gordo Cty. Ordinance No. 15, art. 4. Based on the definition of a "structure", any construction of a decorative appurtenance in the nature of a pergola—such as a fence similar to the one constructed by the Petitioners or a decorative lamp post—would likely require a variance before it could be constructed due to the existence of the brick patio. There was substantial evidence before the Board and the District Court that the Sauls were in need of this area variance, because without it the Sauls would

effectively be prohibited from completing any construction of similar and customary appurtenances on the property at issue.

ii. *A denial of the requested area variance constitutes an infringement on the Sauls' right to peaceful enjoyment of their property*.

This outcome would be an infringement on the Sauls' possession and peaceful enjoyment of their property. Such an infringement would violate the fundamental rights afforded the Sauls under the Iowa Constitution. *See* Iowa Const. art. I, § 1; *Honomichl v. Valley View Swing, LLC*, 914 N.W.2d 223, 235 (Iowa 2018) (noting how the Iowa Constitution includes the fundamental right to acquire, possess, and enjoy property); *Farmers Trust & Savs. Bank v. Manning*, 359 N.W.2d 461, 463 (Iowa 1984) ("Without doubt, the right to enjoy property is constitutionally protected."). Such an infringement of a fundamental right would have caused the Sauls unnecessary hardship.[4] *See Deardorf v. Bd. of Adjustment of Planning & Zoning Comm'n of City of Fort Dodge*, 118 N.W.2d 78, 82 (Iowa 1962) (noting that unnecessary hardship could occur when a regulation interferes with a fundamental right of property").

[4] And, at minimum, it certainly would have constituted a practical difficulty to the Sauls. *See Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 730 (Minn. 2010); *Cromwell v. Ward*, 651 A.2d 424, 428-29 (Md. Ct. Spec. App. 1995).

Under the facts at hand, the general public possesses a minimal interest in strict enforcement of the Ordinances. *See Honomichl*, 914 N.W.2d at 235 (describing the state's police powers to pass laws which promote the public health, safety, and welfare of the public at large). There is sufficient setback between the Sauls' property and the Petitioners' property, even when one takes the pergola into account. With sufficient setback already existing, the requested variance would not adversely affect the public interest the Ordinances presumably protect.

Petitioners' dispute the Sauls' contention that strict compliance with the Ordinances would deprive the Sauls of the peaceful enjoyment of their property does not change the fact that the infringement must equal a denial of all beneficial use, citing *Greenawalt*, 345 N.W.2d at 543. Pets.' Brief p. 21. What Petitioners fail to acknowledge are some key factual differences between *Greenawalt* and the present action. *See* 345 N.W.2d at 539. In *Greenawalt*, the property owner sought a variance to construct a new six-foot fence on the boundary of the property. *Id.* The city zoning ordinance limited front yard fences to a maximum height of forty-two inches (or three-and-a-half feet). *Id.* at 540-41. Here, however, the Sauls sought a variance to build upon a preexisting structure which already existed within the setback area—not an entirely new structure, like in *Greenawalt*. *See id.* at 539.

Moreover, the property owner was not truly deprived of his peaceful enjoyment of the property because he still possessed the ability to construct a fence on the property; albeit, not to his desired height. *See id*. at 540-41.

Further, the Iowa Supreme Court has recently acknowledged a major difference between the two types of variances discussed above. *See Christenson*, 718 N.W.2d at 299-300. As noted in *Christenson*, "the distinction between a use variance and an area variance reveals that an area variance is more aligned with an exception since it does not impose an incompatible use on adjacent land or disrupt the character of a neighborhood with a different use." 781 N.W.2d at 299 fn. 4 (citing 3 Young § 20.48, at 580-81). Despite an area variance being "more aligned with an exception since it does not impose an incompatible use," it would appear Petitioners are requesting this Court to apply an overly burdensome requirement on the Sauls to show they cannot use any portion of the entirety of their property without the requested variance. *See* Pets.' Brief pp. 20-21. Such a requirement is inconsistent with the Iowa Supreme Court's shift in *Christenson*, and is inconsistent with the trend towards a more forgiving standard adopted by Iowa's neighboring jurisdictions. *See* 781 N.W.2d at 299-300; *see also* Mo. Ann. Stat. § 89.090 (West 2020); *Krummenacher*,

783 N.W.2d at 730; *Ziervogel v. Washington Cty. Bd. of Adjustment*, 676 N.W.2d 401, 408-11 (Wis. 2004); Hines, 102 Iowa L. Rev. Online at 372.

iii. *Petitioners assume without support that the District Court applied the wrong legal standard in its review of the Board's decision*.

Petitioners further contend that the District Court applied the wrong "legal standard" when conducting its review because of a passing mention by the Court that the lack of a pergola would diminish the value of the property. Pets.' Brief pp. 18-19. The District Court's sole comment on this consisted of, "There was also evidence before the Board that the Saul's [sic] could not utilize their side yard area, which would diminish the value of the property." Order pp. 6-7 (Sept. 19, 2019); *see* App. at 17. Encompassed in this comment is both a reference to the diminishment of property value which could occur, but also the peaceful enjoyment argument articulated above.

While Sauls acknowledge prior precedent on the issue of whether a reasonable return can be shown by displaying greater economic value with an alternative use[5], the Petitioners ask the Court interpret the District Court's

[5] It should also be noted that under the less restrictive review of area variances called for under the current trend, economic factors such as the one alleged by the Sauls are taken into consideration by courts. *See* 101A C.J.S. *Zoning and Land Planning* § 334, Westlaw (database updated Dec. 2019); *see also* 101A C.J.S. *Zoning and Land Planning* § 336, Westlaw

comments as evidence the wrong standard was applied despite the absence of any support for their argument. *See e.g.*, *Graziano*, 323 N.W.2d at 237. In essence, the Petitioners contend that because the District Court annulled the writ the wrong standard was applied. The record shows the District Court was cognizant of its role in this writ of certiorari proceeding. Order p. 7 (Sept. 19, 2019); *see* App. at 17. As such, the District Court was reviewing the record to determine whether substantial evidence supported the Board's decision—the District Court correctly refused to substitute its own judgment for the Board's judgment. Order p. 7 (Sept. 19, 2019); *see* App. at 17.

The District Court's passing mention of economic factors does not indicate, in and of itself, that economic factors were the reason the Board found the Sauls' met their burden of proof, or even that the District Court applied the wrong standard. What is clear from the record is that substantial evidence exists, for the reasons more thoroughly set forth above, to support the District Court's and the Board's determination that the Sauls met their burden on the issue of whether the property could yield a reasonable return without the requested variance.

(database updated Dec. 2019) ("Economic loss or advantage, *in and of itself*, does not establish hardship sufficient for the granting of a variance." (emphasis added)).

C. THE EXISTENCE OF A PREEXISTING PATIO AREA CREATED UNIQUE CIRCUMSTANCES WHICH JUSTIFIED THE GRANTING OF THIS AREA VARIANCE.

As was the case on the issue of reasonable return, the District Court was correct in concluding that substantial evidence supported the Board's determination that the Sauls' plight was due to unique circumstances. Once again the Petitioners ask the Court to view this prong through the lens of a use variance rather than an area variance. Pets.' Brief p. 22. Since there is nothing unique about the Sauls' entire residence, Petitioners contend, it was improper to find substantial evidence existed that the circumstances were unique to grant this area variance.

Yet, as stated previously, the evidence before the Board and the District Court reflects that the circumstances leading to the Sauls' variance request were unique. *See* 83 Am. Jur. 2d *Zoning and Planning* § 780, Westlaw (database updated Nov. 2019) (unique circumstances supporting an area variance "must be unusual or peculiar to the property involved, and must be different from those suffered throughout the zone or neighborhood."); *see also Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore Cty.*, 962 A.2d 404, 420 (Md. 2008). There was an existing patio area on the property. App. at 63-64. This existing patio encroached upon the Ordinances' six-foot setback requirement. App. at 63-

64. There was no evidence in the record before the Board on when the patio was constructed, whether zoning permits were issued when the patio was constructed, or whether zoning permits were even required for the patio. App. at 48-51, 63-64. As Robbins stated before the Board, it was "borderline" whether the patio area required a zoning permit. App. at 64. By approving the Sauls' variance application without an amendment to incorporate the patio area, the record reflects the Board felt the patio was a valid preexisting structure.

Additionally, the pergola at issue is a common complimentary feature to a patio area. When the Sauls constructed and installed the pergola, it is reasonable to infer that they could not have foreseen that adding a common complimentary feature to an existing structure would violate the Ordinances. Due to the existence of the patio structure, though, there was also no other location to construct the pergola. App. at 51. As a result, there is substantial evidence for the Board and the District Court to conclude that unique circumstances existed in this case to grant an area variance.

D. IT WOULD BE IMPROPER TO FIND THE BOARD'S DECISION ARBITRARY AND CAPRICIOUS, AS IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioners' argument is based on the assertion that "the Board did not apply the correct legal standard on the issue of reasonable return and

approved a variance without evidence which have satisfied that standard or the uniqueness requirement, . . .” Pets.’ Brief p. 23. Petitioners’ argument is inconsistent with the record, and calls for this Court to ignore all evidence before the Board (and, for that matter, the District Court). Furthermore, Petitoners’ argument is dependent upon a finding by this Court in their favor on one or more of the issues described above. To the extent that substantial evidence exists in the record to support both the Board’s and the District Court’s decisions, it would be improper for this Court to reverse both lower tribunals on the grounds that the Board otherwise acted arbitrarily and capriciously. *See Molo Oil Co.*, 692 N.W.2d at 690.

CONCLUSION

The granting of this area variance, as correctly noted by the District Court, was supported by substantial evidence. Petitioners ask this Court to narrowly and strictly construe the unnecessary hardship test in a manner which would effectively bar all forms of area variances, bucking a trend recognized by the Iowa Supreme Court and other jurisdictions to apply a more lenient standard for area variances as opposed to use variances. Petitioners also ask this Court to ignore the evidence which was before the Board—evidence, which it should be reiterated, constituted substantial evidence in the District Court’s eyes, to annul the writ of certiorari in this

action. As there is no indication the District Court's review was improper, the Sauls ask this Court to affirm the District Court's decision and conclude the Board's action was legal.

REQUEST FOR ORAL ARGUMENT

The Sauls hereby request to be heard in oral argument.

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:

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Dated February 13, 2020.

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CERTIFICATE OF COSTS

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

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Intervenor-Appellee's Final Brief was served on the 13th day of February, 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.

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