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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 REPLY BRIEF

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PROOF OF SERVICE

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

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE APPELLEES' ARGUMENT REGARDING THE STRENGTH OF THE EVIDENCE STILL CAN POINT TO NO EVIDENCE OF HARDSHIP WHICH FALLS WOEFULLY SHORT OF THE LEGAL STANDARD AND, LIKE THE DISTRICT COURT, RELIES ON A MISUNDERSTOOD FACT

AUTHORITIES:

II. APPELLEES MISREPRESENT APPLICABLE LAW CONCERNING THE IMPORT OF City of Johnston v. Christenson AND MAKE AN ERRONEOUS ARGUMENT ON THAT BASIS

AUTHORITIES:

Greenawalt v. Zoning Board, 345 N.W.2d 537 (Iowa 1984)
City of Johnston v. Christenson, 718 N.W.2d 290 (Iowa 2006)

III. APPELLANTS PRESERVED ERROR ON THE ISSUES RAISED IN APPEAL

AUTHORITIES:

Mayes and Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. R. 39, 62 (2006)
Iowa R. Civ. P. 1.904(1) & (2

VI. CONCLUSION

I. THE APPELLEES' ARGUMENT REGARDING THE STRENGTH OF THE EVIDENCE STILL CAN POINT TO NO EVIDENCE OF HARDSHIP WHICH FALLS WOEFULLY SHORT OF THE LEGAL STANDARD AND, LIKE THE DISTRICT COURT, RELIES ON A MISUNDERSTOOD FACT

1. The Board could not approve the variance without evidence establishing hardship; the District Court could not assume there was evidence when none was presented to it; and this Court cannot uphold the District Court's ruling without evidence to meet the legal standard.

Appellees recite the applicable rule of law in their brief to this Court and even recognize that substantial evidence had to have been shown to justify the ruling. Appellees' Br., p. 18–20. However, they point to absolutely zero pieces of evidence that the Board or the District Court could have relied upon to find unnecessary hardship. Under the heading dedicated to demonstrating to this Court that substantial evidence supported the District Court's opinion, Appellees devote one sentence to lay out all the evidence in support of the ruling and can muster nothing more than an apparent admission that the District Court pointed to no evidence and ask this Court to assume that "implicit" in the decision was a finding of evidence. App. Br., p. 20. Keep in mind, there was nothing before the Board which was not before the District Court. There is nothing. That is why one cannot find a single fact showing hardship. No evidence supporting a conclusion falls astonishingly below "substantial evidence." It

is not even evidence. The Appellants urge this Court to hold the variance applicants to their standard of proof.

2. The District Court and the Appellees erroneously place some importance on the idea that one phase of the project was completed prior to work on the next phase.

There seems to have been some confusion on the part of the District Court and the Appellees concerning the project to put in the patio area. These were not two separate projects but one project which required a variance. In his statements at the Board hearing, the individual who constructed the pergola described the situation as one in which the landowner's nephew had completed work on the lower, patio part of the structure, *had already placed the uprights onto which the pergola would sit*, but did not feel comfortable completing that part of the project and asked for his assistance. Return, p. 28. App. at 63. He seems to have only been willing to complete the project because the lower "easier part" was already done and all the posts for the roof/pergola portion of the structure were in place. *Id.* The District Court found that these posts were already in place before the construction worker began his work. Order dated September 19, 2019, p. 2. The photographic evidence shows that the only purpose for those upright posts is to support a roof structure.

The Sauls simply mistakenly applied for a variance for part of a project that violates the zoning ordinance. Return, p. 3. App. at 38. The Sauls only applied after they had notice from the zoning authority that the construction of the pergola, the only portion requiring professional help, needed to be approved. Return, p. 17. App. at 52. The Planning and Zoning Administrator, because the application only involved the roof portion of the project, did not examine the lower portion of the project and whether it needed a post-hoc variance as well. Return, p. 10 & p. 28–29. App. at 45, 63-64. (administrator "didn't call him out" on the patio or the wall already there although they "probably would" have needed a variance for that as well)[1].

The Board and the District Court relied on the fact that there was already a patio there to justify their conclusions. *See e.g.*, Return, p. 28. App. at 63. ("The setback is the same as the setback of the patio."); Order dated September 19, 2019, p. 2, 3, & 7. What has happened here is that the first part of a project to construct a patio area with a roof was done without seeking a permit or variance and without professional help and the roof portion of the work was done by a professional and the roof portion of the

[1] The Administrator at that point then suggests that the Board could grant a variance for that portion of the project at the same time although the application and question before the Board only involved the roof portion and the notice to neighboring properties only informed them of the desire to construct the pergola. Return, p. 29. App. at 64. The Board, however, only voted to "approve the variance as requested." Return, p. 30. App. at 65.

project has been granted a variance by being bootstrapped to the lower portion of the project which itself needed a variance but was never granted one and one was never applied for. It is as though one could build a strip mall in violation of the zoning ordinance of a city so long as the applicant had already paved the area even though the pavement violated the ordinance and was never granted a variance. The approval of such an action is bad precedent.

II. APPELLEES MISREPRESENT APPLICABLE LAW CONCERNING THE IMPORT OF *City of Johnston v. Christenson* AND MAKE AN ERRONEOUS ARGUMENT ON THAT BASIS

The Appellees make an argument based on dicta in a footnote from the 2006 case of *City of Johnston v. Christenson*, which turns into a remarkable attempt to pull the wool over this Court's eyes. Appellees' Br., p. 21–23 (citing *City of Johnston v. Christenson*, 718 N.W.2d 290 (Iowa 2006)). On any fair reading of the case, the argument is too cute by half and clearly distinguishable from the case before this Court.

The *Christenson* court was not deciding whether the statutory and common law undue hardship standard related to variances (spatial or use) was no longer the law of the land but was concerned with "issue preclusion." *City of Johnston v. Christenson*, 718 N.W.2d 290, 293 (Iowa 2006). The applicant in that case was seeking not a variance but a "special exception"

from a maximum area limitation for a new building and a height restriction for the building. *Id.* at 294. This cannot be overlooked. The requirements to allow a special exception are different from that of a variance and are that: 1) the need is demonstrated to the Board's satisfaction; 2) the exception will not adversely affect the property value of the subject property or those surrounding it; 3) the "siting" of the property minimizes adverse effects on surrounding properties; and 4) architectural restrictions have been used to be compatible with neighboring structures. *Id.* at 294, n. 1 (citing applicable city ordinance).

The challenge from the decision to grant the special exception (to the spatial requirements) was then challenged by the City because the property's "intended use" was not allowed under the ordinance. *Id.* at 295. The Board of Adjustment in that case then reconsidered its earlier decision but decided in the same way without making a record of the proceeding. *Id.* The City filed a writ of certiorari challenging the Board's decision and also sought a declaratory judgment dictating that the intended use of the building violated the city ordinance and, therefore, it did not have to take any action on the site plan submitted by the property owner. *Id.*

The district court in *Christenson* did not even rule on the writ of certiorari but instead entered an order in the declaratory judgment action in

which it determined that the contemplated structure violated ordinances related to use of the land and the restrictions against the rebuilding of nonconforming structures after more than 51% of the structure had been destroyed as was the case. *Id.* at 295. The appeal by the property owner did not raise any issue relevant to the case at bar. The property owner "did not challenge the findings by the district court that the project violated [use restrictions] but claimed the board of adjustment previously decided the matter adversely to the City" and therefore the City was precluded from raising the issue again. *Id.* at 295–96.

In a footnote, the court in *Christenson* remarks that an area variance (an issue not before the court at the time) "justifies a slightly lesser showing" than that for a use variance. *Id.* at 299, n. 4. This is not a holding of the case and no new rule of law is enunciated which explains why the application for the variance signed by the Appellees in this case lays out the undue hardship requirement, the District Court decided the case under the undue hardship test described in *Greenawalt*, and the Appellees did nothing to challenge the application of the law by the District Court[2] and recite the correct, undue-hardship-requiring test in their brief.

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[2] The District Court in this case was a reviewing court and its unchallenged application of the *Greenawalt* framework became the law of the case and application of some "slightly lesser showing" is contrary to the law of the case doctrine which states that "the legal principles announced and the views expressed by a reviewing court in an opinion, right or wrong, are binding throughout further progress of the caser upon

In fact, the *Christenson* court explicitly reaffirms the undue hardship requirement for an individual seeking a variance. *Id.* at 298 (board of adjustment allowed to grant variance "to avoid undue hardship to a property owner"); 301 (area variance requires "a finding of some form of hardship"). The argument that there is a different standard to be applied here is unsupported, especially when one acknowledges that *Greenawalt* itself involved an area variance. *Greenawalt*, 345 N.W.2d at 540–41 (describing ordinance related to the height of fences). The standard was and is the same. *Greenawalt* is not overruled on this point and that decision is binding, mandatory authority.

III. APPELLANTS PRESERVED ERROR ON THE ISSUES RAISED IN APPEAL

Under Iowa Rule of Civil Procedure 1.904(1), a party making an appeal from a judgment where no jury was involved "may challenge the sufficiency of the evidence to sustain any finding without having objected to it by motion or otherwise." Iowa R. Civ. P. 1.904(1). *See also*, Mayes and Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. R. 39, 62 (2006) ("When an action is tried to a court without a jury, however, parties may later challenge the sufficiency of

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the litigants, the trial court and this court in later appeals." *State v. Grosvenor*, 402 N.W.2d 402–405 (Iowa 1987).

the evidence to sustain any finding, even if they did not initially make an objection or otherwise raise the evidentiary issue before the court."). There is no requirement that the appellant first ask for a reconsideration, amendment, or enlargement of the trial court's decision prior to raising an issue on appeal. *Id.* at 1.904(2) (stating that, upon motion, findings and conclusions of the trial court *may* be reexamined).

In this matter, the Board's decision was properly challenged by the filing of the Petition for the Writ of Certiorari and the District Court's decision has been properly challenged because that court, without a jury, decided the issues appealed as described in Appellants' proof brief. The decision of the District Court discusses and decides the issues raised on appeal, those being whether a reasonable return could be had without the variance (Order dated September 19, 2019, p. 7.) ("The Board could conclude that a reasonable return could not be obtained on the property . . .")); whether the legal standard was correctly applied or interpreted (Order dated September 19, 2019, p. 5–6. (discussing legal standard) & p. 7 (applying standard)); and whether the decision was arbitrary and capricious (Order. p. 7 (deciding issue while stating the grant of variance was "not a product of illogical reasoning, an unreasonable decision, or an abuse of discretion.").

IV. CONCLUSION

There is no evidence of hardship and the Appellees, like the District Court, can point to none in the record. The attempt to use inapplicable and distinguishable authority to justify a lower legal standard is misplaced. The bootstrapping of an approval for variance based on an earlier part of a project which required, but did not receive, a variance is bad precedent. All of these issues were decided by the District Court and are able to be corrected by this Court. This Court should overturn the District Court's decision.

CERTIFICATE OF COSTS

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

Respectfully Submitted,

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