143 N.J.L.J. 34

New Jersey Law Journal
Vol. CXLIII, No. 1, Index 34
Copyright 1996 by American Lawyer Media, ALM LLC

January 1, 1996

In Practice
Real Estate

EIGHT YEARS AFTER MEDICI, USE VARIANCES STILL IN USE

Bruce D. Greenberg

In Medici v. BPR. 107 N.J. 1 (1987), the state Supreme Court established a new, enhanced standard of proof for use variances under N.J.S.A. 40:55D70(d)(1). Emphasizing that use variances were not favored, the Court stated that an applicant for such a variance must "reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district." Id.at 21.

While one land-use practitioner labeled Medici as "something of a riddle wrapped in a mystery inside an enigma," McAndrew, " Medici Redux: Revisiting Use Variance Question," 128 N.J.L.J. 519 (June 13, 1991), its effect was undeniable. As applied by municipal boards and lower courts, the new test made it virtually impossible to obtain a use variance. In fact, it appeared that the examples given in Medici might be virtually the only circumstances in which a use variance could be obtained.

At first, this was so even when the proposed use, though not permitted in the zone, was inherently beneficial. In Sica v. Wall Tp. Bd. of Adj. 246 N.J. Super. 338 (App. Div. 1991), the Appellate Division refused to exempt inherently beneficial uses, such as a proposed head injury facility, from the strictures of the Medici standard. Although Medici had involved a particularly egregious example of zoning by variance to permit motels, the Court had stated in dicta that the "added requirement [of proof announced in Medici] will apply in all use-variance cases." 107 N.J. at 4-5. The Appellate Division therefore believed that Medici applied even to inherently beneficial uses.

Apparently recognizing that the lower courts' view of Medici was resulting in the baby being thrown out with the bath water, the Supreme Court reversed the Sica decision. 127 N.J. 152 (1992). Relying on the opening sentence of its Medici opinion, the Court made clear that Medici applied only to commercial use variances of the type involved there. 127 N.J. at 160-61. Use variances for inherently beneficial uses were thus carved out of Medici territory.

Use variances, of course, are but one of the types of variances subsumed within N.J.S.A. 40:55D-70(d). All of those "subsection d" variances are subject to the same standards imposed by the language of that statute. Since the Legislature had treated all those variances identically in the statute, it remained to be seen whether the Court would impose its Medici standard of proof on the other variances encompassed in subsection d.

Only three years after Medici, the Court declined to apply the enhanced standard to expansion of a pre-existing, nonconforming use, which is just one step (and one subsection of N.J.S.A. 40:55D70(d)) away from a classic use variance application. N.J.S.A. 40:55D-70(d)(2). In Burbridge v. Mine Hill, 117 N.J. 376 (1990), the Court observed that "expansions of existing nonconforming uses ordinarily are less disruptive to the zoning plan than new nonconforming uses." Id. at 389. On that basis, the Court stated that "[c]learly, Medici's enhanced-proof re-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

quirement focused on variances for new uses rather than expansion of existing uses," and declined to apply the enhanced standard. Id. at 398.

Fine Distinction

Though recognized in some cases, this fine distinction between expansion of old and creation of new nonconforming uses -- each of which, at bottom, adds to the extent of uses inconsistent with ordinance requirements -- was less than satisfying. Arguably, the Court was feeling discomfort with Medici, and sought to prevent it from spreading even to a context very closely related to the use variance situation in which the Medici standard was born.
Most recently, in Coventry Square v. Westwood Bd. of Adj., 138 N.J. 285 (1994), the Court faced the issue of whether Medici would apply to conditional use variances. See N.J.S.A. 40:55D70(d)(3). Again, the Court refused to apply Medici. But its reasons for declining to do so are not truly persuasive if Medici is still viable.
The lower courts had applied the Medici enhanced standard of proof in both Coventry Square and other prior conditional use variance cases, resulting each time in denial of the variance sought. See 138 N.J. at 296-97. In doing so, those courts had "treated a conditional use that does not comply with all the conditions of the ordinance as if it were a prohibited use, imposing on the applicant the same burden of proving special reasons as it would impose on applicants for use variances." Id. at 297.
The Supreme Court reversed the decision in Conventry Square, and again refused to apply Medici:

> In our view, [application of the Medici enhanced] standard is plainly inappropriate and does not adequately reflect the significant differences between prohibiited uses, on the one hand, and conditional uses that do not comply with one or more of the conditions imposed by an ordinance, on the other hand. In the case of prohibited uses, the high standard of proof required to establish special reasons for a use variance is necessary to vindicate the municipality's decision that the use ordinarily should not be allowed in the zoning district. In the case of conditional uses, the underlying municipal decision is quite different. The municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied ... The burden of proof required to sustain a use variance not only is too onerous for a conditional-use variance; in addition, its focus is misplaced. The use-variance proofs attempt to justify the board of adjustment's grant of permission for a use that the municipality has prohibited. Proofs to support a conditional-use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

Id. at 297-98.
Yet, as in Burbridge, the Court's rationale was ultimately unsatisfying. Conditional uses are indeed permitted under certain circumstances. When a use does not meet the ordinance conditions, however, it is not permitted, and arguably should be treated no differently for purposes of variance analysis from uses that are totally prohibited. The lower courts, believing themselves to be bound by Medici, had repeatedly reached that conclusion.

Increasing Discomfort

The Supreme Court's contrary decision in Coventry Square, especially when taken together with Burbridge and Sica, suggests increasing discomfort with the effects of Medici, and a desire to cut it back.
The Appellate Division followed the lead of the Supreme Court in Eagle Group v. Hamilton Tp. Bd. of Adj., 274 N.J. Super. 551 (App. Div. 1994). There, the plaintiff applied for a use variance to construct a retail facility in a residential zone. The property was at a major intersection, and all three of the other corner properties were zoned highway-commercial and contained retail stores.
The applicant presented proofs that emphasized hardship, and asserted that the residential zoning of the property

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

was "improper zoning." Id. at 557. The board denied the requested use variance because, among other reasons, the Medici enhanced proof requirement had not been satisfied. Id.at 559-61. The Law Division affirmed that decision.

The Appellate Division reversed and remanded the matter for new hearings. The court observed that, unlike Eagle Group, Medici had not involved a hardship claim, "which calls into question the reasonableness of the zoning applicable to the tract in question." Id. at 563 (citing Medici, 107 N.J. at 4 n.I). "[T]he existence of an economic hardship as the affirmative criterion necessarily colors the board's consideration of the negative criteria," and the board had not in fact considered the hardship claim. Id.

The court concluded that the Medici standard would not apply to an application for a use variance based on economic hardship. Citing Sica, the court stated that "the Medici requirement is grounded in a preference for zoning by ordinance rather than by variance. That rationale is diluted if the ordinance has zoned the particular tract into economic inutility." Id. at 564. Thus, once again, Medici was held inapplicable in its own use variance context. Eagle Group went a step beyond Sica, since Sica had involved a sympathetic, inherently beneficial use, while the applicant in Eagle Group sought to build an ordinary retail building.

Ripe for Overruling

All this suggests that Medici itself may be ripe for reconsideration and, perhaps, overruling. Coventry Square seems to foreshadow future refusals to extend the Medici standard beyond use variances. Even within the use variance circle, the Court's refusal to apply Medici to expansions of nonconforming uses in Burbridge, and its exclusion of inherently beneficial uses from Medici's reach in Sica, leave Medici with a very limited scope. Taken together, Coventry Square, Sica, and Burbridge may lay the groundwork for the Court to give Medici a death with dignity.

It would not be unprecedented for the Court to overrule its own decision within a decade of issuing it. Compare, e.g., Perini v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992) with Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349 (1994) (standard of review of arbitration awards); Yahnko v. Fane, 70 N.J. 528 (1978) with Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981) (sidewalk liability). In both of those instances, the decisions ultimately overruled had been the subject of unremitting criticism from dissenting justices and commentators. Medici, though a unanimous ruling, has also been severely criticized by land use practitioners. See, e.g., McAndrew, supra, 128 N.J.L.J. at 531 ("Medici is not in touch with the real world").

In fact, the Medici rule is not necessary to achieve the desired result of ensuring that planning, rather than zoning by variance, dominates the process. Municipalities can do that by a discerning application of the ordinary rules that govern other land use proceedings before municipal boards, and by carefully evaluating the proofs presented in particular cases. The courts remain available to review any errors of boards in doing so.

Moreover, there is no basis in the Municipal Land Use Law for a different burden of proof on use variance applications. The Supreme Court did not anchor its announcement of the Medici standard in any portion of the statute, but stated only that it was "markedly consistent with the legislative policies underlying the statutory changes in land use law since Kohl v. Fair Lawn, [50 N.J. 268 (1967)]" (emphasis supplied). See Medici, 107 N.J. at 21-22. The Court has since implicitly recognized the absence of any statutory basis when it refused to apply that burden to other variances governed by the very same section of the Municipal Land Use Law.

It may be time for a sympathetic commercial use variance applicant to present the Supreme Court with the opportunity to overrule Medici. If the Court can be persuaded that abandoning Medici is the logical result of its decisions in Sica, Burbridge and Coventry Square, and that of the Appellate Division in Eagle Group, that applicant may be pleasantly surprised by the result.

The author is a partner with Greenbaum, Rowe, Smith, Ravin & Davis, and a member of that firm's Commercial

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Litigation and Land Use Practice Groups. He represented the successful plaintiff in Sica v. Wall Tp. Bd. of Adj, 127 N.J. 152 (1992), one of the cases discussed in this article.
1/1/1996 NJLJ 10

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.