

Media + Madison v. BPR Co, S. Plaintiff 11 April 1986

Letter w/ copy of decision attached

PI #3021

7 pgs

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MEMBER  
NEW JERSEY BAR  
U.S. PATENT BAR

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561-6868

April 11, 1986

Eric Neisser, Esq.  
Constitutional Litigation Clinic  
Rutgers Law School  
15 Washington Street  
Newark, New Jersey 07102

Re: Medici and Madison Property Company No. 4 v. BPR Company, et al

Dear Sir:

Enclosed herein please find original and copy(ies) of the document(s) listed below:

<u>        </u> Summons	<u>        </u> Warrant for Satisfaction
<u>        </u> Complaint	<u>        </u> Answer
<u>        </u> Notice of Motion	<u>        </u> Judgment
<u>        </u> Affidavit	<u>        </u> Check in the sum of \$
<u>        </u> Stipulation	<u>        </u> Return Envelope
<u>        </u> Order	<u>        </u> Closing Statement
<u>        </u> Interrogatories	<u>        </u> Notice to take Oral Depositions
<u>        </u> Answers to Interrogatories	<u>        </u> <input checked="" type="checkbox"/> Copy of Decision
<u>        </u> Release	<u>        </u>

With respect to said matter, would you kindly:

<u>        </u> File	<u>        </u> File <u>        </u> and return copy
<u>        </u> Hold same in escrow pending	<u>        </u> marked "filed" in envelope.
<u>        </u> my receipt of check in full	<u>        </u> Sign Order and return in envelope.
<u>        </u> payment.	<u>        </u> Sign Order, file original, return
<u>        </u> Acknowledge receipt of same on	<u>        </u> conformed copy marked "filed" in
<u>        </u> copy of this letter and return.	<u>        </u> envelope.
<u>        </u> Charge fee to our account.	<u>        </u> Answer and return 0 + 2.

Very truly yours,

*Frank A. Santoro*

FRANK A. SANTORO

Receipt is hereby acknowledged.

Date: \_\_\_\_\_

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-4207-84T1

MARIO M. MEDICI,

Plaintiff,

and

MADISON PROPERTY COMPANY NO. 4,

Intervenor-Respondent,

v.

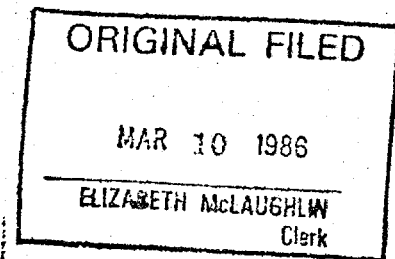
BPR COMPANY, a limited partnership,

Defendant-Appellant,

and

BOARD OF ADJUSTMENT OF SOUTH  
PLAINFIELD; and MAYOR AND COUNCIL  
OF THE BOROUGH OF SOUTH PLAINFIELD,

Defendants.



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Argued February 3, 1986 - Decided MAR 10 1986

Before Judges Furman, Petrella and Ashbey.

On appeal from the Superior Court, Law  
Division, Middlesex County.

Carmine D. Campanile argued the cause for  
appellant (Mandelbaum, Salsburg, Gold &  
Lazris, attorneys).

Daniel S. Bernstein argued the cause for  
respondent (Bernstein, Hoffman & Clark,  
attorneys; Mr. Bernstein and Suzanne T.  
Bogad, on the brief).

The opinion of the court was delivered by

FURMAN, P.J.A.D.

Defendant Board of Adjustment of South Plainfield granted  
defendant BPR Company a use variance, N.J.S.A. 40:55D-70d, for a

four-story motel with 116 rooms, a restaurant and "amenities" in an industrial zone. Defendant Mayor and Council affirmed on appeal by plaintiff, a property owner within 200 feet. In a prerogative writ action, the trial court reversed on the ground of insufficient support in the record for a conclusion that the particular property was "uniquely suitable" for a motel. We in turn reverse.

The subject property is a U-shaped lot of almost nine acres at the intersection of South Clinton Avenue and Hamilton Boulevard, in near proximity to Route 287 and burgeoning office, industrial and commercial development. Defendant BPR proposed a combined motel and office building use, the motel on the northerly arm of the U, the office building on the southerly arm, both fronting on South Clinton Avenue and both with access to the rear on Hamilton Boulevard. Passage between the office building and the motel could be accomplished without traversing any public highway.

After a hearing, defendant board of adjustment reached findings and conclusions that the site was substantially surrounded by professional, industrial and commercial uses; that a motel would compliment existing development; that the premises would be substantially buffered by berm, fencing and the natural terrain from the propane gas distributorship located between the arms of the U; and that, although there were two "existing and prosperous motel/hotels" nearby, both permitted by variance, and a proposed motel development, also permitted by variance, across Hamilton Boulevard, within 500 feet, there was a "need for good

motel accommodations in the Borough of South Plainfield to accommodate the recent substantial professional and office development."

The board of adjustment also determined that the so-called negative criteria of N.J.S.A. 40:55 D-70d were met, that is, that the use variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the land use ordinance.

The municipal governing body affirmed the board of adjustment after legal argument on the record before the board. In reversing for lack of proof of a special reason or reasons for a use variance for a motel, the trial court concluded that there was "sufficient establishment of satisfying the negative criteria." Thus, the only substantive issue on appeal is whether a special reason for the use variance was established on the municipal administrative record.

A preliminary issue of standing must be dealt with. Defendant BPR asserts error in the trial court's granting leave to Madison Property Company No. 4 (Madison) to intervene and to pursue plaintiff Medici's prerogative writ action after Medici had reached a settlement and entered a stipulation of dismissal with defendant BPR. Madison was the contract purchaser from Medici of the premises across Hamilton boulevard from BPR's, for which a use variance for a motel had been granted only two years before upon a similar showing of need for motel accommodations in the area. We sustain the trial court in the exercise of its discretion under R. 4:33-2 in granting Madison leave to intervene, in the absence of any undue prejudice or delay.

The standard for judicial review of the municipal grant of the use variance to BPR is set forth in Kessler v. Bowker, 174 N.J. Super. 478, 486 (App. Div. 1979) certif. den. 85 N.J. 99 (1980): "The grant is presumed valid and may be upset only when the decision is arbitrary, unreasonable or capricious." By that standard, the trial court's reversal of the grant of the use variance to BPR overreached its authority.

BPR's proposed motel use is not a use like a school or a hospital inherently promoting the general welfare and, hence, per se a special reason for a N.J.S.A. 40:55D-70d variance, see Black v. Montclair, 34 N.J. 105 (1961) and Andrews v. Ocean Tp. Bd. of Adj., 30 N.J. 245 (1959). But a motel or hotel is a place of public accommodation subject to the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and to a continuing common law obligation to serve the public by providing shelter and meals to all comers whose conduct is proper, to the limit of available accommodations, Garafine v. Monmouth Park Jockey Club, 29 N.J. 47, 50 (1959).

According to Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 279 (1967), a use other than one inherently promoting the general welfare may provide a special reason for a section d variance if the use serves the general welfare because it is particularly fitted to the location for which the variance is sought. We view the requisite showing as dual: a use serving the general welfare and particular suitability of the proposed site. Here the trial court erroneously imposed the standard of unique, not merely particular, suitability. Nor must an

applicant to qualify for a section d variance prove the inutility of the premises for any use permitted under the zoning ordinance, Black and Andrews, supra.

See also prior decisions upholding or ordering use variances under N.J.S.A. 40:55D-70d or its predecessor statute other than for uses such as schools or hospitals inherently promoting the general welfare: Kramer v. Sea Girt Bd. of Adj., 45 N.J. 268 (1965) (fireproof hotel to replace dangerous structure); Ward v. Scott, 16 N.J. 16 (1954) (supermarket in developing area); Kessler v. Bowker, supra (expansion of nonconforming retail appliance shop); Yahnel v. Bd. of Adjust. of Jamesburg, 79 N.J. Super. 509 (App. Div. 1963) certif. den. 41 N.J. 116 (1963) (building to house telephone service equipment); Brunetti v. Mayor, Coun., Tp. of Madison, 130 N.J. Super. 164 (Law Div. 1974) (moderate income multi-family housing in a municipality with a need for such housing); and Wickatunk Village, Inc. v. Marlboro Tp., 118 N.J. Super. 445 (Ch. Div. 1972) (private sewage treatment plant for mobile home park).

Defendant BPR as applicant before defendant board of adjustment amply demonstrated a public need for a motel in the area and particular suitability of the premises because of their shape and location, their proximity to highways and to office, industrial and commercial developments, to support the determination by the municipal authorities of a special reason for a section d use variance. Under the Kessler standard of review, it was not arbitrary, unreasonable or capricious to so determine. Put another way, we cannot conclude that the only

reasonable result before the municipal authorities would have been to reject plaintiff's use variance application. The proposed motel, subject to its common law obligations, was to serve a public need at an advantageous site.

We reverse the trial court's reversal of defendants board of adjustment and governing body and order reinstatement of the motel use variance to defendant BPR.

I hereby certify that the foregoing  
is a true copy of the original on file  
in my office.

*Elizabeth M. Paughlin*

Clerk