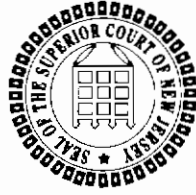


SUPERIOR COURT OF NEW JERSEY

MENELAOS W. TOSKOS
JUDGE



BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NJ 07601
201-527-2675

August 8, 2008

Jeffrey M. Hall, Esq.
Fox Rothschild LLP
Princeton Pike Corporate Center
997 Lenox Drive – Building 3
Lawrenceville, New Jersey 08648

Thomas W. Randall, Esq.
Randall & Randall, LLP
287 Kinderkamack Road
Westwood, New Jersey 07675

Re: Wachovia Bank, N.A. v. Planning Board of the Borough of Westwood
Docket No. BER-L-6403-07

Dear Counsel:

Enclosed is the Court's Opinion and Order for Judgment with respect to the above referenced matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "MWT", is written over the typed name below.

Menelaos W. Toskos, J.S.C.

MWT/ds
Enclosures

HUNTINGTON BAILEY, L.L.P.
312 Kinderkamack Road
Westwood, New Jersey 07675
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Attorneys for Defendant,
Borough of Westwood

FILED
AUG 07 2008
MENELAOS W. TOSKOS
J.S.C.

WACHOVIA BANK, N.A.,

Plaintiff,

vs.

PLANNING BOARD OF THE BOROUGH
OF WESTWOOD AND BOROUGH OF
WESTWOOD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

Docket No. BER-L-6403-07 PW

Civil Action

CASE MANAGEMENT STATEMENT #3

THIS MATTER having been before the Court by Fox Rothschild LLP, attorneys for Plaintiff, Wachovia Bank, N.A. ("Plaintiff"), on notice to counsel for the defendants, Planning Board of the Borough of Westwood and the Borough of Westwood, and counsel for Plaintiff and defendant Borough of Westwood having appeared at a telephonic Case Management Conference on Friday, June 6, 2008; and for other good cause shown,

IT IS on this 7th day of August, 2008; ORDERED as follows:

- (1) The stay on discovery with respect to Counts Four, Five, and Six of Plaintiff's amended complaint is hereby VACATED;
- (2) Initial and/or supplemental interrogatories and requests for the production of documents on the remaining counts, if any, shall be served on or before September 1, 2008;
- (3) Responses to initial and/or supplemental interrogatories and requests for the production of documents on the remaining counts, if any, shall be served on or before October

1, 2008;

(4) Fact depositions, if any, shall be completed on or before November 28, 2008;

(5) Plaintiff's expert report(s), if any, shall be served on or before January 2, 2009;

(6) Defendant' expert report(s), if any, shall be served on or before February 27,

2009;

(7) Plaintiff's supplemental expert report(s), if any, shall be served on or before

March 31, 2009;

(8) Defendant's supplemental expert report(s), if any, shall be served on or before


April 30, 2009;

(9) Expert depositions, if any, shall be completed on or before June 15, 2009;

(10) Trial shall take place on Tues. August 18, 2009; and @ 9:00 a.m.

(11) Plaintiff's counsel shall serve a copy of this Order on all counsel of record

within seven (7) days of receipt.


Hon. Menelaos W. Toskos, J.S.C.

Opposed
 Unopposed

Hon. Menelaos W. Toskos, J.S.C.
SUPERIOR COURT OF NEW JERSEY
Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

FILED

AUG 08 2008

**MENELAOS W. TOSKOS
J.S.C.**

This Order is prepared and filed by the Court:

WACHOVIA BANK, N.A.,

Plaintiff,

vs.

PLANNING BOARD OF THE BOROUGH
OF WESTWOOD and BOROUGH OF
WESTWOOD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. BER-L-6403-07

Civil Action

ORDER FOR JUDGMENT

This matter having come before the Court by way of trial on May 30, 2008, the Honorable Menelaos W. Toskos, J.S.C. presiding, with Fox Rothschild, LLP representing the plaintiff, Wachovia Bank, N.A. (Jeffrey M. Hall, Esq. appearing) and Randall, Randall & Stevens representing the defendant, the Planning Board of the Borough of Westwood (Thomas W. Randall appearing) and the Court having considered the briefs and oral argument of counsel, and for good cause having been shown

It is on this 8th day of August, 2008

ORDERED and **ADJUDGED** that for the reasons set forth in the Court's written opinion dated August 8, 2008, the Court finds as follows:

1. This matter is remanded to the Planning Board of the Borough of Westwood;
2. The Planning Board of the Borough of Westwood is directed to grant the site plan approval, variances and waivers required for the Concept B proposal submitted to a vote at the April 26, 2007 meeting;

3. The approval is to be conditioned upon Wachovia Bank, N.A. entering into an agreement with the Borough of Westwood allowing for the municipal public parking depicted in its plan;

4. The Planning Board of the Borough of Westwood may impose such other conditions as may be reasonable and appropriate for the approval granted;

5. The Planning Board of the Borough of Westwood is directed to hold a public hearing to specifically place on the record those conditions that will become part of the approval. Such hearing shall take place no later than sixty days from the date of this Order; and

6. While the Court does not retain jurisdiction, any party that subsequently feels aggrieved can move before this Court pursuant to Rule 1:10-3 for appropriate relief.



MENELAOS W. TOSKOS, J.S.C.

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

WACHOVIA BANK, N.A.,

Plaintiff,

vs.

PLANNING BOARD OF THE BOROUGH
OF WESTWOOD and BOROUGH OF
WESTWOOD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. BER-L-6403-07

Civil Action

OPINION

Decided: August 8, 2008

Jeffrey M. Hall appearing on behalf of the Plaintiff, Wachovia Bank, N.A. (Fox Rothschild, LLP).

Thomas W. Randall appearing on behalf of the Defendant, the Planning Board of the Borough of Westwood (Randall, Randall & Stevens).

MENELAOS W. TOSKOS, J.S.C.

Plaintiff Wachovia Bank (“Wachovia”) is a corporation seeking to construct a branch bank facility in the Central Business District (“CBD”) of the Borough of Westwood, on a plot bordering Madison Avenue, Washington Avenue, and Broadway. In November 2006, Wachovia filed a development application with the Planning Board of the Borough of Westwood (“Planning Board” or “Board”) seeking preliminary and final major site plan approval to construct a bank facility with full service drive-through lanes, one Automatic Teller Machine (“ATM”) drive-through lane, one bypass lane, and parking spaces.

The application required an impervious lot coverage variance. The maximum coverage permitted was 60% while 65% coverage was proposed. The proposed development was to replace a defunct Valley Ford Car Dealership that was a non-conforming structure.

After filing the original application, Wachovia identified a need for public parking in the area and revised its application to address the insufficient public parking in the downtown area. The proposal also included development of a small “pocket” type park. At the time, the Borough of Westwood was in the process of passing an ordinance that would prohibit drive-through banks in the CBD. The site plan application was heard before the ordinance came into effect. Even if the Planning Board granted approval to the development plan, that approval would have to be contingent upon Wachovia negotiating an easement or license agreement with the Borough of Westwood to permit the municipality to use a portion of Wachovia’s property for public parking.

Between January and June 2007, Wachovia presented revised plans during seven different meetings with the Planning Board. The plan revisions were generally directed to address concerns of the Board. After Wachovia made multiple changes to the site plan, the Board voted to deny the application.

On January 5, 2007 Wachovia proposed a site plan “Concept A”, which included public parking. Objectors, First Westwood Realty and 513 Broadway, LLC (“First Westwood”), raised the issue of whether the Board was precluded from exercising jurisdiction over the application because of an alleged defective notice. At the initial hearing, First Westwood Realty also requested that Mayor Wanner recuse himself from deliberations on the application. The procedural concerns were addressed and Mayor Wanner, who had discussed the public parking concept with Wachovia, did recuse himself prior to the presentation of the testimony. The matter

was carried and the Board accepted jurisdiction over the Application during a public hearing on February 8, 2007.

Over the next several public meetings and work sessions, Wachovia presented testimony from Richard Kendarian, its project engineer, Michael J. Hanna, P.E., a traffic engineer, Vincent F. Wolk, an architect, John R. Martinez, P.E., a site engineer and Paul Grygiel, a professional planner. In addition, the Board heard testimony from its consultants, Lou Raimondi and Paul Neihoff, both professional engineers and Edward Snieckus, a professional planner.

At the February 22, 2007 public hearing, Mr. Meisel, on behalf of First Westwood, said “. . . the applicant has come a long way from where we started this evening . . . my objections to this project at this particular point in time will be dissipated because I think they’ll be addressed.” He also acknowledged that Westwood had a history of public/private arrangements to provide public parking on private property. Mr. Meisel stated that what Wachovia was proposing was not unusual for Westwood “. . . using Center Square as an example there is no formal dedication of municipal parking lot on Center Square but there was an Easement Agreement entered into between the owner, the Borough and the Parking Authority . . .” 2/22/07 104-23-25 105-1-12. It was also at this meeting that Edward Snieckus, the Board Planner, introduced a sketch that proposed moving the position of the bank building to the southeasterly side of the site. The Board favored this new layout over Concept A and thus Wachovia agreed to engineer the alternate location, identified as “Concept B”. On March 22, 2007, Wachovia presented Concept B, but subsequently the Board proposed yet another layout, resulting in a Concept C.

In response to the Board’s suggestions on which layout they favored, Wachovia engineered and presented Concept C to the Board at a work session on April 12, 2007. However,

the Board then decided that they actually preferred Concept B to Concept C, even though they had previously taken a straw vote at the prior meeting indicating a preference for Concept C. By this time Wachovia had plans prepared showing the building in three different locations. Wachovia did not have time to fully engineer Concept B for the April 26 public meeting and, therefore, requested only preliminary site plan approval.

Thus, the proposed Concept C was abandoned and the Planning Board was asked to vote on Concept B. At the April 26 hearing testimony was presented by Wachovia's engineer concerning some minor modification. The changes were a relocation of the trash receptacle, the addition of a parking space compliant with the Americans with Disability Act, a removal of two non-ADA spaces, and the addition of two employee parking spaces. On April 26, 2007 the Board voted five to four to deny the preliminary approval on Concept B. On June 14, 2007, the Board adopted a memorializing Resolution. Subsequently, Wachovia made a request for reconsideration which was denied. On July 10, 2007, the Borough Council adopted Ordinance 07-15 prohibiting drive-through banks in the CBD zone of Westwood.

The Court recognizes as did the Board in its resolution that because the proposal called for the demolition and removal of the existing structures Wachovia had an opportunity to construct a conforming building. In fact, the original application noted in the Board's resolution was essentially variance free. It requested only a "de minimus" lot coverage variance to allow 65% impervious as opposed to the 60% permitted under the ordinance. The metamorphosis of the plan, however, came from the active participation of the Board and its consultants and the willingness of Wachovia to accommodate the Board's requests.

Concept B required the following variances:

Variance	Required/Permitted	Proposed
1. Max Impervious Coverage	60%	73%
2. Front Yard Set-Back	20 feet	2.5 feet
3. Off Street Parking Within Front Yard Lot Line	10 feet	6 feet
4. Wall Signs	1	2
5. Wall Sign Height	12 feet	15 feet

Wachovia presented testimony supporting its variance requests. Wachovia’s experts demonstrated a uniqueness associated with the Property permitting relief from the strict adherence to the bulk standards in the Borough’s ordinance. The Property had three street frontages, an irregular shape, and was relatively narrow, that with inclusion of the municipal public parking made compliance with the setback and signage ordinances impracticable.

Wachovia presented testimony that the variances were necessary to facilitate the proposed dedicated public parking. In addition, the record demonstrates credible evidence that Wachovia’s proposal was in character with the neighborhood. Its variances facilitated the inclusion of a park area which constituted an aesthetic improvement over the non-conforming and abandoned car dealership.

Mr. Grygiel testified that Variance 1 is only 8.3% greater than the bulk requirement and is a significant improvement over the existing 97.2% impervious coverage of the Ford car dealership. Furthermore, the coverage was increased in order to accommodate the proposed public parking. Mr. Grygiel further testified at the March meeting that Wachovia was proposing “. . . a substantial public benefit in terms of public parking . . . on the site.”

The Westwood Ordinance requires a front yard setback of twenty feet whereas Variance 2 under Concept B proposed a 2.5 foot setback. This was required because the Board wanted the building closer to the street. The Board also had safety concerns with having a driveway in front of the bank. Concept A was criticized by Board Planner Snieckus as being out of character for a development in the CBD zone. In his December 20, 2006 review letter he pointed out that the zone is predominantly developed with buildings lining the street which provide a building edge and establish a strong pedestrian connection.” In order to make the building fit in with surrounding buildings as the Board and its planner suggested, and still provide public parking, Wachovia placed the building closer to the street using Mr. Snieckus’s own proposal. The existing Ford building, it should be noted, actually abuts the sidewalks. In addition, Mr. Grygiel explained that although the Property was in the CBD district, it was on the outer fringe of another zone district, the CBD/SPE zone. This zone has very specific requirements tailored towards a pedestrian-oriented environment, and the restrictions are more stringent than the bulk requirements set forth in the CBD zone. Mr. Grygiel explained that because the Property was on the fringe of the CBD/SPE zone, the proposed pedestrian friendly design would be more in keeping with the three or four blocks of Westwood Avenue that were zoned CBD/SPE. 3T 118:19-119:21.

The Board expressed concern about pedestrian movement from the parking stalls across the drive-through area. The Concept B proposal separated and eliminated any traffic movements from the front of the building. Mr. Snieckus testified that Concept “B” would “separate that traffic movement from the frontage of the building and thereby allow for exiting movements from the drive-through lanes to go directly to Madison Avenue as an alternative to avoid the potential conflict from a pedestrian standpoint at the front location.” 4T 19:20-20:1. Mr.

Snieckus stated at the March 22 meeting that the Concept B plan was appropriate in response to some concerns as to the safety aspects of the drive-through lane. He testified that Wachovia's proposed front setback variance was appropriate to provide the fifteen stacking capacity within the former drive-through area. 4T 20:6-10. Thus, while the building location required a variance from the front yard setback, it was fully supported by the fact that it adequately addressed pedestrian safety and streetscape issues as noted by the Board and Board professional.

Variance 3 came from the unique nature of a property, which fronts three streets. The Westwood Ordinance required a minimum setback from the front yard line of ten feet for parking spaces. Wachovia proposed a six foot setback. According to the testimony of Mr. Grygiel, Wachovia could have complied with the Westwood requirement, but, in order to provide the public parking in an appropriate location for existing businesses, the setback variance was required. The Property had three street frontages, making for "a limited amount of room you can work with in terms of providing adequate setbacks." 3T 111:5-7.

Variance 4 arises from the need for an additional wall sign due to the site fronting three streets. Wachovia was willing to remove a permitted freestanding sign in order to have an additional wall sign. The Westwood Ordinance permits one wall sign, and Wachovia sought two. Because of the irregular shape of the Property, the fact that Madison Avenue was one-way and the location of entrances on both Irvington Street and Madison Avenue, the additional signage was required for safe identification. 4T 114:12-115:14. Mr. Grygiel testified that the sign can be granted under (c)(2) criteria because of the three street fronts the public benefits from having two signs on the building since they provide adequate identification.

Finally, Variance 5 was required in order to place Wachovia's signs three feet higher than permitted. Wachovia argues it wanted higher signs in order to conform to the Board's request to

make the building more aesthetically pleasing, which they attempted to do by making the building brick faced. The Westwood Ordinance permits a maximum height of a building sign to be twelve feet from the ground, Wachovia proposed a sign fifteen feet sign from grade. Mr. Grygiel testified that this variance could also be granted under (c)(2) criteria. He pointed to a roof design change predicated by the Board's recommended revisions which required the sign to be more elevated off the ground. Though the wall signs could be designed to conform with the Ordinance standards, they would be less aesthetically pleasing. He testified that with the brick face of the building, a higher location was required and that the variance could be granted without detriment to the zone plan. 4T 120:3-25. There was no contrary testimony.

The Borough of Westwood Master Plan Reexamination Report dated December 1, 2005, which was adopted by the Board, refers to the dearth of public parking in the Central Business District. "The business community and public have emphasized that there needs to be improvements to the accessibility and signing of parking in the [CBD]. The improvement to and the creation of additional parking areas within the [CBD] should be an ongoing effort in order to insure that sufficient parking will be available to meet future demands." Wachovia's planner Mr. Grygiel's un rebutted and unrefuted testimony noted that the proposed Wachovia public parking conferred a substantial public benefit under the Master Plan. See 5T 109:14-22 and 118:1-11.

The significance of the public parking area to Wachovia's application is obvious in the record. The Board never objected to the concept of Wachovia providing public parking. At some point during this long and drawn out process the Planning Board should have notified Wachovia that it was not interested in the public parking and would not be willing to grant the variances made necessary to accommodate the public parking on the property.

The Board contends that the Concept B plan voted on was substantially different from the Concept B plan that Wachovia's planner Mr. Grygiel testified to. The record does not support such a finding.

The Board's planner, Mr. Snieckus, examined the second Concept B plan and concluded:

The plans were two sheets that were submitted, the title sheet and the plan sheet, both with revision number two, dated 4/12/07, and the plan you're looking at is substantially similar to the plan you looked at back on the 22nd with a few changes that were made on some information that became apparent during the workshop. 5T 4:19-25.

"Judicial review of the decision of a Planning Board or Board of Adjustment ordinarily is limited. A board's decision 'is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable.'" Sica v. Board of Adjustment, 127 N.J. 152, 166-167, 603 A.2d 30 (1992). The plaintiff claims that in denying the variances and in rejecting preliminary site plan approval, the Planning Board was arbitrary, capricious, and unreasonable in that this decision was contrary to the uncontroverted substantial weight of the evidence presented.

In reviewing a planning board's decision respecting variance requests, the scope of the court's review is "not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Cohen v. Bd. of Adjustment of Borough of Rumson, 396 N.J. Super. 608, 615 (App. Div. 2007) (emphasis added, internal quotes omitted). Where a board seeks to reject testimony, it must do so carefully, particularly where the testimony is unrefuted. Exxon Co. U.S.A. v. Bd. of Adjustment of Bernardsville, 196 N.J. Super. 183, 194 (Law Div. 1984).

A Board's decision will be reversed where it is not supported by credible evidence. In Green Meadows At Montville, L.L.C. v. Planning Bd. of the Twp. of Montville, 329 N.J. Super. 12, 24 (App. Div. 2000), the Court affirmed a Law Division's reversal of a Planning Board's

denial of a request for preliminary and final major subdivision approval, variances and exceptions because “the Board’s refusal to recognize that granting the variances would cause no detriment and would substantially advance the purposes of the MLUL was arbitrary and unreasonable.” “In regards to site plans ... a ‘planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval.’” Levin Properties, L.P. v. Hamilton Twp. Planning Bd., 2006 WL 1896202, *3 (App. Div. 2006) (citing N.J.S.A. §40:55D-46b).

Here, the Court determines that the Board’s decision was unsupported by any competent testimony or evidence in the record to rebut the position advanced by Wachovia’s experts. Exxon Co. U.S.A. v. Bd. of Adjustment of Bernardsville, 196 N.J. Super. 183, 194 (Law Div. 1984). The Board ignored the undisputed testimony of Mr. Grygiel, Wachovia’s planner, in support of the site plan and variances. Mr. Grygiel provided substantial testimony on the orientation of the Concept B bank at the hearing held on March 22, 2007. Moreover, Westwood’s own planner testified that the reorientation of the building was appropriate. Therefore, all of the competent evidence supported Wachovia’s application with variances as a better planning alternative. Similarly there was nothing in the record to support the Board’s conclusion to the contrary.

The Planning Board argues that Wachovia failed to fully engineer Concept B, and therefore could lawfully deny the application for preliminary approval. Despite the fact that the Board’s resolution states that it did not have enough information to vote on Wachovia’s site plan on April 26, there were no concerns raised at the meeting about lack of information on drainage or landscaping. The record indicates that the Board understood that Wachovia would be submitting fully engineered plans at the time of its final approval. 3T 123:4-20, 4T 9:25-10.1.

In addition, under the MLUL, preliminary approval requires only that plans or other documents be in tentative form for discussion purposes. See N.J.S.A. 40:55D-46(a); see also Davis v. Planning Bd. of Somers Point, 327 N.J. Super. 535, 540 (App. Div. 2000). In Davis, the court recognized that preliminary major site plan submission drawings need not contain fully detailed drawings and a developer can defer a detailed submission until making its application for final approval.

In regards to the variances needed for Concept B, Wachovia's planner, Paul Grygiel, testified that public parking in the area would provide a public benefit due to its proximity to the train station and the lack of public parking in the area. The planner further testified that the Borough recognized this need for parking in its most recent Master Plan Reexamination Report for the CBD district. See 4T 118:1-119:11. Furthermore, Mr. Grygiel testified that no public detriment would occur because the variances did not impair the Master Plan or zoning ordinances of the Borough. See 3T 115:15-25. The public parking addresses a need of the Borough of Westwood, while posing little or no public detriment. This is reflected in the record. Finally, the Board never raised any concerns over possible negative impact related to the public parking.

The testimony supports a granting of the variances under N.J.S.A. 40:55D-70c(1) based on the unique shape of the Property. In addition, there was sufficient unrefuted testimony to support the granting of the variances under N.J.S.A. 40:55D-70c(2). The inclusion of the "pocket" park provides for adequate light area and open space. The location and redesign of the building promotes a desirable visual environment. The Reexamination Report identified a need to encourage and provide public parking in the CBD. This inclusion of public parking proposes

a coordination of public and private activities. All of these serve the recognized purposes of zoning as enumerated in N.J.S.A. 40:55D-2. Bressman v. Gash, 131 N.J. 517, 530.

The second criteria to consider a c(2) variance is whether the benefits of granting the variance outweigh any detriments. There was no evidence showing any detriment in granting the variance. This Court found none in the record below.

For all variance applications, a board must be satisfied that a grant of requested relief will not represent “a substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” This is generally referred to as the negative criteria. The detriment must be substantial and cause such damage to the character of the surrounding neighborhood. Yahnel v. Bd. of Adjut. of Jamesburg, 79 N.J. Super. 509, 519 (A.D.) cert. den. 41 N.J. 116 (1963).

There is nothing in the record below to show a substantial detriment to the character of the neighborhood. To the contrary the plans were modified to make the development more in character with the existing neighborhood.

In denying Wachovia’s application on the grounds that there was no testimony to support the orientation of the building and the building set back variance, the Board acted in an arbitrary and capricious manner. Wachovia’s experts provided testimony in support of the bank’s orientation, but there was no competent testimony or evidence in the record to rebut the position advanced by Wachovia’s experts. In fact, almost no objections were raised by the Board during the presentation of the site plans, and any objections that were raised were resolved by Wachovia making revisions to its plans. Wachovia further presented testimony from Paul Grygiel of the uniqueness of the Property. He described how the property was relatively narrow, irregular in shape and fronted three streets. He concluded that there was “a limited amount of room you can

work with in terms of providing adequate setbacks.” See 3T 111:5-7. As such, it would have been difficult to adhere to the standards while providing for the proposed public parking. Additionally, the Supreme Court has found “narrowness of [a] lot, combined with the effect of the existing driveway and garage along [a] sideyard, rendered the strict enforcement of the setback and land coverage ordinance requirements an undue hardship on the applicant.” Lang v. Zoning Bd. of Adjustment of Borough of North Caldwell, 160 N.J. 41, 59. These unique conditions of the Property further justified the need to grant variance relief.

The Board was also arbitrary and capricious in determining that the proposed development was an underutilization of the Property. This determination was initially made during the Board’s deliberations. In the resolution, the Board states “. . . [T]his hypothetical benefit [the public parking] to a limited group of people is not shown to outweigh any detriment that might occur due to lost revenues to the town from restricted commercial development on the site to warrant such an extreme variance.” A diligent examination of the record fails to reveal any evidence supporting this conclusion.

Wachovia requested that as a condition to approval, it must enter into an agreement with the Borough of Westwood with respect to the granting of a license or easement for public parking. The Board argues that . . . “The conditions that may be imposed must be set forth with some particularity in an ordinance and must be limited to those permitted by the authorizing statute.” Battaglia v. Wayne Township Planning Board, 98 N.J. Super. 194, 198 (App. Div. 1967). The Court agrees with this observation. However, non-accessory public parking is a permitted use in the CBD zone under §65 C-109.B. Chapter 141-18 of the Borough Code which allows for land to be used as a municipal parking lot if an easement or license is given to the Borough of Westwood. As noted earlier, Westwood had entered into such arrangements with

other property owners. In fact, such an arrangement occurred in Witt v. Borough of Maywood, 328 N.J. Super. 432, where a bank and a municipality negotiated an exchange of easements prior to the bank seeking planning board approval. The Court finds that Wachovia should be given the opportunity to enter into such an agreement with the Borough of Westwood.

The Planning Board also argues that Wachovia offered the public parking as a *quid pro quo* for granting the variances necessary for the proposed bank and that, therefore, Wachovia attempted to buy the variances they needed for the bank by offering the town public parking. However, this Court finds that the public parking is not a *quid pro quo* for granting the variances, as there exists an ordinance that allows the property to be used for public parking. There were no “hallmarks of a public auction” that would suggest that the municipality demanded or the developer offered the parking in exchange for municipal approval. Nunziato v. Planning Bd. of the Boro. of Edgewater, 225 N.J. Super. 124 (App. Div. 1988). Furthermore, there were no negotiations between the Planning Board and Wachovia in which they bargained for an exchange of the public parking for the development approval. In Nunziato, there were negotiations directly between the planning board and the applicant. However, that never occurred in this case.

The record here fails to reveal any *quid pro quo* for approval of the application. Instead, Wachovia identified that there was a need for public parking in the CBD Zone, and proposed to assist with ameliorating that problem with additional parking that could be dedicated to public use. Moreover, as testified to by Mr. Meisel such a public/private partnership for public parking already exists in Westwood. In sum, the provision of public parking constituted a legitimate land use concern for the Board to consider. There is simply no evidence of an unlawful exaction or *quid pro quo*. Finally, Wachovia only asked for conditional approval. If the Board had no

interest in having the development providing public parking it was incumbent to notify the applicant early on in the process.

In addition, the Board suggests that Wachovia's inclusion of public parking may require a "d" variance, however, non-accessory public municipal parking is a permitted use in the CBD Zone. §65C-109.B of the Borough Zoning Ordinance. Moreover, two principal uses are permitted in the CBD Zone. See §65C-101.E of the Ordinance. Wachovia's public notice for the April 26 hearing specifically stated that in addition to the construction of a branch bank facility with drive-through lanes, it "proposes 15 parking spaces reserved exclusively for Wachovia's use and the remaining spaces will be shared public and bank parking pursuant to agreement with the Borough of Westwood as permitted by law with such shared parking to be allocated between short term parking (two hours or less) and long term parking (no less than 10 hours)."

The Court, therefore, reverses the Board's denial of Wachovia's application for preliminary site plan approval, with a direction to grant the variances and waivers requested. The reversal is, however, conditioned upon the Borough of Westwood accepting an easement or license from Wachovia for public parking on the site. This Court relies on W.L. Goodfellows and Co. of Turnersville, Inc. v. Washington Twp. Planning Bd., 345 N.J. Super. 109, 118 (App. Div. 2001), which allows for preliminary approval to be granted conditioned upon the acquisition of an easement. Because this Court concludes that the variances and preliminary site plan should have been approved, equity dictates that Wachovia should have the benefit of the statutory protection afforded in N.J.S.A. 40:55D-52a from the subsequent change in use under Ordinance 07-15 which prohibits drive-through tellers. Goodfellows v. Washington Plan. Bd., 345 N.J. Super. 109 (A.D. 2001). S.T.C. Corporation v. Planning Bd. of Hillsborough, 194 N.J. Super.

333, 476 A.2d 888 (App. Div. 1984). The time period shall run from the action of the Board granting the site plan and conditions.

The Court, therefore, remands this matter to the Westwood Planning Board and directs it to grant the site plan approval, variances and waivers required for the Concept B proposal submitted to a vote at the April 26, 2007 meeting. In addition to the condition that Wachovia provide an agreement with the Borough allowing for the municipal public parking depicted in its plan, the Board may impose such other conditions as may be reasonable and appropriate for the approval granted. The Board is directed to hold a public hearing to specifically place on the record those conditions which will become part of the approval. The hearing shall take place no later than sixty days from the date of this decision. While the Court does not retain jurisdiction, any party that subsequently feels aggrieved can move before this Court pursuant to Rule 1:10-3 for appropriate relief.