

Reversing Real Estate Fortunes

Fox Rothschild Aids Clients Stymied by “Arbitrary” Planning Board Decision

In November 2006, Wachovia Bank filed a site plan that proposed construction of a branch bank facility in the Central Business District of the Borough of Westwood in Bergen County, New Jersey. Wachovia’s plan would have replaced a defunct Ford dealership, and offered a branch bank with drive-through lanes and public parking.

But what appeared to be an ideal design with reasonable variance requests was voted down by the Planning Board of the Borough of Westwood. During the course of seven different meetings over five months, Wachovia presented three distinct concepts (A, B and C) showing the building in three different locations in an effort to mollify the Board.

After initially expressing a preference for Concept C, the Board, by straw vote, settled on Concept B. All of the design’s required variances and waivers were supported by testimony from the Board’s expert engineer and planner. In fact, one of the key variances for intrusion into the front yard setback was requested by the Board and its planner.

After months of accommodating the Board’s requests for design changes, Wachovia requested preliminary site approval, but its plan was denied by a five to four vote despite the unrefuted testimony of the Board’s own planner that the proposed building design and location were consistent with the character of the neighborhood.

When Wachovia’s request for reconsideration was denied, Fox Rothschild LLP partner Jeffrey Hall, who represented Wachovia throughout the planning process, knew it was time to take the matter to court.

“Wachovia had been willing to accommodate the Board’s every request,” said Hall. “The original plan only required a minor variance and waivers, but the new plan that the Board requested needed several more in light of the added public parking element.”

Hall and his associate, Alexander Wixted, filed a complaint challenging the Board's denial as well as an ordinance that was passed after Wachovia’s proposal was voted down that banned drive-through banks. The team also alleged civil rights violations due to the Board's egregious actions. Fox associate and litigator James D. Young joined the team to aid the litigation effort.

At trial in May, the Fox team presented testimony from experts supporting Wachovia’s site plan and request for variances and waivers. Together, they demonstrated the uniqueness of the property, which had three street frontages, an irregular shape, and was relatively narrow. As such, the inclusion of the municipal public parking made compliance with the Board’s ordinances impossible.

Although the Board contended that the plan Wachovia presented was “substantially different” than that which Wachovia’s planner testified to, the Court found that there was no support to the

claim, and 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."

"All of the evidence clearly supported Wachovia's application," said Young. "The Court recognized that the Board was completely arbitrary in its decision, which was a great victory for our client."

On August 8, 2008, after nearly two years of discussions, meetings and legal wranglings, the Superior Court of New Jersey not only reversed the Board's denial of Wachovia's application for preliminary site plan approval – declaring it arbitrary, capricious and unreasonable – but also directed the Board to approve the site plan and grant the requested variances and waivers.

"The Judge's opinion was a complete vindication of our client's rights," said Hall. "Our client now has the opportunity to develop a prime piece of real estate in an important market. We're pleased to have obtained this extremely positive outcome for Wachovia."