

Rebuilding the World Trade Center

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CORNELL

REAL ESTATE

REVIEW

VOL. 10, JULY 2012



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integrating the office towers, retail space, memorial, museum and infrastructure on the site.

Mr. Panovka is a frequent speaker and author on topics involving M&A, REITs and commercial real estate. Among other publications, he is co-author of "REITs: Mergers and Acquisitions," an article published by Law Journal Press. Mr. Panovka was born in Johannesburg, South Africa, lived in Israel for eleven years, and currently resides in Manhattan with his family. He holds honors degrees from Cornell University and Duke Law School and is a member of the New York Bar.

Cornell Real Estate Review Questions for Robin Panovka, Partner Wachtell Lipton Rosen & Katz

How did Wachtell Lipton first get involved in the rebuilding efforts?

Larry Silverstein hired us a few days after 9/11 to help him address the myriad issues that arose from the destruction of the World Trade Center, which he had taken over from the Port Authority just a few months before 9/11 under a 99-year lease. Our role initially included a heavy

focus on the insurance claims. Our litigators developed the argument, which ultimately prevailed in court, that Silverstein was entitled to collect for "two occurrences" under some of the insurance policies. The insurance battle ultimately yielded \$4.6 billion of insurance proceeds needed to rebuild. Our role also included representing Silverstein in negotiating a framework for the rebuilding effort, which was my primary focus. Our firm strongly supported Silverstein's mission to rebuild the Trade Center, and we dedicated a huge amount of time and energy toward the effort over the last 10 years.

What were the early days after 9/11 like, down at Ground Zero?

Initially, it was fairly chaotic, as you would expect given the traumatic events of 9/11. The federal government took over the site under its emergency powers. There were rescue and recovery attempts ongoing, and continuing concerns about security. There was also an understandable sense that Ground Zero belonged to the public and not to any one person or institution, that it was more than just land and buildings, and it seemed as if customary private property rights were suspended for a period. There were many strongly-held views about what should happen at the site, coming from many different stakeholders— property -- property



owners, lessees, politicians, families of victims, the press and everyone else.

What was the process for resolving the uncertainty over what, if anything, should be rebuilt?

There was no clear process initially -- just lots of voices calling for different things, including a push by some for the government to take over the site permanently. What was needed in the midst of all the confusion was leadership, and Larry Silverstein quickly stepped in to provide it. From the very early days, Larry believed passionately in the importance of rebuilding as the appropriate response to the terrorist attacks, and he never wavered. Within weeks we formulated what became somewhat of a mantra—we -- we have the right, we have the responsibility, and we have the resources to rebuild—and -- and it turned out to be an important force in shaping the debate. It sounded short and simple, but was actually a carefully constructed position, backed by legal, moral, political and financial analysis and strategic thinking. Each component—the -- the right (a reminder that there was a binding 99-year lease in place which gave Silverstein the right to rebuild), the responsibility (both moral and contractual) and the resources (a reference to the billions of dollars of insurance proceeds to which only Silverstein was entitled and which were essential to rebuilding)—was -- was carefully constructed to blunt arguments against Silverstein rebuilding.

Judging by the many volumes of documents involved, there must have been many agreements devoted to the rebuilding efforts. Do any stand out in particular?

There were a succession of important agreements, each more detailed and voluminous than its predecessor, including so-called Master Development Agreements that tied everything together, but if I were to pick one, it would be what we called the 12/1/03 “immediate swap” letter agreement. The “swap” agreement resolved what, at the time, towards the end of 2003, seemed like an impossible deadlock, and paved a path for rebuilding to proceed. It was a very short, unusual letter agreement which, in the stroke of a pen, or actually the stroke of a color-coded diagram, established the master plan

for the site and created the blue print for all the agreements that followed.

How did this “immediate swap” agreement come about?

Long story short, by mid-2003, Larry Silverstein, the Port Authority, Governor Pataki and most stakeholders had generally agreed on two broad principles. First, that the footprints of the Twin Towers, where so many lives had been lost, should become a memorial. And, second, that it was important to re-open the Manhattan street grid (including Greenwich Street) which had run through the site before the original World Trade Center had been built in the 1960’s, but had been blocked by the “super-block” design of the original WTC. The reasons for re-establishing the grid and the related urban planning considerations is a whole separate topic for another day, but the important point here is that these two principles had taken hold and were strongly felt—don’t -- don’t build on the old footprints, and do re-open the grid.

There was just one problem. The entire legal regime for the site, Silverstein’s 99-year lease and all the other ownership and leasehold stakes, were completely inconsistent with these two principles. In fact, the 99-year lease provided that Silverstein would rebuild the Twin Towers exactly where they had been pre-9/11, exactly where everyone agreed a memorial should be built. There was massive pressure. The Port Authority and Governor took the position that the pre-9/11 legal arrangements had to be thrown out, and that the whole situation was too complicated to sort through and renegotiate. Their positions was that we should just start with a clean page entirely controlled by government agencies and without any private interests. But Silverstein was, as always, passionate about rebuilding and we believed that stepping aside would be counter-productive and just lead to more delay.

Sounds like an impossible situation. How was it resolved?

Well, with this backdrop, after coming back from a summit one night where Silverstein had been given an ultimatum to either come up with a solution or step aside, Larry Silverstein, Marty Lipton, Janno Lieber and I sat down to try to come up with something. Marty pressed us to formulate a short and to-the-point



written proposal by the following morning, so that we could cut through the deadlock, show that the problem could in fact be solved, and start shaping people’s thinking about the way forward. What we came up with was the idea of the “immediate swap”, which we did in fact present to the Port Authority the following morning in the form of two short paragraphs and a color-coded diagram. Essentially what we said was that Silverstein would swap his leasehold for the Twin Towers—so -- so their footprints could become a memorial—for --for a leasehold on five adjacent sites surrounding the memorial, with development rights to build the same quality and amount of office space in the five towers as had existed in the Twin Towers before 9/11—“ -- “10 million square feet of commercially viable Class A above-grade rentable office space ... [each with] an at-grade lobby”. We slapped a three colored diagram on the back that showed what was transferred to the memorial in green, what went to Silverstein for office space in blue, and what would become a train station and infrastructure in yellow. And we agreed to some negotiating principles to fill in the details later, including that everyone would act reasonably and in good faith to negotiate all other issues. That was basically it. Every word was chosen

carefully, but it was short and easy to understand. The key was that this was a final, binding agreement, not an aspirational letter of intent that may or may not be implemented. There was no turning back. Once the letter was signed on 12/1/03, the swap was immediately effective, the master plan for the site was legally adopted and final, and rebuilding could proceed. It was a risky move, but it was essential to resolving a paralyzing deadlock.

Were there other key breakthroughs? What about the deal to rebuild 7 World Trade Center?

There were many breakthroughs along the way— issues -- issues arose frequently that threatened the project and needed to be resolved—but -- but, yes, getting 7 WTC up, starting in 2002 when nothing else was moving at the site, was important because it showed that the WTC rebuilding effort wasn’t hopelessly deadlocked and created a model for resolving future issues. 7 WTC was the last building to go down on 9/11 and fortunately no one died there, so it was less controversial to rebuild. In fact, there was a need to rebuild 7 quickly because its base included a ConEd power substation that was needed to power Lower Manhattan.

But there were two problems.

First, as I mentioned, the pre-9/11 7 World Trade Center had straddled Greenwich Street and completely blocked it, and there was a strong feeling by many people involved, including Larry Silverstein, that Greenwich Street should be re-opened and that, since the Master Plan had not yet been agreed upon, whatever was to be built at 7 should not interfere with the ultimate Master Plan. This was a simple proposition, but it was on a collision course with an equally simple fact. If the new 7 were to be built on only one side of Greenwich Street so as to re-open the street, the building's footprint would be too small to accommodate an office tower. The solution was to expand the footprint into another adjacent street, the NYC-owned Vesey Street, but here we ran into another "roadblock". While the City was willing to trade the required strip of Vesey Street for the re-opened Greenwich Street, it couldn't just convey the strip to Silverstein. Rather, a series of complex regulations needed to be addressed by having the required strip condemned, which was a court process that could be challenged and which carried various risks. There was no certainty it could be accomplished, and in any event, it would take much longer than

circumstances allowed. We needed to build right away, and we couldn't wait for the condemnation. Never shy about taking calculated risk, Larry Silverstein stepped up and proceeded to build 7 on a strip of land he didn't own or lease, ultimately getting most of the building up by the time the strip was acquired. Luckily we never had to find out what would have happened if something were to have gone wrong.

The second problem was also caused by the need to rebuild quickly. The rebuilding of 7 included the ConEd power substation I mentioned earlier, in the first 77 feet, with the office tower directly above it. Construction was to be on a super-fast track, before the plans for the building were complete, and it was not possible to allocate costs between Con Ed and Silverstein in advance of building. There was no way to know how much of the foundation, elevator banks, façade and other elements was attributable to the office versus the substation until full plans and cost estimates were completed, and there was no time to wait for the final plans. So, given the urgent need to rebuild, Silverstein elected to proceed based on weekly agreements rather than wait until a comprehensive approach was possible. Each week during construction, Silverstein and

Con Ed, with the help of the general contractor, Tishman Construction, entered into a weekly agreement allocating costs for the prior week and agreeing on what was to happen the following week. No one knew what would happen if we couldn't reach agreement the following week, but here again luckily we never had to find out.

Are there any lessons about negotiating that you've taken away from your experience at the Trade Center, that Center that perhaps might have broader applicability to other complex, multi-party negotiations?

It's hard to boil down ten years into one simple answer—someday I'll write a book about all this—but I would emphasize the importance of arrangements that align parties interests and create long term incentive to perform (not so simple when you're dealing with

as many diverse stakeholders and motivations as we had at the Trade Center); the importance of building trust and negotiating protocols among the negotiators; getting into the heads of counterparties in order to understand exactly what they are trying to achieve and to help them get there; understanding that in complex multi-party terrain like Ground Zero it's impossible to please everyone, to find the perfect solution or to draft the perfect agreement, so it's often wise to seek Pareto optimality and avoid getting bogged down trying to achieve perfection; trying to resolve disputes and deadlock relatively quickly before they spin out of control or spill into the press, by changing the dynamics or parties at the table, seeking third party intervention, by forming alliances or through PR; getting out ahead of complexity and shaping people's thinking with simple, bold proposals like the "immediate swap"; respecting "off the record" discussion; and avoiding ad hominem attacks if at all possible. Much of negotiation is art, not science, like judging when to stick to your guns and when to compromise, when to draw lines in the sand and when to roll with the punches, and the applicability of any rule will depend on the specific facts and circumstances.

What do you mean by negotiating protocols? Can you give us an example?

Two good examples were the related "resolve what you can and

punt on the rest" and "no thumb on the scale" protocols that we established early on with the Port Authority negotiators. The idea was that at any given stage in the process we would resolve only what needed to be resolved and could be resolved at that time, with other issues deferred by articulating even-handed, broad principles for future negotiation. It was not possible, for example, to agree on all of the terms of redevelopment when we signed the 12/1/03 immediate swap letter—there were too many moving pieces, too many unknown and unknowable facts—so we had to proceed in incremental steps. It was understood that after each incremental step no one would try indirectly to influence the outcome of future negotiations, but rather that we would table the issue until it was ripe for resolution. Any attempt to slant drafting or facts on the ground in a way that would create future advantage, or any collateral agreement that would prematurely change the status quo, was an impermissible "thumb on the scale" entitling the other parties to cry foul. It took a lot of mutual respect and trust to make this work.

Any other general lessons from how the complexity and many obstacles in the way of rebuilding were overcome?

Many, but I would say that Silverstein's sheer determination and passion to rebuild, willingness to take huge (albeit calculated) risks to make it happen, and willingness to cooperate and compromise in order to craft solutions, were all critical ingredients. 7 World Trade Center might never have been built if Silverstein had not been willing to give up Greenwich Street and build on a week-to-week basis on a City street he didn't own, and the Master Plan might never have been adopted if Larry had not been willing to agree to the "immediate swap" in which he gave up well defined multi-billion dollar leases in exchange for a few (admittedly carefully crafted) paragraphs with a basic outline and principles for future negotiation.

