



## **The Wizard of OZ (that's "Opportunity Zones"): Down in the Boondocks - by Dan Flanigan**

February 05, 2019 - Front Section

My law firm has 21 offices located across this land of OZ. We are working intensely on many projects throughout the country and are seeing many projects moving forward that fit within the major real estate asset "food groups:" Plenty of multifamily, lots of mixed-use, warehousing and logistics, self-storage (for example, a proposal for part of the former Brooks Air Force base in San Antonio), and a sprinkling of office and hospitality projects. But I thought it might be interesting to New York Real Estate Journal readers, and perhaps a spur to creative thinking, to describe some of the more exotic initiatives and projects being considered around the country not just from the private sector but also from, and often in partnership with, the nonprofit and public sectors as well.

### **Public Park/10,000-Seat Amphitheatre/Mixed Use**

The Minneapolis City Council is considering a proposal to transform the city's defunct 48-acre Mississippi River Port into a public park with a 10,000 seat amphitheater and adjacent retail, multifamily, and hotel uses. An issue has already arisen, as it is likely to do in many places, as to whether the project can be structured to provide real benefits, such as living-wage jobs and wealth-building opportunities, to residents of the city's North Side where the Port is located.

### **Cyber District**

In Oklahoma, a public-private-nonprofit coalition led by the University of Tulsa is working on the creation of a "Cyber District" within Tulsa's 6th St. Opportunity Zone Corridor. The district would include an Engineering Research Center funded by the National Science Foundation, a Multi-Federal Agency Cybersecurity Center for Excellence, a Cybersecurity Insurance Institute, and a Consortium of Business Sectors. Despite the heavy government presence, we know that governments are often tenants, and opportunities for mixed use development in and surrounding the Cyber District are obvious.

### **Osteopathic College**

Another interesting public-private initiative is a proposed osteopathic college and related medical business park (student housing, medical office, and other health-related facilities) located in an OZ in Jefferson County Wisconsin with add-on possible availability of TIF and NMTC incentives.

### **Memphis RFPs**

After months of preliminary work, the city of Memphis, Tenn. is implementing a particularly aggressive approach to capturing OZ benefits by issuing RFPs seeking proposals from private developers for dozens of city-owned properties in OZs.

### Urban Farms (Indoors)

How about urban farms? Indoors of course. Don't think tractors, grain silos, barnyards with roosters strutting around, and all that. In this age of obsession with farm-to-table and local sourcing, the idea is to bring specialty vegetables, herbs, spices, and similar items closer to city grocery stores. You can't get much fresher or more local than down the block.

### Marijuana Enterprises

A variant is to convert underutilized warehouse properties into marijuana grow facilities in states like Colorado, California, Michigan (and maybe New York soon?) where cannabis is legal. Yet there is a likely huge obstacle. Although marijuana is not one of the "sin" businesses specifically prohibited by the OZ statute, one might suspect that the IRS will try very hard to find a way to prevent such a business from enjoying the benefits of the OZ program—perhaps something similar to Section 280E of the Internal Revenue Code that denies deductibility of ordinary business expenses in connection with the trafficking of "controlled substances" under federal law.

But that's a statute, and Congressional passage of a similar statute denying OZ benefits is unlikely. Still, the question must be asked—Can the IRS accomplish that goal by regulation, without explicit Congressional authority, by arguing, for example, that Congress should not have to specifically list in the statute every item that is illegal under federal law for it to be ineligible for federal tax benefits? Is the absurd outcome to be that you can't sell liquor for consumption off-site in an OZ, but you can sell marijuana for that same purpose? And Congress, right in the OZ statute, gave the Treasury power to issue regulations to prevent abuse of the OZ program.

### Cannabis Waste Processing Facility

Despite the above concerns, an enterprise likely to slip through a hostile federal net is a plan by 9Fiber to build a plant (no pun intended) in an OZ in Pueblo, Colorado devoted to transformation of cannabis waste (emphasize "waste") stalks into industrial and textile products.

This is only a sampling of what's happening out there. The possibilities may not be endless, but they certainly are manifold, and we have only just begun...

### Leasing To Marijuana Enterprises

While we are more or less on the subject, if marijuana businesses can't receive OZ benefits, can those who lease a building to a marijuana business enjoy those benefits? While the landlord would not be directly "trafficking" in a controlled substance, would the landlord be engaged in a criminal

conspiracy to do so? And loss of OZ benefits may be the least of the landlord's problems. There may not be much risk of an actual prosecution, but—"shades of the prison-house begin to close"—one may wish to pause and reflect on and consider that forfeiture of the asset, fines, and incarceration are all possible consequences of a federal criminal conspiracy conviction. (Jeff Sessions may still be lurking out there somewhere.) In any event, we can safely say that it won't be an asset class attractive to institutional investors anytime soon.

Dan Flanigan is managing partner of the New York office of POLSINELLI.

Flanigan and POLSINELLI have provided the above material for informational purposes only. The material provided is general and not intended to be legal advice. Nothing in the material should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540