



Investor Alert: Does Investing in Opportunity Development Partners' Opportunity Zone Fund Come with Significant Risks?

Responsible Contracting and Investor Risk: Sturgeon Development Partners, d/b/a Opportunity Development Partners and affiliates' pattern of behavior signals potential investor risk in the country's hottest Opportunity Zone real estate market

We believe that persons considering investing in Opportunity Development Partners' (ODP) Opportunity Zone Fund should be aware of recent actions by related-entity, TMT Development. We are sending you this informational alert because it is our opinion that the potential success of ODP's Opportunity Zone Fund could be threatened by TMT's failure to manage risk, maintain labor peace and establish productive relationships with community stakeholders in its key market, Portland, Oregon.

ODP's president Vanessa Sturgeon serves as president of TMT Development, the real estate company founded by her grandfather. In Portland, there has long been a market standard of responsible contracting for building services that brings together all the stakeholders invested in the success of the real estate market: investors, contractors, workers, tenants, and communities. This market standard rewards all stakeholders and minimizes risk for investors in one of the country's hottest commercial real estate markets, which includes:

- Over 1M square feet of existing commercial office space.ⁱ
- Nearly 1M additional square feet of commercial real under construction or in development.ⁱⁱ
- Over 80% of commercial janitorial workers in the commercial core organized under collectively bargained contracts with major contractors and owners.

In our view, TMT has aggressively promoted itself as a good community partner that cares about the vitality and success of all stakeholders, but the company actually undermines market standards. We have serious questions about TMT's business decisions and dealings with elected officials and community stakeholders. TMT's actions should give pause to any investor.

We believe TMT has repeatedly violated its current lending agreement with Metlife

Metlife's lending agreement requires TMT to comply with all regulations and covenants, and prohibits TMT from changing the use or legal description of the tower without prior explicit consent by Metlife. Despite these requirements, our opinion is that TMT has repeatedly violated its lending agreement by violating a restrictive covenant for the tower negotiated with the City of Portland and by converting some of the residential portion of the tower to short term rentals without the proper permits.

We believe TMT is violating its covenant with the City of Portland, jeopardizing labor peace and risking its reputation

In 2013, TMT Development announced it was resuming construction on the long-stalled Park Avenue West Tower.ⁱⁱⁱ Under Portland's zoning code, TMT needed to procure and transfer additional floor area ratio credits (FAR) from an adjacent site owned by the City of Portland.^{iv} Failure to do so could have once again jeopardized TMT's lease agreements and newly-secured funding.^v **The City of Portland negotiated a good faith covenant with TMT that included a commitment to the exclusive use of union janitorial and security contractors for the commercial portion of PAWT through March 31, 2026,^{vi} aimed at securing labor peace to protect the City's interest as the owner of neighboring Director Park. TMT agreed to this binding covenant, but has been using non-union janitorial contractors in the commercial portion of the building since it opened in 2016.**

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The Portland City Attorney has exchanged multiple letters with TMT attempting to resolve the issue amicably. As the situation continues to stagnate, the City may be forced to consider its options in enforcing the covenant.^{vii}

Breaching this covenant also jeopardizes the City's interest in maintaining labor peace. Park Avenue West's continued operation with non-union janitorial services stands in marked contrast with the rest of Portland's downtown core, where over 80% of building owners have chosen to do business with union janitorial vendors. TMT's alleged evasion of its obligation under the covenant threatens working standards that the region's janitors have fought so hard to raise.

Our view is that TMT has repeatedly violated its current lending agreement with Metlife by failing to timely secure proper permits, and by possibly changing the legal use of the property without Metlife's prior consent.

TMT may be in violation of its current lending agreement with Metlife by making a wide selection of units available on short-term rental sites such as Airbnb and Vacasa.^{viii} The lending agreement requires TMT to comply with all regulations, and prohibits TMT from changing the use or legal description of TMT's Park Avenue West Tower without Metlife's prior written consent that "may be withheld or conditioned in [Metlife's] sole and absolute discretion."^{ix}

TMT entered Portland's short-term rental market by violating City regulations. Initially and for far too long, it was reported that TMT's short-term rentals were operating completely out of compliance with the City's permitting requirements.^x It is our understanding that TMT has now applied for and received at least some of its required occupancy permits,^{xi} but this prior lack of proper permitting compounded another potential violation of City regulations, Portland's "One Host, One Home" rule aimed at preventing "commercial, hotel-style uses of the short-term rental platform in Portland."^{xii}

In curing its permitting problem with the City, it raises questions as to whether TMT obtained Metlife's prior consent as required by its lending agreement. Sometime within the past year, TMT applied for "permits that have been issued to convert occupancy of units from residential to hotel occupancy and use."^{xiii} Did TMT, with a record that in our view shows disregard for provisions of other binding legal covenants, comply with its lending agreement by obtaining Metlife's prior written consent before proceeding with such a change? The answer to this question may further indicate that potential partners should consider with caution any investment opportunity with TMT or an affiliate.

TMT's non-union contractor could potentially jeopardize its finances by exposing it to joint liability under ORS 658.465

TMT's non-union janitorial contractor makes use of subcontractors, which we believe could expose TMT to liability under Oregon's Property Service Worker Protection Act (2017). **Effective January 1, 2018, it is unlawful for any janitorial contractor to operate in the state of Oregon without a Property Services Contractor license. It is unlawful for anyone to hire an unlicensed janitorial contractor, and this potential liability may increase in cases when janitorial contractors use unlicensed subcontractors or franchisees.**

TMT's primary janitorial vendor, Millennium Building Services (MBS), is licensed. But it is possible that its subcontractors are not. It has been reported that MBS uses subcontractors at some locations. We have reason to believe, based on practices that have been reported to us, that MBS may be using subcontractors to clean Park Avenue West Tower. Using unknown subcontractors could expose clients and tenants to liability over which you have no control. We urge you to investigate whether this is the case.

This matters for building owners, as anyone wishing to hire a janitorial company is now required to examine its Property Service Contractor license or permit, and to retain a copy.^{xiv} It can be extremely difficult for a building owner or investor to know whether subcontractors are working in their building, and if so, whether they are licensed. Under ORS 658.465's new liability provisions a customer could be held liable for any unpaid wages owed by an unlicensed subcontractor, plus attorney fees.^{xv}

With joint liability now part of Oregon law, building owners and managers are required to do their due diligence in hiring a legitimate and licensed janitorial contractor. But even a customer who complies with this basic requirement can face other hidden risks.

TMT's labor issues could compromise service quality and tenant satisfaction, ultimately jeopardizing investors.

Liability aside, when contractors pay poverty wages and maintain poor working conditions, the result is often high employee turnover, which can compromise service quality.³⁰ Tenant frustration with poor service quality can in turn lead to leasing instability, with correspondingly negative impacts on a building owner's bottom line. And in some cases, irresponsible contractors' practices can drag building owners and their business partners into highly publicized and embarrassing controversies.

Millennium Building Services employees in recent years have reported many problems related to the company, including poverty wages, management's flouting of sick leave protected under Oregon law, and high rates of employee turnover. In 2018, MBS employees alleged retaliation by management for union organizing, and a settlement with the regional NLRB obligated MBS to post worksite notices affirming workers' rights.

According to Oregon OSHA, MBS also has a record of workplace safety and health problems. Its rate of illnesses and injuries has been 2-3 times higher than the industry average in recent years. Oregon OSHA has cited MBS for multiple violations of workplace safety and health regulations, including a number of "Serious" hazards that could cause an accident or illness that would most likely result in death or serious physical harm.

In October 2018, an MBS window cleaner survived an eight-story fall from a downtown rooftop due to faulty safety practices. An Oregon OSHA investigation found that the building's property manager had hired MBS to clean the windows, and MBS hired a subcontractor, which hired a subcontractor, which in turn hired yet another subcontractor. The building's tenants and property manager were completely unaware of this nesting doll of subcontracting operating in their building.^{xvi}

Risking the Community Reputation Needed for Upcoming Development and Investor Returns

We believe TMT's continued undermining of market standards threatens the approval process needed to realize the expected returns on ODP's Opportunity Zone Fund. Allegations of labor law violations and bad faith dealing could damage TMT's reputation, and by extension the reputation of ODP's Opportunity Zone Fund

News reports indicate that ODP wants to raise a record-breaking \$330M via its recently-launched Opportunity Zone Fund to finance two projects in two of Oregon's highly-regarded and newly designated Opportunity Zones. City code requirements mean ODP will need to take these sites through a comprehensive Type III or Type IV Land Use Review (LUR) process before being granted the permits needed to begin construction. Any proposal going through this process must submit to hearings in front of community members and, if the project is appealed, gain the support of Portland's City Council. This process is closely watched by all of the major players in the Portland real estate community and any problems with the approval process can generate a lot of coverage in the media.

Conclusion

Ensuring that the Portland real estate market thrives for long-term investors requires stakeholders to work together. In Portland, stakeholders have agreed that real estate owners hire and promote responsible contractors to ensure the assets they invest in are serviced by highly trained and loyal workers that add value to an owners' bottom line and avoid potential reputational, operational, and legal risks that can all threaten long term returns. This is the market standard that stakeholders in Portland have agreed to as a fundamental principle to ensure the long term, sustainable health of the marketplace. We believe TMT's behavior to threaten this standard should concern all stakeholders, including potential investors in SDP's Opportunity Zone Fund.

For further information, please contact:

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ⁱ JLL Office Insight Q4 2018

ⁱⁱ JLL Office Insight Q4 2018

ⁱⁱⁱ Wendy Culverwell, *A skyscraper will finally rise*, The Portland Business Journal, October 18, 2013, available at <https://www.bizjournals.com/portland/print-edition/2013/10/18/a-skyscraper-will-finally-rise.html> (last accessed 02/25/19)

^{iv} Portland, Oregon, *City Code and Charter, Title 33, Planning and Zoning, Chapter 510, Central City Plan District* (2013)

^v Elliot Njus, *Park Avenue West Tower: Stoel Rives signs on as tenant, clearing the way for construction*, The Oregonian, October 19, 2013, available at <https://www.oregonlive.com/front-porch/2013/10/park-avenue-west-tower-law-fir.html> (last accessed 02/25/19)

^{vi} *Second Amendment to Land Use Covenant Including Transferring Floor Area Ratio, Document No. 2014-047400*, Multnomah County Records, recorded on May 19, 2014.

^{vii} Letter from Harry Auerbach, Chief Deputy City Attorney, to Dana Krawczuk, Perkins Coie LLP (August 17, 2016). Letter from Harry Auerbach, Chief Deputy City Attorney, to Dana Krawczuk, Perkins Coie LLP (October 26, 2016). Letter from Dana Krawczuk, Perkins Coie LLP, to Harry Auerbach, Chief Deputy City Attorney (December 13, 2016). Letter from Dana Krawczuk, Perkins Coie LLP, to Linda Law, Deputy City Attorney (February 11, 2017). Letter from Linda Law, Deputy City Attorney, to Dana Krawczuk, Perkins Coie LLP (November 6, 2018). All on file with SEIU Local 49.

^{viii} <https://www.airbnb.com/rooms/19592316?guests=1&adults=1>, <https://www.vacasa.com/usa/Park-Avenue-West-Portland/>

^{ix} *Line of Credit Trust Deed, Assignment of Leases and Rents, Security Agreement and Fixture Filing between Grantor West Park Avenue LLC and Beneficiary Metropolitan Life Insurance Company*. Multnomah County Official Records, 2016-010763.

Section 2.06(c) Grantor shall use, or cause to be used, the Property solely for the Use. **Grantor shall not use, or permit the use of, the Property for any other use without the prior written consent of Beneficiary, which may be withheld or conditioned in Beneficiary's sole and absolute discretion. Without the prior written consent of Beneficiary, which may be withheld or conditioned in Beneficiary's sole and absolute discretion, Grantor shall not (i) file or record a declaration of condominium, master deed of trust or mortgage or any other similar document evidencing the imposition of a so-called "condominium regime" whether superior or subordinate to this Trust Deed, (ii) permit any part of the Property to be converted to, or operated as, a "cooperative" regime whereby the tenants or occupants participate in the ownership, management or control of any part of the Property, or (iii) initiate or permit any subdivision of the Property or change in the legal description thereof.** (emphasis added)

^x Elliot Njus, *More Portland high-rise apartments rented as hotel rooms; many without required permits*, The Oregonian, March 2018, available at https://www.oregonlive.com/business/2018/03/growing_number_of_high-rise_ap.html (last accessed 02/22/19)

^{xi} Liefeld, Mike. "RE: STR/change of occupancy permits?," Message to SEIU L49 researcher Nicole Knudsen, November 28, 2018, sent via e-mail.

^{xii} Steve Law, *Host or Hoax? Meet Nadia . . .*, The Portland Tribune, October 2, 2018, available at https://portlandtribune.com/pt/9-news/407872-305199-host-or-hoax-meet-nadia-?fbclid=IwAR3nI4JmNx4HcbrWc7a3sldI2AsZVKQyxFJRtuWY-K5t-8OYDKJgkNB_x2Y (last accessed 02/22/19)

^{xiii} Liefeld, Mike. "RE: STR/change of occupancy permits?," Message to SEIU L49 researcher Nicole Knudsen, November 28, 2018, sent via e-mail.

^{xiv} Oregon Revised Statute 658.437(2)

^{xv} To learn more about minimizing exposure under the Property Service Worker Protection Act and ways to protect investments via responsible contracting, please see the report "Cleaning Up Oregon's Janitorial Industry", available at <http://raiseamericapdx.org/>. See also, Oregon Revised Statutes 658.415, 658.437, 658.453, and 658.475.

^{xvi} OR-OSHA 317722108 Millennium_windows fall Oct 2018, pp. 9-10