ORDINANCE NO. 17-02

APPROVING A THIRD AMENDMENT TO DEED OF TRUST AND SUBORDINATION AGREEMENT IN RELATION TO THE COUNTY'S TAXABLE INDUSTRIAL REVENUE BONDS (TRANSFORMATION, LLC PROJECT), SERIES 2009; AND AUTHORIZING CERTAIN OTHER ACTIONS IN CONNECTION THEREWITH.

WHEREAS, on December 21, 2009, by passage of Ordinance No. 09-01, the County Commission of the County of Cape Girardeau, Missouri (the "County") approved a transaction (the "Industrial Revenue Bond Financing") whereby the County (1) issued its Taxable Industrial Revenue Bonds (Transformation, LLC Project), Series 2009 (the "Bonds); (2) used the proceeds of the Bonds to acquire certain real property located at 4680 Nash Road in the County and improve the facility located thereon (collectively, the "Project"); and (3) leased the Project to Transformation, LLC ("Transformation") for rental payments equal to the debt service on the Bonds; and

WHEREAS, Transformation borrowed funds from a private lender to further improve the Project (the "Loan"); and

WHEREAS, Transformation has previously modified the terms of the Loan with the approval and consent of the County Commission, and now desires to modify the terms of the Loan again; and

WHEREAS, in order to modify the Loan, the County, as fee owner of the Project, must approve and execute a Third Amendment to Deed of Trust and Subordination Agreement (the "Third Amendment"); and

WHEREAS, the County Commission finds and determines that it is necessary and desirable in connection with the Industrial Revenue Bond Financing that the County approve the Third Amendment and that the County take certain other actions and approve the execution of the Third Amendment and certain other documents as herein provided;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNTY COMMISSION OF THE COUNTY OF CAPE GIRARDEAU, MISSOURI AS FOLLOWS:

SECTION 1. Approval of Third Amendment. The County hereby approves the Third Amendment to Deed of Trust and Subordination Agreement in substantially the form presented to the County Commission and attached to this Ordinance (the "Third Amendment"), with such changes therein as shall be approved by the officials of the County executing the Third Amendment, such officials' signatures thereon being conclusive evidence of their approval thereof.

SECTION 2. Execution of Third Amendment. The Presiding Commissioner is hereby authorized to execute the Third Amendment and such other documents, certificates and instruments as may be necessary or desirable to carry out and comply with the intent of this Ordinance, for and on behalf of and as the act and deed of the County. The County Clerk is hereby authorized to attest to the Third Amendment and such other documents, certificates and instruments as may be necessary or desirable to carry out and comply with the intent of this Ordinance.

SECTION 3. Further Authority. The County shall, and the officials, agents and employees of the County are hereby authorized to, take such further action, and execute such other documents, certificates and instruments as may be necessary or desirable, to carry out and comply with the intent of this Ordinance and to carry out, comply with and perform the duties of the County with respect to the Third Amendment.

SECTION 4. Effective Date. This Ordinance shall take effect and be in full force immediately after its passage by the County Commission.

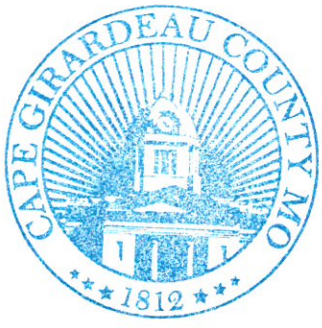
PASSED by the County Commission of Cape Girardeau County, Missouri, this December 28, 2017.

By: _____
Name: Clint Tracy
Title: Presiding Commissioner

By: _____
Name: Paul Koeper
Title: Associate Commissioner, 1st District

By: _____
Name: Charles Herbst
Title: Associate Commissioner, 2nd District

(Seal)



Attest:

By: _____
Name: Kara Clark Summers
Title: Clerk of the County Commission

THIRD AMENDMENT TO DEED OF TRUST AND SUBORDINATION AGREEMENT

This Third Amendment to Deed of Trust and Subordination Agreement is dated December 28, 2017, between Transformation, LLC, a Missouri Limited Liability Company, ("***Transformation***"), as GRANTOR; Cape Girardeau County, Missouri, a political subdivision of the State of Missouri, (the "***County***"), as GRANTOR; and Montgomery Bank, N.A., a national banking association, ("***Lender***"), whose address is Branch 98 – Cape Girardeau Commercial, One Montgomery Bank Plaza, Sikeston, Missouri, 63801, as GRANTEE.

WITNESSETH:

WHEREAS, on or about December 30, 2008, Lender made a loan to Transformation in the original principal amount of $3,612,500.00 (the "***Loan***"); and

WHEREAS, the Loan was evidenced by a Promissory Note dated December 30, 2008, executed by Transformation and payable to Lender in the original principal amount of $3,612,500.00 (the "***Note***"); and

WHEREAS, the repayment of the Note is secured by a Deed of Trust dated December 30, 2008 (the "***Mortgage***"), and recorded December 31, 2008, as **Document Number 2008-15285** in the office of the Recorder of Deeds for the County of Cape Girardeau, Missouri, granting Lender a first lien and security interest in certain real property and personal property, fixtures and equipment located in Cape Girardeau County, Missouri, and assigning to Lender the leases, rents and profits from the real property; (the Note, Mortgage and all other documents evidencing, securing and otherwise referred to herein regarding the Loan, the "***Loan Documents***"); the real property described in the Mortgage is located at 4680A Nash Road in Cape Girardeau County, Missouri and more particularly described as follows (the "***Property***"):

> Part of the Southwest Quarter of the Northeast Quarter and part of the Southeast Quarter of the Northeast Quarter of Section 27, Township 30 North, Range 13 East, in Cape Girardeau County, Missouri, described as follows: Commence at the corner common to Section 26, 27, 34 and 35, Township 30 North, Range 13 East, thence North 1°13'30" West along the Section line, 2717.0 feet to centerline Station 453+52.4 of Missouri State Route "AB", thence South 89°22'30" West, along said centerline, 879.4 feet to centerline Station 444+73, thence North

0°37'30" West, 44.2 feet to a metal R/W marker on the North R/W line of said route "AB" for the point of beginning, thence South 89°31'52" West along said R/W line, 634.25 feet, thence North 01°01'18" West, 694.45 feet, to the South line of the Headwater Diversion System of the Little River Drainage District; thence North 89°09'47" East, along said South line, 634.7 feet, thence South 1°01'18" East, 358.55 feet, thence North 89°24'47" East, 250.0 feet, thence South 1°01'18" East, 339.65 feet to the North R/W line of said Route "AB", thence South 89°09'31" West, along said R/W line, 250.47 feet to the point of beginning. LESS AND EXCEPT a parcel 65' by 50' containing 0.0746 acre, more or less, located in the SE ¼ NE ¼ of Section 27, Township 30 North, Range 13 East as shown in Book 347 at Page 3, land records of Cape Girardeau County, Missouri. SUBJECT TO a 20 foot wide access easement described in Book 347 at Page 3, land records of Cape Girardeau County, Missouri.

and

WHEREAS, pursuant to the provisions of Article VI, Section 27(b), of the Missouri Constitution, and Sections 100.010 through 100.200, inclusive, of the revised Statutes of Missouri, as amended (collectively the "***Act***"), the County is authorized and empowered to purchase, construct, extend and improve certain projects and to issue industrial development revenue bonds for the purpose of providing funds to pay the cost of such projects and to lease or otherwise dispose of such projects to private persons or corporations for manufacturing, commercial, warehousing and industrial development purposes upon such terms and conditions as the County shall deem advisable; and

WHEREAS, pursuant to the Act, the governing body of the County passed an ordinance on December 21, 2009 (the "***Ordinance***"), authorizing the County to issue its taxable industrial revenue bonds, Series 2009, in the maximum principal amount of $4,450,000.00 (the "***Bonds***"), for the purpose of acquiring and improving the Property; and

WHEREAS, on December 1, 2009, and pursuant to the Ordinance, the County entered into (1) a *Trust Indenture* with UMB Bank, N.A., St. Louis, Missouri, as Trustee, for the purpose of issuing and securing the Bonds, as therein provided, and (2) a *Lease Agreement* with Transformation (the "***Lease***"), under which the County acquired the Property, constructed the improvements thereon, and leased the improved Property to Transformation in consideration of rental payments to be made by Transformation sufficient to pay the principal of and interest on the Bonds. A Memorandum of the Lease is recorded in the land records of Cape Girardeau County as Document Number 2009-15465; and

WHEREAS, on December 30, 2009, a *Special Warranty Deed* was executed by Transformation in favor of the County, and recorded as Document Number 2009-15464 in the Cape Girardeau County land records, conveying title to the Property to the County; and

WHEREAS, the *Special Warranty Deed* transferred title to the Property to the County subject to the Mortgage in favor of Lender; and

WHEREAS, in consideration of the terms and conditions of the Lease, the Ordinance, issuance of the Bonds and certain other agreements, the County and Transformation entered into a Performance Agreement on December 1, 2009 (the "***Performance Agreement***") pursuant to which Transformation agreed to make certain payments in lieu of taxes ("***PILOTS***") to the County. A Memorandum of the Performance Agreement is recorded in the land records of Cape Girardeau County as Document Number 2009-15466; and

WHEREAS, on December 30, 2009, Transformation and Lender executed an *Amendment to Deed of Trust* recorded as Document Number 2009-15463 (the "***First Amendment***") subordinating the Mortgage to the lien of the County to the extent of any unpaid PILOT payments, as that term is defined by the Performance Agreement between Transformation and the County; and

WHEREAS, on August 31, 2010, Transformation executed a second Promissory Note in favor of Lender in the amount of $200,000.00 (the "***Second Note***"), evidencing additional loan amounts advanced by Lender to Transformation; and

WHEREAS, on November 22, 2010, Transformation, the County and Lender executed a *Second Amendment to Deed of Trust* recorded as Document Number 2010-14531 (the "***Second Amendment***") increasing the total principal amount of obligations secured by the Mortgage from $3,612,500.00 to $3,812,500.00; and

WHEREAS, the Second Amendment did not affect Lender's subordination of its Mortgage lien to the County's lien in the amount of unpaid PILOT payments, as set out in the First Amendment, but the parties agreed that the amounts advanced by Lender to Transformation under the Note and Second Note and secured by the amended Mortgage were to be superior to any lien of the County, *except* with respect to any unpaid PILOT payments; and

WHEREAS, on June 1, 2016, Transformation refinanced the Note and Second Note with Lender, and those notes were replaced with a new Note in the original amount of $3,205,840.86 (the "***Replacement Note***"); however, the Mortgage was not amended; and

WHEREAS, Transformation desires to refinance the Replacement Note with two (2) new notes in favor of Lender, a term note in the amount of $2,168,528.34, and a line of credit note in the amount of $900,000.00 (the "***New Notes***"); and

WHEREAS, the New Notes will describe the collateral as the Mortgage, amended by this Third Amendment, and other miscellaneous collateral; and

WHEREAS, since the County owns the Property, the County must consent to this Third Amendment and agree to subordinate its interest in the Property, including any rental payments due to the County from Transformation, to Lender's lien created by the Mortgage as amended by this Third Amendment; and

WHEREAS, Lender's subordination of its Mortgage lien to the lien of the County in the amount of unpaid PILOT payments, as set out in the First Amendment, will not be modified by this Third Amendment; and

WHEREAS, it is the intention of all parties that the County have a first priority lien on the Property in the amount of unpaid PILOT payments, and that Lender shall have a second priority Mortgage lien, in the full and modified amounts of the New Notes.

NOW, THEREFORE, for valuable consideration, as mutually agreed:

1. The total principal amount of obligations secured by the Mortgage, as amended, is reduced to $3,068,528.34.

2. The amounts advanced by Lender to Transformation under the New Notes shall be secured by the amended Mortgage and shall be superior to any lien of the County, except with respect to any unpaid PILOT payments.

3. The Mortgage shall remain and continue in full force and effect upon the same terms and conditions stated therein unless expressly modified.

4. The County consents to the terms herein and executes this *Third Amendment and Subordination Agreement* as the current owner of the Property. This *Third Amendment and Subordination Agreement* shall not be effective until executed by the duly authorized Officer of the County.

5. The County is subordinating its interest in the Property, to the full amount of the Mortgage, except to the extent of Transformation's unpaid PILOT payments as provided in the First Amendment.

6. Nothing in this *Third Amendment and Subordination Agreement* shall be construed to make the County responsible for payment of the New Notes or Mortgage between Transformation and Lender.

7. Transformation hereby represents and warrants that, after giving effect to the agreement of Lender contained herein:

(i) No default or event of default exists under the Loan Documents as of the date hereof;

(ii) All of the representations and warranties of Transformation set forth in the Mortgage and the other Loan Documents remain true, correct and accurate in all respects as of the date hereof; and

(iii) The lien of the Mortgage as previously subsisting, has been, is and shall remain after execution of this Amendment, a valid first, prior and paramount lien on the Property described therein (subject only to the extent of Transformation's unpaid PILOT payments), and

join the same for superior priority with respect to other claims and encumbrances upon the Property as prevailed prior to the execution of this Third Amendment. Transformation further acknowledges that Lender has relied on the foregoing warranties and representations in entering into this Third Amendment. Any breach of the foregoing representation and warranties shall constitute a default under the Mortgage as amended by this Third Amendment.

8. This Third Amendment is made as an accommodation to Transformation, and does not constitute a waiver of any of Lender's rights, remedies, privileges or power under the Mortgage. Except as herein expressly modified, the Mortgage remains in full force and effect, and all the terms and provisions of the Mortgage, as herein modified, are hereby ratified and reaffirmed in all respects. No reference to this Third Amendment need be made in any instrument or document in any time referring to the Mortgage, and a reference to the Mortgage in any such instrument shall be deemed to be a reference to the Mortgage as amended hereby. In the event there is a conflict between the terms and provisions of this Amendment and the terms of the Mortgage, the terms and provisions of this Third Amendment shall prevail.

IN WITNESS WHEREOF, Transformation, the County and Lender have caused this instrument to be executed in their respective corporate names by their duly authorized officers.

TRANSFORMATION, LLC

By: _____
Mark G. Diamond, General Manager

MONTGOMERY BANK, N.A.

By: _____
James P. Limbaugh, Regional President

COUNTY OF CAPE GIRARDEAU, MISSOURI

By: _____
Clint Tracy, Presiding Commissioner

(Seal)

ATTEST:

By: _____
Kara Clark Summers, Clerk

STATE OF MISSOURI)
) ss.
COUNTY OF CAPE GIRARDEAU)

On this ____ day of _____, 2017, before me, a Notary Public in and for said state, personally appeared ***Mark G. Diamond, General Manager of Transformation, LLC***, known to me to be the person who executed the within instrument in behalf of said Limited Liability Company and acknowledged to me that he executed the same as the free act and deed of said Limited Liability Company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

_____
Notary Public

My commission expires:

STATE OF MISSOURI)
) ss.
COUNTY OF CAPE GIRARDEAU)

On this ____ day of _____, 2017, before me, a Notary Public in and for said state, personally appeared ***James P. Limbaugh***, to me personally known, who being duly sworn did say that he is the ***Regional President of Montgomery Bank, N.A.***, and the said James P. Limbaugh acknowledged to me that he executed the same as the free act and deed of said national association.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

_____
Notary Public

My commission expires:

STATE OF MISSOURI)
) ss.
COUNTY OF CAPE GIRARDEAU)

On this 28th day of December, 2017, before me, a Notary Public in and for said state, personally appeared ***Clint Tracy***, to me personally known, who being duly sworn did say that he is the ***Presiding Commissioner for the County of Cape Girardeau, Missouri***, a political subdivision of the State of Missouri, and he acknowledged to me that the above instrument was signed on behalf of said County by authority of its County Commission, and acknowledged said instrument to be the free act and deed of said County.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Vicki C. Ivy
Notary Public

My commission expires:

VICKI C. IVY
Notary Public - Notary Seal
State of Missouri, Cape Girardeau County
Commission # 12319164
My Commission Expires Mar 25, 2020