

County Council of Cuyahoga County, Ohio

Resolution No. R2013-0093

Sponsored by: County Executive FitzGerald/ Department of Development	A Resolution authorizing the issuance and sale of County of Cuyahoga, Ohio Taxable Economic Development Revenue Bonds, Series 2013 (Flats East Development, LLC Project) in a principal amount not-to-exceed \$17,000,000.00 for the purpose of assisting in financing the costs of a “Project” within the meaning of Chapter 165, Ohio Revised Code, paying capitalized interest, funding a debt service reserve fund and paying costs of issuance; providing for a guaranty for the payment of such bonds; authorizing the execution of various documents required in connection with said bond issuance and authorizing and approving related matters; and declaring the necessity that this Resolution become immediately effective.
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WHEREAS, the County of Cuyahoga, Ohio (the “Issuer”), a county and political subdivision duly organized and validly existing under the laws of the State of Ohio, by virtue of the laws of the State of Ohio (the “State”), including Article VIII, Section 13 of the Constitution of the State and Chapter 165 of the Ohio Revised Code, as amended (the “Act”), is authorized and empowered among other things (a) to issue its Taxable Economic Development Revenue Bonds, Series 2013 (Flats East Bank Phase II Project) in an aggregate principal amount not to exceed \$17,000,000 (the “Bonds”), and loaning the proceeds of the Bonds to Flats East Development LLC, an Ohio limited liability company (“Borrower”), to (i) finance a portion of the costs of acquiring, constructing, equipping, furnishing and improving a “project”, as defined in Section 165.01, as amended, Ohio Revised Code, including but not limited to commercial facilities constituting approximately 235,000 square feet of new market rate residential rental units and approximately 80,000 square feet of ground level retail and restaurant space, (ii) pay capitalized interest, (iii) fund a debt service reserve fund and (iv) pay costs of issuance (collectively, the “Series 2013 Project”); (b) to guaranty the payment of the Bonds; and (c) to enact this Bond Resolution (the “Bond Resolution”) and execute and deliver the agreements and instruments hereinafter identified; and

WHEREAS, the Cuyahoga County Community Improvement Corporation (“CCCIC”) approved the issuance of the Bonds in the maximum aggregate amount of \$17,000,000 and the related Issuer guaranty (the “Guaranty”) at its annual meeting on March 20, 2013; and

WHEREAS, this Council of the County of Cuyahoga, Ohio (this “Council”), pursuant to the foregoing authority and at the request of, and based upon the representations of the Borrower, has determined that it is willing to authorize the issuance and sale of the Bonds in the aggregate maximum principal amount of \$17,000,000 to assist in the financing of the Project, and in connection with that issuance and sale, to adopt this Bond Resolution, to enter into the Issuer Documents (as hereinafter defined) and to execute and deliver certain other statements, documents and instruments upon the terms set forth in this Bond Resolution and those documents and instruments; and

WHEREAS, the Bonds will be issued pursuant to the provisions of the Act and a Trust Agreement (the “Trust Agreement”), by and between the Issuer and The Huntington National Bank, as trustee (the “Trustee”); and

WHEREAS, neither the Bonds nor the Guaranty shall represent or constitute a general obligation, debt or bonded indebtedness, or a pledge of moneys raised by taxation or the faith and credit of the Issuer, the State or any political subdivision thereof, and the holders of the Bonds shall not be given and shall not have any right to have excises or taxes levied by this Council or the Issuer, or the State or the taxing authority of any political subdivision thereof, for the payment of bond service charges, and the Bonds will be payable solely from Revenues (as defined in the Trust Agreement) and other monies available to the Borrower; and

WHEREAS, amounts due under the Guaranty shall be payable by the Issuer from Nontax Revenues, subject to appropriation by this Council;

WHEREAS, the Act provides, among other things, that, to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the State, it is in the public interest and a proper public purpose for the State or its political subdivisions, including the Issuer, to guarantee loans to provide moneys for the acquisition, construction, enlargement, improvement, or equipping of property, structures, equipment, and facilities within the State for commerce; and

NOW THEREFORE, BE IT RESOLVED BY THE COUNTY COUNCIL OF CUYAHOGA COUNTY, OHIO, THAT:

SECTION 1. Definitions.

(a) As used herein, the following capitalized words and terms shall have the following definitions, unless the context or use indicates another or different meaning or intent:

(i) “County Executive” means the Cuyahoga County Executive.

(ii) “Fiscal Officer” means the Cuyahoga County Fiscal Officer.

(iii) “Guaranteed Bond Service Charges” means any interest on or scheduled principal (including mandatory sinking fund installments) of the Bonds payable during a Guaranty Period.

(iv) “Guaranty” means the Guaranty Agreement between the Issuer, Borrower, and the Trustee, to be dated as of the same date as the Bonds, as authorized pursuant to Section 10 hereof and as the same may be modified, amended or supplemented from time to time in accordance with its terms.

(v) “Guaranty Period” means, as the case may be, the Initial Guaranty Period or any Subsequent Guaranty Period.

(vi) “Initial Guaranty Period” means the calendar year 2013.

(vii) “Nontax Revenues” shall include all money of the Issuer that is not money raised by taxation, to the extent lawfully available, including, but not limited to the following: (a) grants from the United States of America and the State, (b) payments in lieu of taxes now or hereafter authorized by State statute; (c) fines and forfeitures that are deposited in the Issuer’s General Fund; (d) fees deposited in the Issuer’s General Fund from properly imposed licenses and permits; (e) investment earnings on the Issuer’s General Fund and that are credited or transferred to the Issuer’s General Fund; (f) investment earnings of other funds of the Issuer that are credited to the Issuer’s General Fund; (g) proceeds from the sale of assets that are deposited in the Issuer’s General Fund; (h) rental income that is deposited in the Issuer’s General Fund; (i) gifts and donations that are received and deposited in the Issuer’s General Fund; and (j) charges for services and payments received in reimbursement for services that are deposited in the Issuer’s General Fund.

(viii) “Payment Date” means any Interest Payment Date or any date on which a scheduled payment of principal or of a mandatory sinking fund installment of the Bonds is due.

(ix) “Subsequent Guaranty Period” means any calendar year subsequent to the Initial Guaranty Period during which any Bonds remain outstanding and for which all conditions precedent to the renewal of the Guaranty for such year set forth in Section 8 hereof have been met.

(b) All other capitalized terms used herein and those not otherwise defined herein shall have the respective meanings given to them in the Trust Agreement with respect to the Bonds.

(c) Any reference herein to the Issuer, or to any officers or members thereof, shall include those which succeed to their functions, duties or responsibilities pursuant to or by operation of law or who are lawfully performing their functions.

(d) Unless the context shall otherwise indicate, words importing the singular number shall include the plural number, and vice versa, and the terms “hereof,” “hereby,” “hereto,” “hereunder,” and similar terms, mean this Bond Resolution.

SECTION 2. Determination of Issuer. This Council hereby finds and determines, based on the information and representations provided by the Borrower and Bond Counsel, that the issuance of the Bonds for the purpose of financing the Series 2013 Project and execution of the Guaranty, in accordance with the terms set forth herein, is consistent with the purposes of the Constitution of the State and the Act and will benefit the people of the Issuer by creating or preserving jobs and employment opportunities and promoting the industrial, commercial and economic development of the Issuer and the State. Provision of the loan to assist in the financing of the Series 2013 Project will require the issuance, sale and delivery of the Bonds.

SECTION 3. Authorization of Bonds. It is hereby determined to be necessary to, and the Issuer shall, issue, sell and deliver, as provided herein and pursuant to the authority of the Act, the Bonds, all in accordance with the provisions of the Loan Agreement between the Issuer and the Borrower (the “Loan Agreement”). The Bonds shall be designated “Taxable Economic Development Revenue Bonds, Series 2013 (Flats East Bank Phase II Project).”

SECTION 4. Terms and Execution of the Bonds. The Bonds shall be issued in the form and denominations, shall be numbered, dated and payable as provided in the Trust Agreement. The Bonds shall mature no later than June 1, 2038, and have such terms, and be subject to mandatory and optional redemption as provided in the Trust Agreement. This Board hereby determines that the interest rate on the Bonds shall be a variable rate that shall be determined in the manner and pursuant to the provisions of the Trust Agreement. The Bonds shall be executed on behalf of the Issuer by the manual or facsimile signature of the County Executive. In case any officer whose signature or a facsimile thereof shall appear on the Bonds shall cease to be such officer before the issuance or delivery of the Bonds, such signature or facsimile thereof shall nevertheless be valid and sufficient for all purposes, the same as if the officer had remained in office until after that time.

The form of the Bonds substantially in the form set forth in Exhibit A to the Trust Agreement, subject to appropriate revisions in order to comply with the provisions of the Trust Agreement, is hereby approved, and when the same shall

be executed on behalf of the Issuer by the appropriate officer thereof in the manner contemplated hereby and by the Trust Agreement, in an aggregate principal amount of up to \$17,000,000, shall represent the approved form of the Bonds.

The Bonds initially shall be issued only in fully registered form as described in the Trust Agreement.

SECTION 5. Authorization of Trust Agreement, Loan Agreement, Guaranty, Bond Purchase Agreement, and All Other Documents to be Executed by the Issuer. To provide for the issuance and sale of the Bonds, and to better secure the payment of the principal of, and premium, if any, and interest on, the Bonds as the same shall become due and payable, the County Executive and the County Executive's Chief of Staff as the County Executive's designee pursuant to Executive Order No. 02011-0002, and each of them, is hereby authorized and directed to execute, acknowledge and deliver in the name and on behalf of the Issuer, the Trust Agreement, the Guaranty, the Loan Agreement and the Bond Purchase Agreement (collectively, the "Issuer Documents") in substantially the forms on file with the Clerk of this Council, which are hereby approved, with such changes requested and approved by the County Prosecutor's office and Issuer's Counsel, and any changes not materially inconsistent with this Bond Resolution and not adverse to the Issuer as may be permitted by the Act and approved by the officers executing the same on behalf of the Issuer. The approval of such changes by said officer, and that such are not adverse to the Issuer, shall be conclusively evidenced by the execution and delivery of such Issuer Documents by such officer.

The County Executive, the Chief of Staff as authorized designee of the County Executive, the Fiscal Officer and the Clerk of this Council are each hereby separately authorized to take any and all actions and to execute such financing statements, assignments, certificates and other documents and instruments that may be necessary or appropriate in the opinion of Bond Counsel and Issuer's Counsel, in order to effect the issuance of the Bonds and the intent of this Bond Resolution, including taking all actions necessary to complete the sale of the Bonds under the "blue sky" laws of any jurisdiction; provided that the Issuer shall not be required to submit to service of process in connection with any such "blue sky" action in any state except the State. The Clerk of this Council, or other appropriate officer of the Issuer, shall certify a true transcript of all proceedings had with respect to the issuance of the Bonds, along with such information from the records of the Issuer as is necessary to determine the regularity and validity of the issuance of the Bonds.

SECTION 6. Sale of Bonds. The Bonds are to be sold and awarded to the original purchaser thereof (the "Original Purchaser") identified in accordance with the Trust Agreement, the Loan Agreement and the Bond Purchase Agreement, at a purchase price of not less than 96% of the aggregate par amount of the Bonds.

The County Executive, the Chief of Staff as authorized designee of the County Executive, the Clerk of this Council and the Fiscal Officer are each hereby authorized and directed to make the necessary arrangements with the Original Purchaser to establish the date, location, procedure and conditions for delivery of the Bonds to the Original Purchaser and to take all steps necessary to effect due execution, authentication and delivery to the Original Purchaser of the Bonds under the conditions of this Bond Resolution and the Trust Agreement.

It is determined by this Council that the price for and the terms of the Bonds, and the sale thereof, all as provided in this Bond Resolution, the Bond Purchase Agreement, the Loan Agreement and the Trust Agreement, are in compliance with all legal requirements.

SECTION 7. Covenants of Issuer. In addition to other covenants of the Issuer in this Bond Resolution, the Loan Agreement and the Trust Agreement, the Issuer further covenants and agrees as follows:

(a) Payment of Principal, Premium and Interest. The Issuer will, solely from the Revenues received under the Loan Agreement or sources otherwise provided herein and in the Trust Agreement, pay or cause to be paid the principal of, premium, if any, and interest on the Bonds on the dates, at the places and in the manner provided herein, in the Trust Agreement and in the Bonds.

(b) Performance of Covenants, Authority and Actions. The Issuer will at all times observe and perform all agreements, covenants, undertakings, stipulations and provisions contained in the Issuer Documents, and in all proceedings of the Issuer pertaining to the Bonds. The Issuer warrants and covenants based upon opinion of Bond Counsel and representations of the Borrower that the Issuer is, and upon delivery of the Bonds will be, duly authorized by the laws of the State of Ohio, including particularly and without limitation the Act, to issue the Bonds and to execute the Issuer Documents, and all other documents to be executed by it, to provide for the security for payment of the principal of, premium, if any, and interest on the Bonds in the manner and to the extent herein and in the Trust Agreement set forth; that all actions on its part for the issuance of the Bonds and execution and delivery of the Issuer Documents, and all other documents to be executed by the Issuer in connection with the issuance of the Bonds, are binding upon each officer of the Issuer in his or her official capacity as may from time to time have the authority under the law to take such actions as may be necessary to perform all or any part of the duty required by such provision; and each duty of the Issuer and of its officers and employees undertaken pursuant to such proceedings for the Bonds is established as a duty of the Issuer and of each such officer and employee having authority to perform such duty, specifically enjoined by law and resulting from an office, trust or station within the meaning of Section 2731.01 of the Ohio Revised Code, providing for enforcement by writ of mandamus.

SECTION 8. Guaranty.

(a) During the Initial Guaranty Period and any

Subsequent Guaranty Period, the Issuer absolutely and unconditionally guarantees to the Trustee for the benefit of the holders of the Bonds the full and timely payment of Guaranteed Bond Service Charges.

The Guaranty shall become effective as of its date, and the Initial Guaranty Period shall commence on the effective date of the Guaranty. The Initial Guaranty Period and the Guaranty shall terminate on December 31, 2013, unless renewed as set forth below. The amount of the appropriation required for the Guaranty during the Initial Guaranty Period shall be equal to the Guaranteed Bond Service Charges payable during such Guaranty Period. The Guaranty may be renewed in accordance with the terms and conditions set forth herein for Subsequent Guaranty Periods. If the right to renew is exercised, the Guaranty shall be a new Guaranty, and each such new Guaranty shall terminate on the termination date of the applicable Subsequent Guaranty Period unless it terminates at an earlier date as hereinafter provided in this Section 8. If the Guaranty shall not have terminated previously, then the Guaranty shall terminate at such time as all Guaranteed Bond Service Charges are paid in full by Borrower or any other party on behalf of Borrower.

The Issuer shall be deemed to have exercised its right of renewal for each succeeding Subsequent Guaranty Period if, at or prior to the expiration of the then current Guaranty Period, the Issuer lawfully appropriates sufficient funds to permit the payment of all Guaranteed Bond Service Charges due during the next Subsequent Guaranty Period. The Fiscal Officer shall promptly certify each such appropriation to the Trustee, but no failure to make such certification shall negate the effect of a lawful and sufficient appropriation for the purpose of renewal of the Guaranty.

The Issuer hereby agrees and covenants that the Fiscal Officer shall include an appropriation of sufficient funds to permit the payment of all Guaranteed Bond Service Charges due within the next subsequent Guaranty Period in each biennial budget or annual update to such appropriations ordinance, as applicable.

The Issuer currently has no reason to believe that legally available funds in an amount sufficient to pay Guaranteed Bond Service Charges due during each Guaranty Period cannot be appropriated and obtained.

In the event no funds or insufficient funds are lawfully appropriated to permit the payment of Guaranteed Bond Service Charges due during a Guaranty Period, then the Issuer will immediately notify the Trustee of such occurrence. On the first day following the Payment Date on which the last Guaranteed Bond Service Charges could be paid in full from lawfully appropriated funds, the Guaranty shall terminate without penalty or expense to the Issuer of any kind whatsoever, except as to the portions of Guaranteed Bond Service Charges for Guaranty Periods in which sufficient funds had been lawfully

appropriated, but subject to the provision of this Section 8 for reinstatement and renewal of the Guaranty.

If during any Guaranty Period, the Issuer lawfully appropriates sufficient funds to permit the payment of all Guaranteed Bond Service Charges due within a period less than the full term of a subsequent Guaranty Period, the Guaranty shall be deemed renewed for such shorter period and can be successively renewed for periods shorter than the full term of a Subsequent Guaranty Period. The Issuer shall be deemed to have exercised its right to renew for such a period shorter than a Subsequent Guaranty Period of, at or prior to the termination of the current Guaranty Period, there are lawfully appropriated funds enabling the payment of Guaranteed Bond Service Charges for such shorter period. If the Guaranty is renewed for any period shorter than a Subsequent Guaranty Period, such shorter period shall terminate on the first day of the month following the last Payment Date on which there were funds lawfully appropriated to permit the payment of the Guaranteed Bond Service Charges then due in full.

If a Guaranty Period terminates without a renewal of the Guaranty for a succeeding Guaranty Period and if within thirty (30) days after such date of termination (a) there are lawfully appropriated funds which would have caused the Guaranty to be renewed if the appropriation had occurred prior to the termination of the Guaranty Period; and (b) the Fiscal Officer certifies that there is a balance in the appropriations, which balance is not obligated to pay existing obligations and is available to pay Guaranteed Bond Service Charges during the period for which funds have been lawfully appropriated for the payment thereof, then the Guaranty shall be reinstated and deemed renewed as of the day following the date of termination of the preceding Guaranty Period. If a Payment Date occurs during the period between the date of termination and date of reinstatement of the Guaranty, any Guaranty payment that would have been due on such Payment Date if the Guaranty had not been terminated shall become immediately due on the date the Guaranty is reinstated and shall be payable as soon thereafter as it is practicable for the Issuer to process payment.

(b) In consideration for the Issuer's execution and delivery of the Guaranty, Borrower shall pay the Issuer a fee of \$25,000 plus ten basis points of the amount of the issuance, simultaneously with the issuance and sale of the Bonds.

(c) The Borrower shall agree under the Loan Agreement to repay or cause to be repaid to the Issuer from Borrower's future excess revenues any moneys paid to the Trustee pursuant to the Guaranty with interest and on such other terms and in such form as are consistent with Borrower's obligations under the Loan Agreement and the other related agreements securing the Bonds.

(d) The Trust Agreement shall provide that the Revenues received under the Loan Agreement pledged to payment of the Bonds shall be

applied to the following purposes in the following order: (i) to the payment of bond service charges on the Bonds; (ii) to the replenishment of the debt service reserve fund established under the Trust Agreement securing the Bonds if such replenishment is necessary after a draw on such fund to restore its balance to the minimum amount required under that Trust Agreement; (iii) to the repayment to the Issuer of any amounts paid by the Issuer under the Guaranty not previously reimbursed to the Issuer; and (iv) to such other purposes in such priority as shall be set forth in or pursuant to the Trust Agreement.

(e) The Guaranty shall include the Issuer's representation and warranty that:

(i) The Issuer has full power and authority to deliver, and to execute and perform its obligations under, the Guaranty and to enter into and carry out the transactions contemplated therein;

(ii) such execution, delivery and performance are not in contravention of any resolution of this Council, or any indenture, agreement or undertaking to which the Issuer is a party or by which it or any of its property is bound; and

(iii) the Guaranty has, by proper Council action, been duly authorized, executed and delivered by the Issuer, and all steps necessary have been taken to constitute the Guaranty, when executed and delivered, a valid and binding obligation of the Issuer enforceable in accordance with its terms.

SECTION 9. No Personal Liability. No recourse under or upon any obligation, covenant, acceptance or agreement contained in this Bond Resolution, or in any Bond, or in the Issuer Documents, or under any judgment obtained against the Issuer or by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any constitution or statute or otherwise, or under any circumstances, shall be had against any officer or employee as such, past, present, or future, of the Issuer, either directly or through the Issuer, or otherwise, for the payment for or to the Issuer or any receiver thereof, or for or to any holder of any Bond, or otherwise, of any sum that may be due and unpaid by the Issuer upon any of the Bonds. Any and all personal liability of every nature, whether at common law or in equity, or by statute or by constitution or otherwise, of any such officer or employee, as such, to respond by reason of any act or omission on his or her part, or otherwise, for, directly or indirectly, the payment for or to the Issuer or any receiver thereof, or for or to the owner or any holder of any Bond, or otherwise of any sum that may remain due and unpaid upon any Bond, shall be deemed to be expressly waived and released as a condition of and consideration for the execution and delivery of the Issuer Documents and the issuance of the Bonds.

SECTION 10. No Debt or Tax Pledge. Anything in this Bond Resolution, the Trust Agreement, the Guaranty, the Bonds or any other agreement

Clerk of Council

Date

First Reading/Referred to Committee: May 28, 2013

Committee(s) Assigned: Economic Development & Planning

Committee Report/Second Reading/Referred to Committee: June 25, 2013

Committee(s) Assigned: Economic Development & Planning

Journal CC011

July 9, 2013