

McKIRDY AND RISKIN, P.A.  
Richard P. De Angelis, Jr.  
Attorney ID # 028671998  
136 South Street  
P.O. Box 2379  
Morristown, NJ 07962-2379  
(973) 539-8900  
Attorneys for plaintiff, 214 Kinderkamack, LLC

214 KINDERKAMACK, LLC a New Jersey  
Limited Liability Corporation,

Plaintiff,

v.

BOROUGH OF EMERSON, and  
BOUROUGH OF EMERSON MUNICIPAL  
LAND USE BOARD,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY  
DOCKET NO. \_\_\_\_\_

CIVIL ACTION

**COMPLAINT**  
**(In Lieu of Prerogative Writs)**

Plaintiff, 214 Kinderkamack, LLC, a New Jersey limited liability company, having offices at 10 Devon Place, Boonton Township, New Jersey 07005, by way of Complaint in Lieu of Prerogative Writs against defendant, Borough of Emerson and defendant, Borough of Emerson Municipal Land Use Board, hereby says:

### **INTRODUCTION**

1. 214 Kinderkamack, LLC (hereinafter referred to as the “Owner” or “plaintiff”) owns certain real property comprised of three individual lots, in the Borough of Emerson, County of Bergen, State of New Jersey.

2. Defendant, Borough of Emerson (hereinafter referred to also as the “Borough”), is a municipal corporation of the State of New Jersey, with administrative offices located at 1 Municipal Place, Emerson, New Jersey 07630.

3. Defendant, Borough of Emerson Municipal Land Use Board (hereinafter referred to also as the “Land Use Board”), was created by the governing body of the Borough by ordinance to exercise the authority of a municipal planning board and zoning board of adjustment pursuant to *N.J.S.A.40:55D-1 et seq.* and has administrative offices located at 1 Municipal Place, Emerson, New Jersey 07630.

4. The within matter is a challenge to the determination of the Mayor and Council of the Borough (also referred to hereinafter as “Governing Body”) to designate an area, consisting of Block 419, Lots 1, 2, 3, 4, 5, 6.01, 6.02, 7, 8, 9 and 10 (hereinafter, the “Block 419 Area”) as “an area in need of redevelopment” under the criteria of the Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.* (hereinafter, “the LRHL”).

5. Having been designated as an area as in need of redevelopment, the Owner’s property is deemed to be a “blighted area” under the New Jersey State Constitution.

6. By Resolution No. 58-17 adopted on January 17, 2017, the Governing Body memorialized its acceptance of the Land Use Board’s recommendation to declare the Block 419 Area as a blighted area (“2017 Blight Designation”). A true copy of Resolution No. 58-17 is annexed hereto as **Exhibit A**.

7. The 2017 Blight Designation by the Governing Body was based on the recommendation of the Land Use Board and the record upon which the board relied as memorialized in its resolution dated January 5, 2017 (“LUB January 5, 2017 Resolution”). A true copy of the LUB January 5, 2017 Resolution is annexed hereto as **Exhibit B**.

8. As set forth more fully herein, in making its blight recommendation, the Land Use Board relied on a report entitled “Determination of Area in Need of Redevelopment, Emerson Redevelopment Area” dated December 8, 2016 (“2016 Study Report”). A true copy of the 2016 Study Report is annexed hereto as **Exhibit C**.

9. There is no evidence set forth in the 2016 Study Report, let alone substantial evidence to support a designation of Plaintiff’s Properties as an area in need of redevelopment.

10. The Governing Body adopted the “Borough of Emerson Redevelopment Plan” (“2006 Redevelopment Plan”, a true copy of which is annexed hereto as **Exhibit D**) by Ordinance No. 1305-06 on July 11, 2006 (a true copy of which is annexed hereto as **Exhibit E**).

11. The 2006 Redevelopment Plan was adopted after an earlier blight study in 2004 that resulted in the designation of a portion of the Borough’s Business District (“CBD”) as an area in need of redevelopment (“2004 Blight Designation”).

12. The 2004 Blight Designation was approved by the Governing Body by Resolution No. 199-04, adopted on September 7, 2004. A true copy of Resolution No. 199-04 is annexed hereto as **Exhibit F**.

13. In January 2016, the Borough sought a developer for the Block 419 Area relying on its 2004 Blight Designation and 2006 Redevelopment Plan.

14. In April 2016, the Borough selected a developer to implement the development of the Block 419 Area.

15. After the developer was unable to acquire any of the properties in the Block 419 Area, it requested the Borough to do so through its power of eminent domain, as provided under the LRHL.

16. The Borough recognized that the 2004 Blight Designation, also complained of by way of this Complaint, was flawed under intervening case law and, as such, it was susceptible to a successful judicial challenge.

17. The Borough knew it could not rely on the 2004 Blight Designation to acquire any of the properties in the Block 419 Area by eminent domain and authorized a new blight study through the adoption of Resolution No. 221-16 on August 16, 2016. A true copy of Resolution No. 221-16 is annexed hereto as **Exhibit G**.

18. As the record demonstrates, the 2017 Blight Designation is not supported by substantial credible evidence as is required by the LRHL.

19. As the record demonstrates, the 2017 Blight Designation was the result of the Mayor and Council wishing to serve the interests of a private redeveloper selected in April 2016.

### **ALLEGATIONS COMMON TO ALL COUNTS**

#### **A. Physical Description of Plaintiff's Property**

20. Plaintiff owns three individual lots in the Block 419 Area, which are commonly known as the addresses listed in the table below with the corresponding block and lot designations as shown on the Official Tax Map of the Borough of Emerson.

<b><u>Location</u></b>	<b><u>Block</u></b>	<b><u>Lot</u></b>
15 Lincoln Boulevard	419	2
9 Lincoln Boulevard	419	3
214 Kinderkamack Road	419	4

21. The lots listed in the table included in the preceding paragraph (hereinafter referred to collectively as the "Plaintiff's Properties" or individually as "Lot 2", "Lot 3" and "Lot 4") are

contiguous and situated at the southwest corner of the intersection of Kinderkamack Road and Lincoln Boulevard.

22. Together, the Plaintiff's Properties cover approximately 25,140 square feet (sf) of land or .577 acre.

23. Lot 2 covers approximately 4,000 sf or .0918 acre and is improved with approximately 1,400 square feet of paved area and a six-foot chain link fence and gate that encloses an area of approximately 640 square feet of the paved area in which waste containers are located that are used by the restaurant operation on Lot 4.

24. The balance of Lot 2 remains unimproved after a single family residence was demolished by the Owner in 2013.

25. Lot 3 covers approximately 5,300 sf or .1216 acre and is improved as surface parking lot consisting of 17 parking spaces used in conjunction with restaurant operation located on Lot 4.

26. Lot 4 covers approximately 15,840 sf or .3636 acre and is improved with a one and two story building that includes a restaurant on the ground floor and two apartments on the second floor.

27. Lot 4 is improved also with a paved area used as a parking lot with 29 parking spaces.

28. Together, Lot 2, Lot 3 and Lot 4, comprise a single economic unit.

**B. Ownership and use of Plaintiff's Properties**

29. Title to Plaintiff's Properties transferred to the Owner by Sheriff's deed dated March 4, 2013.

30. At the time the Owner took title, the Plaintiff's Properties were vacant.

31. After acquiring Plaintiff's Properties, the Owner made significant improvements to Lot 2 and Lot 4.

32. At the request of the Borough, the plaintiff demolished the single-family home that was located on Lot 2.

33. The plaintiff also made significant renovations, upgrades and repairs to the building on Lot 4 including, but not limited to:

- a. New HVAC system;
- b. Upgraded plumbing;
- c. Upgraded electrical system;
- d. Installation of new lighting;
- e. Removal and replacement of old bar and with new, larger bar, plus added a second bar area;
- f. Commence gut rehabilitation of second floor apartments; and
- g. Improvements to the façade, including repairs and painting.

34. The plaintiff obtained all necessary permits from the Borough for the improvements listed in the preceding paragraphs.

35. Upon completion of the improvements to Plaintiff's Properties, plaintiff, through an affiliate, opened a restaurant known as "Ranchero Cantina."

36. The plaintiff decided to close Ranchero restaurant and in November 2016, had entered into an agreement, again through an affiliated entity, to open new restaurant to be known as "Cinar."

37. Ranchero closed in January 2017 and Cinar is expected to open by the end of March 2017.

### **C. Surrounding Neighborhood**

38. The Plaintiff's Properties are located in a typical suburban downtown setting.

39. To the southwest on Block 419, Plaintiff's Properties are bordered by an ambulance squad building owned by the Borough and a municipal commuter parking lot.

40. The commuter parking lot requires a permit, although it is open to the public after 6:00 PM weeknights and on the weekends.

41. To the south on Block 419, along Kinderkamack Road, Plaintiff's Properties are bordered by a one-quarter acre lot, improved with a newly constructed, two story, 5,800+/- sf mixed use building, with 2,600 sf of unoccupied retail space on the first floor and two residential apartments on the second floor and 14 parking spaces that was completed in 2016.

42. Across Kinderkamack Road from the Plaintiff's Properties are two lots:

- a. One lot is improved with a multi-tenanted retail building occupied by a pizzeria and locksmith on the first floor and a dance studio on the second floor; and
- b. The other lot is improved with a church and school.

43. Across Lincoln Boulevard from the Plaintiff's Properties is a commercial property containing a nail salon that fronts on Kinderkamack Road, with a fence company located behind it on Lincoln Boulevard.

### **D. Previous Redevelopment History – 2004 through February 2009**

44. By Resolution Number 40-04, adopted on February 3, 2004, the Governing Body authorized the Planning Board for the Borough of Emerson ("Planning Board") to conduct a preliminary investigation of certain properties in the CBD along Kinderkamack Road, including the Plaintiff's Properties, and recommend whether such properties met the then-existing statutory

criteria to be designated as an area in need of redevelopment as defined under the LRHL (“2004 Study”).

**i. 2004 Study Report**

45. The Planning Board conducted an investigation, including consideration of an investigation report prepared by Burgis Associates, Inc. (hereinafter “Burgis”) entitled “Planning Report To Determine If An Area Is In Need of Redevelopment,” dated July 12, 2004 (hereinafter “2004 Study Report”). Annexed hereto as **Exhibit H** is a true copy of excerpts of the 2004 Study Report.

46. With respect to Plaintiff’s Properties, the 2004 Study Report does not: (a) cite to specific reports of illegal and illicit activity; (b) cite to any record of fires or fire code violations; or (c) conclude that the condition of the properties had reached a point deterioration or stagnation that negatively affects the surrounding area or caused or contributed to a decrease in surrounding property values.

47. The only comment in the 2004 Study Report as to the then-existing single family residence on Lot 2 of the Plaintiff’s Properties was that residential use was not permitted in the zone and that “the roof and windows appear to be in need of repair.” (**Exhibit H**, 2004 Study Report at 15 & A-7)

48. The only comments by Burgis regarding Lot 4 of the Plaintiff’s Properties was that the “[f]acade of the building appears in a good condition” and that there is “[e]xcessive land coverage.” (**Exhibit H**, 2004 Study Report at 15 & A-8)

49. Burgis states that the proximity of Blocks 412 and 419 to the train station also reflects on the relationship of these blocks to smart growth principles referring to the “h” criterion. (**Exhibit H**, 2004 Study Report at 15)



50. The 2004 Study Report did not expressly conclude that Plaintiff's Properties met any of the statutory criteria under *N.J.S.A.* 40A:12A-5, but rather it observed that certain "factors suggest that there are characteristics evident here that affirm such criteria as criteria a, d and h." (**Exhibit H**, 2004 Study Report at 15)

51. The 2004 Study Report contained no factual basis on Plaintiff's Properties met the "a" or "d" criteria under *N.J.S.A.* 40A:12A-5

**ii. 2004Hearing**

52. In connection with the 2004 Study, the Planning Board conducted a public hearing to receive testimony and evidence on July 29, 2004 and August 19, 2004 (referred to collectively as the "2004 Hearing") with regard to whether the properties subject to the 2004 Study should be designated as an area in need of redevelopment.

53. The 2004 Study Report was the basis for the redevelopment investigation cited by the Planning Board in its public notices regarding the 2004 Hearing.

54. The notice of the 2004 Hearing, which applied to all properties that were subject to the 2004 Study, did not advise the owners of such properties that: (a) the properties located in the study area could be designated as an area in need of redevelopment; (b) as a result of such designation any property located in the study area could be acquired by condemnation; or (c) that a redevelopment designation could be challenged by the owner of such property by way of an action in lieu of prerogative writs filed in Superior Court, provided that such challenge was filed within forty-five (45) days of the designation of as an area in need of redevelopment

**iii. 2004 Blight Designation**

55. The Planning Board adopted a resolution on September 7, 2004 recommending to the Governing Body that it designate the study area as an area in need of redevelopment ("Planning

Board's September 7, 2004 Resolution"). A true copy of the Planning Board's September 7, 2004 Resolution is annexed hereto as **Exhibit I**.

56. The Planning Board's 2004 Resolution does not cite to any evidence, let alone substantial evidence, in support of a finding that the study area generally, or the Plaintiff's Properties specifically, meets any of the criteria set forth in *N.J.S.A. 40A:12A-5*.

57. The Planning Board's 2004 Resolution states that it gave "specific attention" to the section of the 2004 Study Report entitled "Compliance with Statutory Criteria" and that "[t]he Board adopts all of the findings and recommendations of this section of the Report, in full, and specifically finds that each one, or more of the criteria for redevelopment contained in *N.J.S.A. 40A:12A-5*."

58. The 2004 Study Report does not conclude that the Plaintiff's Properties meet any one of the cited redevelopment criteria.

59. By Resolution No. 199-04, adopted on September 7, 2004, the same day as the Planning Board's 2004 Resolution, the Governing Body designated several properties, including the Plaintiff's Properties, as an area in need of redevelopment ("2004 Blight Designation"). (**Exhibit F**, Resolution No. 199-04)

60. Resolution No. 199-04 does not cite to any evidence, let alone substantial evidence, in support of a finding that the CBD area generally, or the Plaintiff's Properties specifically, meets such criteria under the LRLHL.

#### **iv. 2006 Redevelopment Plan**

61. In or about early 2006, the Governing Body authorized the preparation of a redevelopment plan for the CBD area, including the Plaintiff's Properties.

62. The Planning Board engaged Burgis to prepare the 2006 Redevelopment Plan. **(Exhibit D)**

63. The 2006 Redevelopment Plan was adopted by the Governing Body by Ordinance No. 1305-06 on July 11, 2006. **(Exhibit E)**

**v. 2008 Blight Study**

64. The Governing Body recognized that decisions by the New Jersey Supreme Court and Appellate Division of the Superior Court called into question the validity of the 2004 Blight Designation and authorized the Planning Board to undertake what it described as a “supplemental investigation” of whether the properties subject to the 2004 Blight Designation should remain as such and whether additional properties should be included (“2008 Study”).

65. The Planning Board authorized Burgis to prepare a supplemental redevelopment study report of the expanded area.

66. Burgis prepared a report entitled “Supplemental Planning Report to Determine if the Downtown Emerson Redevelopment Area Continues to Meet the Criteria for Designation” dated August 18, 2008 (“Burgis 2008 Study Report”).

67. The findings of the Burgis 2008 Study Report as to the Plaintiff’s Properties were virtually identical as to those stated in the 2004 Study Report.

68. The Planning Board conducted public hearings over five dates on September 24, 2008, October 2, 2008, October 16, 2008, November 6, 2008 and December 4, 2008.

69. The Planning Board adopted a resolution dated February 19, 2009 recommending that the properties subject to the 2008 Study, including the Plaintiff’s Properties, be designated as an area in need of redevelopment.

70. The Governing Body never acted on the Planning Board's recommendation to designate the properties subject to the 2008 Study as an area in need of redevelopment.

71. From approximately February 20, 2009 through December 2015, the Borough took no further formal action in connection with the 2004 Blight Designation, 2006 Redevelopment Plan or the 2008 Study.

**E. 2016 request for proposals to develop Block 419 Area**

72. On January 5, 2016, by Resolution No. 16-16 AO, Brigitte Bogart, PP, AICP, of Brigitte Bogart Planning and Design Professionals, LLC (referred to collectively as "Bogart") was reappointed as the municipal planner for the Borough of Emerson.

73. On January 8, 2016 the Borough, through its planner, Ms. Bogart, issued a request for proposals ("RFP") for a project entitled "Central Business District Redevelopment Project – Block 419 Lots 1, 2, 3, 6.01, 6.02, 7, 8, 9 & 10" which includes Lots 2 and 3 of the Plaintiff's Properties, but excluded Lot 4 on which the restaurant is located. A true copy of the Cover Sheet to the RFP is annexed hereto as **Exhibit J**.

74. The purpose of the RFP was to find a developer to redevelop that portion of Block 419, which was subject to the 2004 Blight Designation.

75. JMF Property Group, LLC ("JMF") submitted a response to the RFP dated January 28, 2016.

76. In March 2016, JMF advised the Borough indicated its intention to include Lot 4 of the Plaintiff's Properties in its proposed project.

77. At no time did the Owner communicate to the Borough, JMF or any other individual or entity that it wished to have Lot 4 included in the JMF project.

**F. Selection of redeveloper for Block 419 Area**

78. By Resolution No. 129-16, adopted April 5, 2016, the Governing Body authorized the Borough to negotiate a Redevelopment Agreement with JMF.

79. By Resolution No. 173-16 adopted on June 14, 2016, the Governing Body authorized the Mayor to execute the Redevelopment Agreement. A true copy of Resolution No. 173-16 is annexed hereto as **Exhibit K**.

80. A Redevelopment Agreement by and between the Borough of Emerson and Emerson Redevelopers Urban Renewal, LLC (“ERUR”), an affiliate of JMF, was executed on June 14, 2016 (“Redevelopment Agreement”). A true copy of the Redevelopment Agreement is annexed hereto as **Exhibit L**.

81. The Redevelopment Agreement is for the redevelopment of the Block 419 Area, including the Plaintiff’s Properties. (**Exhibit L**, Redevelopment Agreement, at 9, 39)

82. ERUR, upon information and belief, has only two members, Giuseppe Forgione and Steven Kalafer, each owning a fifty percent stake in the company (hereinafter JMF, ERUR, Forgione and Kalafer referred to collectively as “Forgione/Kalafer”). (**Exhibit L**, Redevelopment Agreement, at 42)

83. On July 12, 2016, the Governing Body introduced Ordinance No. 1529-16 to authorize execution of an agreement with Forgione/Kalafer for long term tax exemption and payment in lieu of taxes for the properties that comprise the Block 419 Area. A true copy of Ordinance No. 1529-16 with exhibits is annexed hereto as **Exhibit M**.

84. On or about August 9, 2016, Forgione/Kalafer submitted to the Borough an Application for Long Term Tax Exemption. (**Exhibit M**)

85. On August 16, 2016, the Governing Body adopted Ordinance No. 1529-16 authorizing the tax exemption agreement with Forgione/Kalafer for the properties that comprise the Fogione/Kalafer Project area. (**Exhibit M**)

**G. 2016 Redevelopment Study**

86. On August 16, 2016, the same day the Governing Body approved the Forgione/Kalafer tax exemption agreement, it adopted Resolution No. 221-16 (**Exhibit G**) directing defendant, Land Use Board to conduct what it described as a supplemental and preliminary study if the CBD Redevelopment Area that was subject to the 2004 Blight Designation, including the Plaintiff's Properties, and some additional properties identified therein met the blight criteria as set forth in the LRHL ("2016 Blight Study").

87. Consideration of Resolution No. 221-16 was on the Governing Body's Consent Agenda and not subject to discussion. A true copy of Minutes of the August 16, 2016 meeting of the Governing Body is annexed hereto as **Exhibit N**.

**H. Notice of December 8, 2016 Hearing before Land Use Board**

88. A letter dated November 21, 2016, addressed to the plaintiff from the Borough Clerk, contained what was entitled a "Notice of Official Action of the Land Use Board Hearing Regarding Condemnation Redevelopment Area Designation" concerning the Plaintiff's Properties (the "Hearing Notice").

89. The Hearing Notice indicated that the Land Use Board would conduct a public hearing on December 8, 2016 as to whether the seventy individual properties listed therein, including the Plaintiff's Properties, meet the statutory criteria for a Condemnation Redevelopment Area under the LRHL. A true copy of the Hearing Notice is annexed hereto as **Exhibit O**.

90. A Condemnation Redevelopment Area is one in which the municipality, upon a proper designation, may acquire properties therein pursuant to the Eminent Domain Act, *N.J.S.A. 20:3-1 et seq.*

91. The Hearing Notice stated that “all persons who are interested in or would be affected by a determination that the Study Area is a Condemnation Redevelopment Area may be heard as the time of the hearing.”

92. The Hearing Notice stated that a map of the study area along with “a statement of the basis for the investigation” was on file with the Borough Clerk.

#### **I. 2016 Study Report**

93. The Land Use Board retained the Borough Planner, Ms. Bogart, to serve as the board’s planning consultant and prepare a report to assist the board with the 2016 Blight Study.

94. Prior to forming her own firm, Ms. Bogart had been associated with Burgis Associates and, upon information and belief, assisted in the preparation of the 2004 Study Report that resulted in the 2004 Blight Designation, the 2006 Redevelopment Plan and the 2008 Study Report

95. Ms. Bogart’s 2016 Study Report (**Exhibit C**) did not evaluate each of the properties identified in Resolution No. 221-16, but rather focused only on the Block 419 Area, which was the subject of the January 2016 RFP prepared by Ms. Bogart to select a redeveloper for the Block 419 Area.

96. The properties within the Block 419 Area are subject to the tax abatement agreement with by and between the Borough and Forgione/Kalafer.

97. The stated purpose of the 2016 Study Report, as set forth therein, was to “update and reaffirm the fact that this area still meets the criteria set forth in the [LRHL]” as previously determined by the 2004 Blight Designation. (**Exhibit C**, 2016 Study Report, at 2).

**J. 2016 Study as to the Plaintiff’s Properties**

98. As to Lot 2 of the Plaintiff’s Properties, Bogart noted that the single family residence formerly located thereon had been demolished; but that there had been “exterior building maintenance violations” in 2011, before it was demolished. (**Exhibit C**, 2016 Study Report at 21)

99. Bogart stated also that Lot 2 “is considered substandard” for reasons stated therein including:

- a. “It was a nonconforming residential land use that was demolished.”
- b. “This site is currently vacant and has been for several years.”
- c. “Its improvement to land value ratio is .045 wherein the standard for property utilization of land is a ratio of 2.0 [and a]s such it represents a significantly underutilized property in the heart of the Borough’s [CBD] Redevelopment Area.”

(**Exhibit C**, 2016 Study Report at 22)

100. Bogart concluded that Lot 2 “exhibits conditions consistent with Statutory Criteria [*sic*] “e” which she claims was confirmed through site inspections” and that her analysis under this criterion “focused both on the underutilization of the stagnant area but also the broader land use and planning goals of the municipality.” (**Exhibit C**, 2016 Study Report at 22)

101. Bogart stated also in support of her conclusion that Lot 2 meets the “e” criterion that “the area as a whole is not developing in a manner that furthers or is consistent with the



Borough's land use plan and the proximity to the train station which offers excellent opportunities for smart growth and transit-oriented development.” (**Exhibit C**, 2016 Study Report at 22)

102. As to Lot 3 and Lot 4 of Plaintiff's Properties, Bogart noted that there is a one-story restaurant with excessive land coverage, insufficient parking and unsafe vehicular circulation. (**Exhibit C**, 2016 Study Report at 23)

103. Bogart stated also that Lots 3 and 4 are “considered substandard” and that the site exhibits faulty arrangement that is characteristic of meeting Statutory Criteria [*sic*] ‘d’ ... due to the fact that the site was developed as one lot and not as a comprehensive plan.” (**Exhibit C**, 2016 Study Report, at 24)

104. Bogart attributes the alleged faulty arrangement of lot 3 and Lot 4 to “the size and use of the building on site [that] creates a site with an inefficient layout and lack of parking which creates a greater demand for on-street parking, thereby having a negative impact on surrounding properties and the area.” (**Exhibit C**, 2016 Study Report at 24)

105. The Study Report dedicates less than two paragraphs to its conclusion that the Plaintiff's Properties qualifies as an area in need of redevelopment.

**K. December 8, 2016 Hearing**

106. On December 8, 2016, the Land Use Board convened for its regularly scheduled meeting at the Emerson Junior Senior High School, during which it held a public hearing on the 2016 Study (the “2016 Hearing”) as well as reviewed proposed amendments to the 2006 Redevelopment Plan.

107. A true copy of the transcript of the December 8, 2016 Hearing (“12/8/16T”) is annexed hereto as **Exhibit P**.

108. A copy of the 2016 Study Report was not made available to the public until after the 2016 Hearing commenced.

109. During the 2016 Hearing Ms. Bogart testified that the basis for the designation of properties under the “e” criterion was based on her review of the Master Plan and other Borough documents which articulated the Borough’s desire for mixed use redevelopment in the Study Area. (**Exhibit P**, 12/8/16T 28:5-18 and 36:18 – 38:8 (as to area generally), 47:17-20 (as to Lot 2), 51:6-11 (as to Lots 3 & 4), 66:2-3 (as to Lot 2 and Lot 33))

110. Ms. Bogart testified that specifically that the Plaintiff’s Properties were underutilized under criterion “e” because it was not developed in conformance with the 2006 Redevelopment Plan. (**Exhibit P**, 12/8/16T. 87:5 – 88:24)

111. Ms. Bogart testified as to the lack of parking on the Plaintiff’s Properties, which she alleged has a negative impact on the surrounding area.

112. Ms. Bogart also testified that the Plaintiff’s Properties are necessary for the development of the entire Block 419 Area, but she did not offer any evidence that the balance of Block 419 could not be developed without the Plaintiff’s Properties.

113. The Land Use Board voted to recommend to the Governing Body that the Block 419 Area be designated as an area in need of redevelopment by adopting LUB January 5, 2017 Resolution (**Exhibit B**).

114. The LUB January 5, 2017 Resolution states that its findings and conclusion were based solely upon the 2106 Bogart Study Report and Bogart’s testimony.

**L. 2017 Blight Designation of Block 419 Area**

115. By Resolution No. 58-17 (**Exhibit A**), the Governing Body accepted the findings as set forth in the LUB January 5, 2017 and designated the Block 419 Area, including Plaintiff's Properties, as an area in need of redevelopment.

116. The Governing Body accepted the recommendation of the Land Use Board without question citing Bogart's 2016 Study Report and her testimony during the Hearing.

**FIRST COUNT**

**(Challenge To 2017 Blight Designation Of Plaintiff's Properties  
As An Area In Need Of Redevelopment As Not Being Based  
Upon Substantial Evidence In The Record)**

117. Plaintiff repeats each and every prior allegation as though set forth herein at length.

**A. Purpose of the LRHL and evidence required to sustain a designation of a property as an area in need of redevelopment**

118. As set forth in *N.J.S.A. 40A:12A-2a*, the purpose of the LRHL is to address conditions of deterioration of communities which resulted from forces that "are amenable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort.

119. As a matter of law, the statutory criteria under *N.J.S.A. 40A:12A-5* must be applied in accordance with the literal terms of the statute.

120. As a matter of law, a finding that a property meets the criteria under *N.J.S.A. 40A:12A-5* to be designated as an area in need of redevelopment must be based on substantial evidence and may not be arbitrary, capricious and unreasonable.

121. The New Jersey State Supreme Court recognized in *62-64 Main Street, L.L.C. v. Mayor and Council of City of Hackensack*, 221 N.J. 129, 156 (2015), citing its previous decision

in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344, 373 (2007) that a finding that an area is in need of redevelopment under the LRHL has significant consequences for the property owner, most notably that the property may be acquired by condemnation pursuant to the provisions of the Eminent Domain Act of 1971, P.L. 1971, c. 361 (*N.J.S.A. 20:3-1 et seq.*).

122. Given the implication of the power of eminent domain, municipal planning boards and governing bodies have an obligation to rigorously comply with the statutory criteria of the LRHL for determining whether an area is in need of redevelopment. *62-64 Main Street, supra.*, 221 N.J. at 156-57.

123. To support a blight designation under the LRHL, the municipal record must “contain[] more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met.” *62-64 Main Street, supra*, 221 N.J. at 156 (quoting *Gallenthin, supra*, 191 N.J. at 373).

124. A resolution adopted by a municipal planning board recommending a blight designation and governing body resolution adopting such recommendation of the planning board to designate an area in need of redevelopment under the LRHL must clearly articulate the factual findings that support the statutory criteria for designating an area as in need of redevelopment. *62-64 Main Street, L.L.C., supra*, 221 N.J. at 156

**B. No substantial evidence in the 2016 Study Report that the Plaintiff’s Properties meet any criteria under LRHL to support a blight designation**

125. Bogart concluded that Lot 2 of the Plaintiff’s Properties met the “e” criterion under *N.J.S.A. 40A:12A-5*.

126. To qualify under the “e” criterion it must be shown that the property suffers from “[a] growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real properties therein or other similar conditions which impede land

assemblage or discourage the undertaking of improvements, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare, which condition is presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals, or welfare of the surrounding area or the community in general.” *N.J.S.A. 40A:12A-5(e)*.

127. Lot 2 does not constitute “an area in need of redevelopment” under criterion “e” of *N.J.S.A. 40A:12A-5* as a matter of fact and as a matter of law.

128. There is no evidence in the record, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A. 40A:12A-5e*, of a growing lack or total lack of proper utilization of Lot 2 caused by a condition of the title, diverse ownership or other similar condition which impedes land assemblage or discourages the undertaking of improvements.

129. There is no evidence in the record, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A. 40A:12A-5e*, that there is any condition of title or diversity of ownership that has a negative social or economic impact or is otherwise detrimental to the safety, health, morals, or welfare of the surrounding area or the community in general.

130. Ms. Bogart did not conclude that the condition of the Plaintiff’s Properties had reached a point deterioration or stagnation that negatively affects the surrounding area or caused or contributed to a decrease in surrounding property values.

131. To the extent there was a non-conforming use on Lot 2, it was demolished by the Owner after it acquired the property in 2013.

132. Lot 2 is partially improved and is part of a larger single economic unit along with the restaurant operation on Lot 4, which was ignored by Bogart.

133. Bogart's conclusion that Lot 2 is blighted under criteria "e" was not driven by application of the statutory criteria, but rather, as stated in her report, it was to fulfill "broader land use and planning goals" of the Borough which has not been permitted under the LRHL.

134. Consideration of land use and planning goals as part of a review of whether Lot 2 meets the "e" criterion is improper and irrelevant as a matter of law and demonstrative of the arbitrary and capriciousness of Bogart's findings.

135. Bogart states also that given the location of Lot 2, the property "is necessary to the effective redevelopment of the entire area." (2016 Study Report at 22)

136. *N.J.S.A.* 40A:12A-3 provides under the definition of "redevelopment area" that such area "may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part."

137. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A.* 40A:12A-3, that Lot 2 is part of an area for which there is substantial evidence that the properties surrounding Lot 2 are blighted under the criteria set forth in *N.J.S.A.* 40A:12A-5.

138. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A.* 40A:12A-3, that Lot 2 is necessary for the effective redevelopment of the surrounding properties.

139. Bogart concluded that Lot 3 and Lot 4 of the Plaintiff's Properties meet the "d" criterion under *N.J.S.A.* 40A:12A-5.

140. To qualify under the “d” criterion it must be shown that the improvements on the property “by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.” *N.J.S.A.* 40A:12A-5(d).

141. Bogart’s primary support for finding that Lot 3 and Lot 4 meet the “d” criterion is due to a lack of parking that she alleges – without citation to any evidence – has a negative impact on the surrounding area. (**Exhibit C**, 2016 Study Report at 24)

142. There is no provision under the LRHL to blight a property due to lack of parking or due to a perceived negative impact on surrounding properties.

143. Bogart states that her analysis of Lots 3 and 4 of the Plaintiff’s Properties under the “d” criteria was not driven by the statutory criteria, but rather her analysis “focused on the broader land use and planning goals of the [Borough]” (**Exhibit C**, 2016 Study Report at 24).

144. Bogart’s investigation concluded “that the area as a whole is not developing in a manner that furthers or is consistent with the Borough’s land use plan and the proximity to the train station which offers excellent opportunities for smart growth and transit-oriented development” (**Exhibit C**, 2016 Study Report at 24), which is not an appropriate consideration under *N.J.S.A.* 40A:12A-5.

145. Consideration of land use and planning goals as part of a review of whether the property meets the “d” criterion is improper and irrelevant as a matter of law and demonstrative of the arbitrary and capriciousness of Bogart’s findings.

146. Lot 3 and Lot 4 of the Plaintiff's Properties do not constitute "an area in need of redevelopment" under criteria "d" of *N.J.S.A. 40A:12A-5* as a matter of fact and as a matter of law.

147. There is no evidence in the record, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A. 40A:12A-5d*, that Lot 3 and Lot 4 are dilapidated, obsolete, overcrowded, suffer from faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout.

148. There is no evidence in the record, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A. 40A:12A-5d*, that any condition of Lot 3 and Lot 4 are detrimental to the safety, health, morals, or welfare of the community.

149. Bogart suggested, by merely citing to *N.J.S.A. 40A:12A-3*, that Lot 3 and Lot 4 are necessary to the effective redevelopment of the other properties on Block 419, but she did not state conclusively that these lots are in fact necessary for the effective redevelopment of the balance of Block 419. (**Exhibit C**, 2016 Study Report at 24)

150. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A. 40A:12A-3* that that the properties surrounding Lot 3 and 4 on Block 419 are blighted.

151. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A. 40A:12A-3*, that Lot 3 and Lot 4 are necessary for the effective redevelopment of the surrounding properties on Block 419.

152. The 2016 Study Report merely recites the statutory criteria to support a designation of an area in need of redevelopment and claims the Plaintiff's Properties meets such criteria without providing the requisite substantial evidence to support a designation.



153. The Study Report dedicates less than two paragraphs to its conclusion that the Plaintiff's Properties qualifies as an area in need of redevelopment.

154. Bogart ignored the recent acquisition of Plaintiff's Properties by plaintiff and the subsequent improvements and continued use of the property as a single economic unit.

**C. LUB January 5, 2017 Resolution does not cite to substantial evidence to support blight designation of Plaintiff's Properties**

155. The LUB January 5, 2017 Resolution (**Exhibit B**) states that its findings and conclusion were based solely upon the 2106 Bogart Study Report and Bogart's testimony.

156. There is no evidence, let alone substantial evidence cited in the LUB January 5, 2017 Resolution, that the Plaintiff's Properties satisfy criteria "d" and "e" or otherwise necessary for the effective redevelopment of the other Block 419 Area properties.

157. The determination by the Land Use Board that the Plaintiff's Properties should be designated as an area in need of redevelopment is in contravention of the facts, violates the provisions and policies of the Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.*, and is arbitrary, capricious, and unreasonable.

**D. Plaintiff's Properties are not blighted under criteria "d" or "e" of N.J.S.A.40A:12A-5 and are not necessary for the effective redevelopment of surrounding properties**

158. Resolution No. 58-17 adopted by the Governing Body does not cite to substantial evidence to support the designation of Plaintiff's Properties as an area in need of redevelopment under the LRHL.

159. The reliance of the Governing Body upon a finding that the Plaintiff's Properties satisfy criterion "d" is arbitrary, capricious and unreasonable and an inadequate basis for a determination that the Lot 3 and Lot 4 of the Plaintiff's Properties are an area in need of redevelopment.

160. There is no evidence in the record, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A.40A:12A-5e*, of a growing lack or total lack of proper utilization of Lot 2 caused by the condition of the title, diverse ownership or other similar conditions which impede land assemblage or discourage the undertaking of improvements.

161. The reliance of the Governing Body upon a finding that the Lot 2 of the Plaintiff's Properties satisfies criterion "e" is arbitrary, capricious and unreasonable and an inadequate basis for a determination that Lot 2 is an area in need of redevelopment.

162. There is no evidence in the record that the Plaintiff's Properties are necessary for the effective redevelopment of surrounding properties under *N.J.S.A.40A:12A-3* as a matter of fact or law.

163. The reliance of the Governing Body upon a finding that the Plaintiff's Properties are necessary for the effective redevelopment of surrounding properties under *N.J.S.A.40A:12A-3* is arbitrary, capricious and unreasonable and an inadequate basis for a determination that Plaintiff's Properties are an area in need of redevelopment.

164. The determination by the Governing Body that plaintiff Plaintiff's Properties constitutes an area in need of redevelopment, as set forth in Resolution No. 58-17, is in contravention of the facts, violates the provisions and policies of the Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.*, and is arbitrary, capricious, and unreasonable.

**WHEREFORE**, Plaintiff demands judgment against defendants the Borough of Emerson and Municipal Land Use Board, as follows:

- a. Setting aside the determination of the Land Use Board, as memorialized in the LUB January 5, 2017 Resolution, recommending that the Plaintiff's Properties be designated as an area in need of redevelopment as defined in the Local Redevelopment and Housing Law,

*N.J.S.A 48:12A-1 et seq.*

b. Setting aside the determination of the Mayor and Council of the Borough of Emerson, as memorialized in Resolution No. 58-17, adopted on January 17, 2017, accepting the recommendation of the Land Use Board that the Plaintiff's Properties constitute an area in need of redevelopment as defined in the Local Redevelopment and Housing Law, *N.J.S.A 48:12A-1 et seq.*

c. Enjoining and restraining defendant, Borough of Emerson, from taking any further action with regard to the determination that the Plaintiff's Properties as an area in need of redevelopment under the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*

d. Enjoining and restraining defendant, Borough of Emerson, from acquiring the Plaintiff's Properties by eminent domain to accommodate the implementation of the 2006 Redevelopment Plan.

e. For such other relief as the court may deem equitable and just.

f. For reasonable attorney fees and costs of suit.

## **SECOND COUNT**

**(Challenge To 2017 Blight Designation Of Block 419, including Plaintiff's Properties, As An Area In Need Of Redevelopment Which Designation Was Not For A Valid Public Purpose But Rather To Serve The Interests Of A Private Developer)**

165. Plaintiff repeats each and every allegation of the prior counts as though set for the herein at length.

### **A. The Borough failed to follow the procedural requirements of the LRHL**

166. The LRHL establishes a clearly delineated procedure under which a governing body of a municipality may proceed thereunder.

167. Under the LRHL, a municipal governing body has the power to, *inter alia*:

- a. Direct a municipal planning board to conduct a preliminary investigation of whether an area shall be determined to be a redevelopment area under the law, *N.J.S.A. 40A:12A-4a(1)*;
- b. Determine whether the area that was subject to the investigation is in need of redevelopment, *N.J.S.A. 40A:12A-4a(2)*;
- c. Adopt a redevelopment plan, *N.J.S.A. 40A:12A-4a(3)*; and
- d. Implement a duly adopted redevelopment plan and carry out redevelopment projects either directly or through a redevelopment agency or municipal housing authority, *N.J.S.A. 40A:12A-4c*

168. The exercise of powers as set forth above must occur sequentially in order to undertake a redevelopment project.

169. Under the LRHL, a municipal governing body must first authorize the preliminary investigation and then designate the area as in need of redevelopment before it is authorized to adopt a redevelopment plan after. *N.J.S.A. 40A:12A-7a*.

170. As a matter of law, a finding that a property meets the criteria under *N.J.S.A. 40A:12A-5* to be designated as an area in need of redevelopment must be in the public interest and may not be made to serve a private interest.

**B. 2016 Blight Study directed and paid for by Forgione/Kalafer**

171. Forgione/Kalafer were designated by the Borough as redeveloper to implement a project pursuant to the 2006 Redevelopment Plan in April 2016.

172. The 2016 Blight Study of the Block 419 Area initiated in August 2016 was intended to further the private interests of Forgione/Kalafer to afford the developer the opportunity to acquire property through the Borough's power of eminent domain.

173. Relevant to the consideration of the within matter is that a property designated as an area in need of redevelopment under the LRHL is deemed to be a "blighted area" under the New Jersey State Constitution which permits, *inter alia*, properties in that designated area to qualify for long term tax abatements.

174. The Governing Body approved the tax exemption for Forgione/Kalafer on the Block 419 Area properties the same day it authorized the 2016 Blight Study. (**Exhibit M**)

175. Prior to authorizing the tax exemptions, the Borough entered a "Funding Agreement" with Emerson Redevelopers, LLC, an affiliate of Forgione/Kalafer, dated May 6, 2016, signed by Mayor Louis Lamatina for the Borough and a Giuseppe Forgione for Emerson Redevelopers, whereby the latter agreed to pay certain fees and costs, including the cost of the Borough's professionals. A true copy of Funding Agreement is annexed hereto as **Exhibit Q**.

176. The Funding Agreement required Forgione/Kalafer to fund an escrow from which the Borough's professionals would be paid (the "Developer's Escrow"), however before such payment, the Borough would provide Forgione/Kalafer a copy of any such invoices in order to afford Forgione/Kalafer the opportunity to object to payment.

177. The Funding Agreement provides that approved costs to be paid out of the Developer's Escrow include those costs and expenses incurred by the Borough in reviewing the proposed development of Plaintiff's Properties, including but not limited to, fees for legal, engineering, planning and financial advisory services, including subsequent investigations and

studies as may be reasonably determined and agreed by the parties.” (**Exhibit Q**, Funding Agreement at 2)

178. Annexed hereto as **Exhibit R** is a true copies ledger entries and supporting documentation (cancelled checks, bills and payment vouchers) provided by the Borough’s Finance Department showing payments to the Developer’s Escrow by Forgione/Kalafer and payments from the Developer’s Escrow by the Borough to various professionals from May 12, 2016 through January 18, 2017.

179. Annexed hereto as **Exhibit S** is email correspondence by and between Borough officials, redevelopment counsel and/or Forgione/Kalafer concerning payments to and from the Developer’s Escrow from June 15, 2015 through December 20, 2016.

180. The Redevelopment Agreement by and between the Borough and Forgione/Kalafer for the redevelopment of the Block 419 Area states that “the Borough and the Redeveloper may determine that it is in the interest of the Project to re-study the Central Business District Redevelopment Area or particular properties located [therein] to confirm that the continue to be blighted and otherwise meet the criteria pursuant to [the LRHL].” (**Exhibit L**, Redevelopment Agreement at §2.01(16)).

181. The Redevelopment Agreement provides further that Forgione/Kalafer “shall reimburse the Borough for such costs associated with [any future blight study].” (**Exhibit L**, Redevelopment Agreement at §2.01(16)).

182. Under the Redevelopment Agreement, Forgione/Kalafer could request a blight study to designate the Block 419 Area as a Condemnation Redevelopment Area for the purpose of acquiring those properties through the Borough’s power of eminent domain, for the Forgione/Kalafer.

183. The Plaintiff's Properties consist of three separate lots that together comprise .58 acre, is the largest land area under common ownership in Block 419, and is located on the corner of Kinderkamack Road and Lincoln Boulevard.

184. In correspondence dated June 1, 2016, Mr. Kevin X. Codey, a representative of Forgione/Kalafer, notified the plaintiff Owner that Forgione/Kalafer was designated redeveloper by the Borough and presented a "best and final offer" to purchase the Plaintiff's Properties.

185. The Owner rejected Forgione/Kalafer's offer, after which Forgione/Kalafer requested the blight study as provided in the Redevelopment Agreement.

186. At Forgione/Kalafer's request, the Governing Body adopted Resolution 221-16 to authorize the 2016 Blight Study.

187. Forgione/Kalafer remained active in the process throughout the 2016 Blight Study process.

188. On November 21, 2016, during the time of the 2016 Blight Study was underway, there was a meeting at the Borough municipal building between Mayor Lamatina, the Borough Planner, Ms. Bogart, the Borough Administrator, Robert Hoffman, and Borough Redevelopment Counsel, Douglas Doyle, and Mr. Codey, representing Forgione/Kalafer to discuss the implementation of the redevelopment of Block 419, including, *inter alia*, re-designation of that area as an area in need of redevelopment, the wording of the Notice of the 2016 Hearing and the acquisition of parcels.

189. Annexed hereto as **Exhibit T** are true copies of email correspondence initiated by Borough Administrator, Mr. Hoffman, to the Mayor, Council Members Knoller, Lazar and Tripodi, Ms. Bogart and Mr. Codey for Forgione/Kalafer scheduling the November 21, 2016 meeting to discuss, *inter alia*, "Re-designate the zone"; "Modification of Language if necessary";

Timeline for Developer to acquire the properties”; and “Other items which the Land Use Board or Governing Body may be asked to evaluate.”

190. The initiation of the 2016 Blight Study to further the goals of previously adopted 2006 Redevelopment Plan and the Redevelopment Agreement violates the provisions and policies of the Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.*, and demonstrative of the arbitrary and capriciousness of the 2017 Blight Designation complained of.

**C. Borough Planner did not conduct an independent investigation**

191. As set forth in the 2016 Study Report, Ms. Bogart’s conclusion of blight under the “e” criteria was not based on any of the requisite statutory conditions, but rather to fulfill the “goals and objectives of the Master Plan and Central Business District Plan” and “broader land use and planning goals of the municipality” to redevelop the affected areas, which was, by extension, to serve the interests of the private developer, Forgione/Kalafer as directed by the Mayor and Council. (Exhibit C, 2016 Study Report at 22 & 24)

192. During the December 8, 2016 Hearing before the Land Use Board, Ms. Bogart testified that in addition to fulfilling the Borough’s planning goals and objectives under the Master plan and CBD plan, she relied also on the 2006 Redevelopment Plan in concluding that the Plaintiff’s Properties met the “e” criteria under *N.J.S.A. 40A:12A-5*. (Exhibit P, 12/8/16T 28:5-18 and 36:18 – 38:8 (as to area generally), 47:17-20 (as to Lot 2), 51:6-11 (as to Lots 3 & 4), 65:19 – 66:5 (as to Lots 2-3), 88:22-24 (as to Lot 4))

193. Fulfillment of municipal planning objectives as set forth in a master plan, redevelopment plan or any other planning document are not appropriate considerations of whether a property is blighted under the LRHL.



194. Consideration of municipal planning objectives as set forth in a master plan, redevelopment plan or any other planning documents is improper and irrelevant as a matter of law and demonstrative of the arbitrary and capriciousness of the 2017 Blight Designation complained of.

195. Ms. Bogart's conclusions and recommendations were a predetermined outcome desired by the Mayor and Council who appointed her as the Borough Planner and to further the Forgione/Kalafer Project which had already been endorsed by the Mayor and Council in April 2016.

196. Before and at the time of her December 8, 2016 Study Report, Ms. Bogart was compensated with funds from the Forgione/Kalafer Developer's Escrow. (**Exhibits R and S**)

197. The Borough's Redevelopment Attorney, Mr. Doyle admitted during the Governing Body's January 17, 2017 meeting that to allow payments by the developer to Borough professionals would "skew the entire process", and would therefore impact upon the ability of the planner to make an objective recommendation to the Land Use Board. (*See* Transcript of the January 17, 2017 meeting of the Governing Body ("1/17/17T"), 19:6-12, a true copy of excerpts of which are annexed hereto as **Exhibit U**)

198. That Ms. Bogart had no interest in reaching an independent determination based on the statutory criteria is evidence by the lack of any evidence to support her stated conclusions and her stated reliance on the Borough's planning goals and objectives set forth in the Master Plan, CBD Plan and 2006 Redevelopment Plan and, more specifically, the proposed Forgione/Kalafer development project.

199. Ms. Bogart interviewed only a single owner of one of the Block 419 Area, not the plaintiff. (**Exhibit P**, 12/8/16T 92:21 – 93:2)

200. In performing the 2016 Blight Study, Ms. Bogart was not interested in obtaining a better understanding the condition of the Block 419 Area or to determine to the extent any alleged condition of deterioration existed, or whether any alleged condition constituted blight under the LRHL or deferred maintenance.

201. In performing the 2016 Blight Study, Ms. Bogart was not interested in determining if any owner of one of the Block 419 Area were ready, willing and able to be correct or ameliorate the purported blight condition.

202. The sole purpose of the 2016 Blight Study was to find that the properties thereto constituted an area in need of redevelopment under the LRHL as desired by the Mayor and Council so that the Borough could attempt to acquire the property by eminent domain for Forgione/Kalafer.

203. Bogart failed to provide an independent analysis and arrive at an unbiased conclusion in order to serve the public interest based upon the requirements of law.

204. Bogart's conclusions were improperly influenced by the desires on the Mayor and Council to advance the Forgione/Kalafer Project and her own personal and financial interests in payments from the Developer's Escrow and continued employment as the Borough Planner.

205. Because the Borough already had a developer in place who was paying Borough professionals, the designation of Block 419 Area as an area in need of redevelopment was a pretextual *fait accompli* which deprived the plaintiff and other affected property owners from having a meaningful opportunity to contest the Bogart's recommendation.

**D. Conflict of Borough Attorney and Borough Redevelopment Counsel**

206. Wendy Rubinstein, an attorney with the law firm DeCotiis, Fitzpatrick & Cole, LLC ("DeCotiis") was appointed as the municipal attorney for the Borough in 2016 and 2017.

207. Mr. Doyle, also of the DeCotiis firm, executed the contract for professional services between the Borough and DeCotiis to provide general legal services as municipal attorney to the Borough.

208. Mr. Doyle was appointed separately by the Mayor and Counsel to serve a special redevelopment counsel to the Borough in 2016 and 2017.

209. Mr. Doyle, on occasion, attends meetings of the Governing Body in the capacity as municipal attorney

210. Before, during and since, the December 8, 2016 Hearing, Mr. Doyle and the DeCotiis firm were compensated from the Forgione/Kalafer Developer's Escrow for services provided in connection with the planned redevelopment of the Block 419 Area, including providing advice and counsel as to the investigation as to whether the Block 419 Area constituted an area in need of redevelopment under the LRHL, and the developer's attempt to acquire the properties within the Block 419 Area. **(Exhibits R and S)**

211. Having been compensated from the Forgione/Kalafer Developer's Escrow, Mr. Doyle and the DeCotiis firm were prevented from providing objective advice and counsel to the Borough and Land Use Board.

212. That there was a conflict in Mr. Doyle and the DeCottis firm in providing advice and counsel related to the blight investigation was conceded by Mr. Doyle himself during the January 17, 2017 meeting of the Governing Body when he said:

[D]evelopers cannot pay to have areas studied because that would skew the entire process. \* \* \* Similarly [as with the planner], I have to make an objective determination as the Special Redevelopment Counsel so that nobody could question the legitimacy of the process designating an area in need of redevelopment.

**(Exhibit U, 1/17/17T 19:7-17)**

**E. The Borough has invoked its power of eminent domain to serve private interests contrary to established law**

213. In adopting Resolution No. 221-6 to authorize the 2016 Blight Study the Borough invoked its power to acquire property through eminent domain.

214. Once the Borough invoked its power of eminent domain in connection with the 2016 Blight Study, it had “an overriding obligation to deal forthrightly and fairly with property owners” in the study area pursuant to the holding of the Supreme Court in *F.M.C. Stores, Co. v. Borough of Morris Plains*, 100 N.J. 418, 426-427 (1985); *see also Jersey City Redevelopment Agency v. Costello*, 252 N.J.Super. 247, 257 (App.Div.1991); *Rockaway v. Donofrio*, 186 N.J.Super. 344 (App.Div.1982); *State v. Siris*, 191 N.J.Super. 261 (App.Div.1983).

215. The Mayor and Council violated their duty to act solely in the public interest when they adopted Resolution No. 58-17 and invoked the Borough’s power of eminent domain, when such action served only to advance the interests of the private developer, Forgione/Kalafer over the interests of owners of the Block 419 Area that are subject to the 2017 Blight Designation.

216. The reliance of the Governing Body on the private interests of Forgione/Kalafer to support a finding that the Block 419 Area, including the plaintiff’s Property, is improper and irrelevant as a matter of law and demonstrative of the arbitrary and capriciousness of the 2017 Blight Designation complained of.

217. The 2017 Blight Designation was a forgone conclusion before the Bogart 2016 Study Report was written and the December 8 2016 Hearing was conducted in order to serve the interests of Forgione/Kalafer.

218. During the December 8, 2016 Hearing, Borough Councilwoman Danielle DiPaola presented a question to the Borough’s Redevelopment Counsel, Mr. Doyle about whether the owners of the Block 419 Area could be afforded the incentives, such as tax abatements, to

redevelop their properties (**Exhibit P**, 12/8/16T 115:25 – 116:19) to which Mr. Doyle responded “no . . . the Governing Body has already entered into an agreement with a redeveloper [Forgione/Kalafer] ... [s]o the answer is no, that the Governing Body has already voted to allow a redeveloper to redevelop this area.” (**Exhibit P**, 12/8/16T 117:5-10)

219. When pressed by Councilwoman DiPaola whether the Borough had authority to enter the Redevelopment Agreement granting Forgione/Kalafer exclusive rights to develop the Block 419 Area, Mr. Doyle stated that the Mayor and Council were “absolutely permitted by law” to proceed, citing the 2004 Blight Designation, although because that action was susceptible to court challenge the 2016 Blight Study was authorized “to reconfirm that this area continues to meet the criteria under the [LRHL].” (**Exhibit P**, 12/8/16T 117:16 – 118:5)

220. The Borough’s intentions were confirmed during the July 17, 2017 meeting of the Governing Body when Mr. Doyle remarked in his opening statement before the Governing Body concerning the adoption of Resolution No. 58-17 (**Exhibit A**) that the Block 419 Area was a priority to restudy “[the Borough has] a redeveloper that’s willing to move forward with respect to Block 419....” (**Exhibit U**, 1/17/17T 60:12-15)

221. The record is clear that there was to be only one outcome as a result of the 2016 Blight Study and that was to blight the Block 419 Area.

222. There is nothing in the record to suggest that the 2016 Blight Study was an independent analysis based on the conditions of the properties subject thereto as required by the LRHL.

223. The determination by the Governing Body that Block 419, including plaintiff Plaintiff’s Properties constitute an area in need of redevelopment, as set forth in Resolution No.

58-17, is in contravention of the facts, violates the provisions and policies of the Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.*, and is arbitrary, capricious, and unreasonable.

224. The 2017 Blight Designation as set forth in Resolution No. 58-17, was a predetermined outcome that resulted from the collusion by and between defendants, Borough and Land Use Board, and Forgione/Kalafer.

225. The 2017 Blight Designation deprived the plaintiff and all Block 419 Property owners of due process under the 14<sup>th</sup> Amendment of the United States Constitution and in violation of the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1 et seq.*

**WHEREFORE**, Plaintiff demands judgment against defendants, the Borough of Emerson and Municipal Land Use Board, as follows:

a. Setting aside the determination of the Land Use Board, as memorialized in the Resolution adopted on January 5, 2017, recommending that the Block 419 Area be designated as an Area in Need of Redevelopment;

b. Setting aside the determination of the Land Use Board, as memorialized in the Resolution adopted on January 5, 2017, recommending that the Plaintiff's Properties be designated as an Area in Need of Redevelopment;

c. Setting aside the determination of the Mayor and Council of the Borough of Emerson, as memorialized in Resolution No. 58-17, adopted on January 17, 2017, accepting the recommendation of the Land Use Board that the Block 419 Area constitutes an area in need of redevelopment as defined in the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*;

d. Setting aside the determination of the Mayor and Council of the Borough of Emerson, as memorialized in Resolution No. 58-17, adopted on January 17, 2017,

accepting the recommendation of the Land Use Board that the Plaintiff's Properties constitute an area in need of redevelopment as defined in the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*

e. Enjoining and restraining defendant, Borough of Emerson, from taking any further action with regard to the 2017 Blight Determination as to the Block 419 Area as an area in need of redevelopment under the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*;

f. Enjoining and restraining defendant, Borough of Emerson, from taking any further action with regard to the 2017 Blight Determination as to the Plaintiff's Properties as an area in need of redevelopment under the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*;

g. Enjoining and restraining defendant, Borough of Emerson, from acquiring any of the Block 419 Area by eminent domain to accommodate the implementation of the 2006 Redevelopment Plan

h. Enjoining and restraining defendant, Borough of Emerson, from acquiring the Plaintiff's Properties by eminent domain to accommodate the implementation of the 2006 Redevelopment Plan.

i. For such other relief as the court may deem equitable and just.

j. For costs, interest and reasonable attorneys' fees for this action pursuant to *N.J.S.A. 10:6-2* and as otherwise provided by law.

### **THIRD COUNT**

#### **(Challenge To 2017 Blight Designation Of Block 419 Area, Including Plaintiff's Properties, As An Area In Need Of Redevelopment Based on Deprivation Of Due Process)**

226. Plaintiff repeats each and every allegation of the prior counts as though set for the herein at length.

227. Under the New Jersey State Constitution, Article I, paragraph 1, citizens are granted "certain natural and unalienable rights, among those of enjoying and defending life, liberty, of acquiring and possessing, and protecting property...."

#### **A. Land Use Board did not conduct independent & unbiased investigation—flawed notice**

228. Pursuant to the LRHL, defendant Land Use Board, was required to schedule a hearing as part of the 2016 Blight Study. *N.J.S.A.* 40A:12A-6b

229. Before proceeding to the public hearing, the Land Use Board was required to prepare a map that shows the boundaries of the area to be investigated, including the location of the individual parcels included therein, and appended to such map there must be a statement setting forth the basis for the investigation. *N.J.S.A.* 40A:12A-6b(1).

230. Pursuant to the LRHL, the Land Use Board was obligated to provide notice of the statutorily required hearing, which notice was to include a statement that the map of the study area and statement for basis for the investigation was on file with the Borough Clerk for inspection. *N.J.S.A.* 40A:12A-6b.

231. The Hearing Notice of the December 8, 2016 Hearing was mailed to plaintiff on November 22, 2016, the Tuesday before Thanksgiving

232. The Hearing Notice stated that "[t]he designation will operate as a conclusive finding of public purpose which authorizes the Borough ... to use all those powers provided by



the [LRHL], including the power of eminent domain, to acquire or condemn the parcels comprising the Condemnation Redevelopment Area.” (**Exhibit O**)

233. The Hearing Notice did not state that the hearing was the owner’s only opportunity to present evidence in opposition to the designation of its property as an area in need of redevelopment.

234. The Notice indicated that the map of the study area and statement of the basis for the investigation were on file with the Borough Clerk and available for review.

235. The statement of the basis for the investigation referenced in the Hearing Notice was a one-page document that provided a summary of ongoing litigation concerning the Borough’s affordable housing obligation and states that “in order to fulfill this obligation, the Mayor and Council have determined that a supplemental study of areas previously designated as ‘an area in need of redevelopment’ be conducted to ensure that the designated area continues to meet the statutory criteria set forth in the [LRHL] and be designated a Condemnation Redevelopment Area.” A true copy of the statement of the basis for the investigation referenced in the Hearing Notice is annexed hereto as **Exhibit V**.

236. Consideration of affordable housing, while a worthy endeavor, is an improper and irrelevant consideration as a matter of law as to whether certain properties qualify as an area “in need of redevelopment”, and demonstrative of the arbitrary and capriciousness of the 2017 Blight Designation complained of.

237. While typically a planner’s study report is provided as the statement of basis for the investigation prior to the a blight study hearing, the Borough and Land Use Board decided not to provide the 2016 Study Report to affected property owners until the night of the December 8, 2016 hearing.

238. The decision to deprive affected property owners a copy of the 2016 Study Report until the night of the Hearing was intended to deny them a meaningful opportunity to create a full and complete record in that proceeding concerning the condition of their respective properties..

239. The decision to deprive affected property owners a copy of the 2016 Study Report until the night of the Hearing, deprived such owners, including plaintiff, the opportunity to prepare adequate cross examination of Ms. Bogart.

240. The decision to deprive affected property owners a copy of the 2016 Study Report until the night of the Hearing, deprived such owners, including plaintiff, the opportunity to obtain expert reports to counter Ms. Bogart's unsubstantiated findings and conclusions.

241. The Borough and Land Use Board failed to provide constitutionally required notice and meaningful opportunity for the Block 419 Area property owners to participate in the Hearing and create a full and complete record.

242. The decision to deprive affected property owners a copy of the 2016 Study Report until the night of the Hearing was arbitrary and a deprivation of due process under the 14<sup>th</sup> Amendment of the United States Constitution and in violation of the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1* et seq.

**B. Land Use Board did not conduct independent and unbiased investigation – hearing directed by the Mayor and Council**

243. The December 8, 2016 Hearing before the Land Use Board was not part of an independent and unbiased investigation that is required under the LRHL.

244. The Hearing was directed by the Mayor and Council who had already entered the Redeveloper's Agreement with Forgione/Kalafer.

245. Every aspect of the hearing, including notice thereof was directed by the Mayor and Council.

246. Notice of the 2016 Hearing was not provided by the Secretary of the Land Use Board, but rather it was provided by the Borough Clerk at the direction of the Mayor and/or the Borough's Redevelopment Counsel.

247. Recipients of the Notice were instructed to contact the Borough Clerk with any questions regarding the Notice and Hearing.

248. The Land Use Board Chairman opened the Hearing by stating that it would be led by Mr. Doyle, who the Chairman identified as the Borough's redevelopment counsel, whose firm, DeCotiis, also serves as the Borough's municipal attorney.

249. The Hearing was not conducted in accordance with the procedural requirements of the LRHL.

**C. Contrary to the LRHL, the Land Use Board did not hear from all persons who were interested or would be affected by the 2016 Blight Study**

250. At the Hearing, the Land Use Board was statutorily obligated to ensure all persons who were interested in or be affected by the blight study, would be heard. *N.J.S.A.* 40A:12A-6b(4).

251. Despite its statutory obligation, the Land Use Board was more concerned with time than the development of a full and complete record.

252. At least four times during the aforesaid meeting, the Chairman of the Land Use Board reminded attendees that the board had the room until only 11:00 PM, at which time the meeting would be adjourned

253. At 10:52 PM the Hearing on the 2106 Blight Study was closed to the public, at which time persons interested in or affected by the designation wished to be heard and were not heard.

254. As a result of statements and actions by the Land Use Board, persons interested in or affected by the 2016 Blight Study left the Hearing.

255. The Land Use Board, after closing the Hearing to the public, continued the meeting to discuss proposed amendment amendments to the 2006 Redevelopment Plan.

256. One of a few residents, including a tenant in a building in Block 419 who, remained, complained to the Land Use Board that the 2016 Hearing was cut short and interested persons who wished to speak were not heard.

257. The Land Use Board's duly appointed attorney, Christopher Martin, confirmed it was cut short because the board had other issues to attend to. (**Exhibit P**, 12/8/16T 145:20-21)

258. When asked by the tenant in a building in Block 419 if the Hearing would be continued, Mr. Martin said no.

259. The Land Use Board knowingly and purposely denied the opportunity to be heard by all persons who were interested in or would be affected by a determination that Study Area would be delineated area is a redevelopment area.

260. After closing the Hearing to the public and after consideration of the amendments to the Redevelopment Plan and knowing that almost all of those in attendance for the Hearing had left, the Land Use Board voted to approve the blight designation for Block 419.

**D. January 5, 2017 Land Use Board Meeting**

261. By letter dated December 29, 2016, the undersigned attorney for the plaintiff advised the Land Use Board that it had submitted a separate written request to the Governing Body that it rescind Resolution No. 221-16, which authorized the 2016 Redevelopment Study and requested that the Land Use Board reconsider its recommended blight designation for the

Plaintiff's Properties. A true copy of the December 29, 2016 letter to the Land Use Board is annexed hereto as **Exhibit W**.

262. By that same December 29, 2016 letter, counsel for the plaintiff requested alternatively that the Land Use Board, as provided in the LRHL, adjourn the matter and schedule another hearing to ensure that all property owners are afforded an opportunity to be heard and to develop a full and complete record upon which the board may make a fully informed decision.

263. The Land Use Board denied the Owner's request that the board reconsider its prior determination to recommend that Block 419 be designated as an area in need of redevelopment or adjourn the matter and schedule further hearings.

264. The undersigned attorney for plaintiff had requested the opportunity to be heard by the Land Use Board at its January 5, 2017 meeting before the board voted to adopt the resolution memorializing its blight designation of Block 419, but was denied.

265. At the January 5, 2017 meeting of the Land Use Board, the undersigned attorney was denied the opportunity to speak until after the Board voted to adopt the LUB January 5, 2017 Resolution to memorialize its recommendation that the Governing Body designate the Block 419 Area as an area in need of redevelopment. A true copy of excerpts of the transcript of portions of the Land Use Board's January 5, 2017 meeting pertaining to the 2016 Blight Study ("1/5/17T") is annexed hereto as **Exhibit X**.

266. After the Land Use Board adopted the LUB January 5, 2017 Resolution at the January 5, 2017 meeting, the Owner, through counsel, requested that the Land Use Board reconsider its recommendation.

267. The basis for the Owner's request for the Land Use Board to rescind or reconsider its recommendation was the existence of various substantive and procedural infirmities as set forth in this Complaint.

268. The Land Use Board denied the Owner's request that the board reconsider its recommendation to designate Block 419 as an area in need of redevelopment

269. The Land Use Board also denied plaintiff's request to reopen the Hearing and take additional testimony to afford plaintiff and others a full and fair opportunity to present evidence for the board to consider, including consideration of any additional evidence which purported to support a blight designation.

270. The Chairman of the Land Use Board rejected requests to hear from other expert planners for property owners to rebut Bogart, stating the Board would follow the opinion of Bogart, and that the board made its decision based on Bogart's opinion. (**Exhibit X**, 1/5/17T 17:8-15)

271. When asked by a property owner if the Board would consider a contrary opinion of another professional, the duly appointed attorney of the Land Use Board, Mr. Martin, stated that such a contrary opinion was speculative and that the time for such testimony was the December 8, 2016 Hearing. (**Exhibit X**, 1/5/17T 18:8-23)

272. Mayor Lamatina, sitting as a member of the Land Use Board, stated that to reopen the Hearing would violate the "public trust" which the Mayor identified as the Borough's agreement with the developer, Forgione/Kalafer. (**Exhibit X**, 1/5/17T 50:9-18, 51:10-23)

273. Mayor Lamatina objected also to the Hearing being reopened for fear that it would make plaintiff's anticipated "litigation position stronger." (**Exhibit X**, 1/5/17T 55:21 – 56:12)

274. The Land Use Board refused to reopen the Hearing, as is permitted under the LRHL – contrary to how it proceeded in 2004 (two hearing dates) and 2008 (five hearing dates) – not

based on valid considerations under the LRHL, but to serve the interests of the private redeveloper, Forgione/Kalafer.

275. The Land Use Board refused to reopen the Hearing, because it knew with competent redevelopment counsel and a professional planner, the owners of the Block 419 Area, including the plaintiff, would be able to present compelling evidence that their properties are not blighted.

276. Property owners in the Block 419 Area, including the plaintiff, were entitled under the law to make a full and complete record before the Land Use Board concerning the condition of their properties were deprived a meaningful opportunity to do so by the Land Use Board.

277. All other persons interested in or affected by the 2016 Blight Study were entitled to be heard by the Land Use Board and were denied such opportunity by the Land Use Board.

278. The LUB January 5, 2017 Resolution states that its findings and conclusion were based solely upon the 2106 Bogart Study Report and Bogart's testimony.

279. Pursuant to the LRHL, the Land Use Board was obligated to receive and consider all objections before rendering its final decision. *N.J.S.A. 40A:12A-6b(4)*

280. The LUB January 5, 2017 Resolution incorrectly stated that "all persons present and affected were given an opportunity be heard."

281. The Land Use Board did not hear from all persons who were interested in or affected by a determination the 2016 Blight Study, contrary to law.

282. The Land Use Board prevented the opportunity for owners and other interested parties from presenting full and complete objections on the record.

283. To the extent objections were made part of the record, the Land Use Board did not consider same, but relied solely on the 2016 Study Report and Bogart's testimony.

284. The record upon which the Land Use Board January 5, 2017 Resolution was based is incomplete and contrary to the provisions of the LRHL.

285. To the extent that the Land Use Board relied upon the recommendation of Bogart in recommending the area be designated as an area in need of redevelopment, such determination is arbitrary, capricious and unreasonable factually and as a matter of law and an inadequate basis for a determination that Block 419 is an area in need of redevelopment.

286. The refusal of the Land Use Board to reopen the hearing was arbitrary, capricious and unreasonable and constitutes a deprivation of due process under the 14<sup>th</sup> Amendment of the United States Constitution and in violation of the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1 et seq.*

287. The recommendation of the Land Use Board as memorialized in Land Use Board January 5, 2017 Resolution was arbitrary, capricious and unreasonable and constitutes a deprivation of due process under the 14<sup>th</sup> Amendment of the United States Constitution and in violation of the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1 et seq.*

**E. January 17, 2017 meeting of the Governing Body**

288. By letter dated December 29, 2016, the undersigned attorney for the Owner, submitted a written request to the Mayor and Council to request that it rescind Resolution No. 221-16, which authorized the 2016 Blight Study. A true copy of the December 29, 2016 letter to the Mayor and Council is annexed hereto as **Exhibit Y**.

289. By that same December 29, 2016 letter, counsel for the Owner requested alternatively that the Governing Body reject the anticipated recommendation of the Land Use Board to designate Block 419 as an area in need of redevelopment or, in the alternative, to remand the matter back to the Land Use Board for further proceedings to ensure that all property owners



are afforded an opportunity to be heard and to develop a full and complete record upon which the Land Use Board could make a fully informed decision.

290. The Governing Body only responded to the Owner's written request by letter from its Redevelopment Counsel dated January 20, 2017 after it had already approved Resolution No. 58-17 to designate the Block 419 Area as an area in need of redevelopment.

291. At the January 17, 2017 meeting of the Governing Body the undersigned counsel for the Owner appeared to request that it reject the recommendation of the Land Use Board based on various substantive and procedural infirmities cited in the December 29, 2016 letter and as set forth in this Complaint.

292. The Governing Body denied the Owner's request and voted to adopt the recommendation of the Land Use Board as memorialized in Resolution No. 58-17.

293. The 2017 Blight Designation by the Governing Body as set forth in Resolution No. 58-17 was arbitrary, capricious and unreasonable and constitutes a deprivation of due process under the 14<sup>th</sup> Amendment of the United States Constitution and in violation of the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1 et seq.*

294. Defendants, Borough and Land Use Board colluded to deprive property owners, including the plaintiff, of due process under the 14<sup>th</sup> Amendment of the United States Constitution and in violation of the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1 et seq.*

**WHEREFORE**, Plaintiff demands judgment against defendants, the Borough of Emerson and Municipal Land Use Board, as follows:

- a. Setting aside the determination of the Land Use Board, as memorialized in the Resolution adopted on January 5, 2017, recommending that the Block 419 Area be designated as an Area in Need of Redevelopment;

b. Setting aside the determination of the Land Use Board, as memorialized in the Resolution adopted on January 5, 2017, recommending that the Plaintiff's Properties be designated as an Area in Need of Redevelopment;

c. Setting aside the determination of the Mayor and Council of the Borough of Emerson, as memorialized in Resolution No. 58-17, adopted on January 17, 2017, accepting the recommendation of the Land Use Board that the Block 419 Area constitutes an area in need of redevelopment as defined in the Local Redevelopment and Housing Law, *N.J.S.A 48:12A-1 et seq.*;

d. Setting aside the determination of the Mayor and Council of the Borough of Emerson, as memorialized in Resolution No. 58-17, adopted on January 17, 2017, accepting the recommendation of the Land Use Board that the Plaintiff's Properties constitute an area in need of redevelopment as defined in the Local Redevelopment and Housing Law, *N.J.S.A 48:12A-1 et seq.*

e. Enjoining and restraining defendant, Borough of Emerson, from taking any further action with regard to the 2017 Blight Determination as to the Block 419 Area as an area in need of redevelopment under the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*;

f. Enjoining and restraining defendant, Borough of Emerson, from taking any further action with regard to the 2017 Blight Determination as to the Plaintiff's Properties as an area in need of redevelopment under the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*;

g. Enjoining and restraining defendant, Borough of Emerson, from acquiring any of the Block 419 Area by eminent domain to accommodate the implementation of the 2006

Redevelopment Plan

h. Enjoining and restraining defendant, Borough of Emerson, from acquiring the Plaintiff's Properties by eminent domain to accommodate the implementation of the 2006 Redevelopment Plan.

i. For such other relief as the court may deem equitable and just.

j. For costs, interest and reasonable attorneys' fees for this action pursuant to *N.J.S.A.*

10:6-2 and as otherwise provided by law

**FOURTH COUNT**

**(Challenge To 2004 Designation Of Plaintiff's Properties As An Area In Need Of Redevelopment As Not Being Based Upon Substantial Evidence In The Record)**

295. Plaintiff repeats each and every allegation of the prior counts as though set for the herein at length.

296. The former owner of the Plaintiff's Properties was not provided written notice from the Borough of the 2004 Blight Designation pursuant to Resolution No. 199-04 and therefore, the owner was not advised of the consequences of such designation or of its right the right to challenge the designation and, as such, the Owner's right to contest the 2004 Blight Designation is preserved under *Harrison Redevelopment Agency v. DeRose*, 398 N.J.Super. 361 (App.Div. 2008).

**A. Plaintiff's Properties not blighted under criteria "a" "d" or "h" of *N.J.S.A. 40A:12A-5***

297. There is no evidence, let alone substantial evidence in the record of the 2004 Blight Designation that Plaintiff's Properties constitute "an area in need of redevelopment" under criteria "a" "d" or "h" of *N.J.S.A. 40A:12A-5* as a matter of fact and as a matter of law.

298. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A.40A:12A-5a* that the conditions of the improvements on the Plaintiff's Properties are or cause unwholesome living or working conditions.

299. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A.40A:12A-5d*, that the conditions of the improvements on the Plaintiff's Properties are detrimental to the safety, health, morals, or welfare of the community.

300. There is no evidence, let alone substantial evidence as a matter of fact and as a matter of law under *N.J.S.A.40A:12A-5h*, that the designation of the Plaintiff's Properties are consistent with smart growth planning principles.

301. The Governing Body's determination to accept the finding of Burgis and the Planning Board that the Plaintiff's Properties satisfies criteria "a", "d" or "h" as set forth in Resolution No. 199-04 is arbitrary, capricious and unreasonable factually and as a matter of law and an inadequate basis for a determination that Plaintiff's Properties are an area in need of redevelopment under the LRHL.

302. The Borough concedes that the 2014 Blight Designation as to the Plaintiff's properties, as well as others, is flawed, which is why it authorized the 2016 Blight Study. (**Exhibit P**, 12/8/16T 90:23 -91-5, 117:24 – 118:1, **Exhibit U**, 1/17/17T 61:9-22)

**WHEREFORE**, Plaintiff demands judgment against defendants the Borough of Emerson and Municipal Land Use Board, as follows:

- a. Setting aside the determination of the Land Use Board's predecessor, Planning Board, as memorialized in the Planning Board's September 7, 2004 Resolution, adopted on September 7, 2004, recommending that the Plaintiff's Properties be designated as an area in need of redevelopment as defined in the Local Redevelopment and Housing Law,

*N.J.S.A 48:12A-1 et seq.*;

b. Setting aside the determination of the Mayor and Council of the Borough of Emerson, as memorialized in Resolution No. 199-04, adopted on September 7, 2004, accepting the determination of the Planning Board that the Plaintiff's Properties constitute an area in need of redevelopment as defined in the Local Redevelopment and Housing Law, *N.J.S.A 48:12A-1 et seq.*

c. Enjoining and restraining defendant, Borough of Emerson, from taking any further action with regard to the determination that the Plaintiff's Properties are an area in need of redevelopment under the Local Redevelopment and Housing Law, *N.J.S.A. 48:12A-1 et seq.*

d. Enjoining and restraining defendant, Borough of Emerson, from acquiring the Plaintiff's Properties by eminent domain to accommodate the implementation of the 2006 Redevelopment Plan.

e. For such other relief as the court may deem equitable and just.

f. For reasonable attorney fees and costs of suit.

#### JURY DEMAND

Plaintiffs hereby demand trial by jury as to all issues so triable.

#### DESIGNATION OF TRIAL ATTORNEY

Please be advised that Richard P. De Angelis, Jr. Esq. is designated to try this matter.

#### CERTIFICATION PURSUANT TO R.4:69-4

We hereby certify that all necessary transcripts of local agency proceedings have been ordered.

R.4:5-1(b)(2) CERTIFICATION

We certify that the matter in controversy is not the subject of any other action pending in any Court, nor is it the subject of any arbitration proceeding, and that no action or arbitration proceeding is contemplated. To the best of our knowledge, no other parties need be joined. Other parties may need to be joined or additional causes of action alleged depending upon further investigation and discovery relating to the contacts and communications between defendants and Emerson Redevelopers Urban Renewal, LLC, JMF Property Group, LLC, Giuseppe Forgione and Steven Kalafer.

**McKIRDY AND RISKIN, P.A.**  
Attorneys for Plaintiff,  
214 Kinderkamack, LLC

BY:

  
\_\_\_\_\_  
RICHARD P. DE ANGELIS, JR.

Dated: March 6, 2017

214 KINDERKAMACK, LLC v. BOROUGH OF EMERSON, and BOUROUGH OF EMERSON MUNICIPAL LAND USE BOARD

**INDEX OF EXHIBITS**

<b><u>Exhibit</u></b>	<b><u>Description</u></b>
A.	Governing Body Resolution No. 58-17 (2017 Blight Designation)
B.	Land Use Board Resolution January 5, 2017 (Recommending Blight Designation)
C.	Bogart 2016 Study Report
D.	2006 Redevelopment Plan
E.	Ordinance No. 1305-06 (Adopting 2006 Redevelopment Plan)
F.	Governing Body Resolution No. 1990-04 (2004 Blight Designation)
G.	Governing Body Resolution No. 221-16 (Authorizing 2016 Blight Study)
H.	Burgis 2004 Study Report (excerpts)
I.	Planning Board Resolution September 7, 2004 (Recommending Blight Designation)
J.	Cover Sheet of Request for Proposals for Redevelopment of Block 419 Area
K.	Governing Body Resolution No. 173-16 (Approving Redevelopment Agreement)
L.	Redevelopment Agreement
M.	Ordinance 1529-16 (Approving Tax Exemption/PILOT)
N.	Council Meeting Minutes, August 16, 2016
O.	Notice of December 8, 2016 Blight Study Hearing
P.	Transcript of Blight Study Hearing, December 8, 2016
Q.	Developer's Funding Agreement
R.	Borough Ledger Entries/Supporting Documents (Cancelled Check, Bills & Vouchers)
S.	Emails Among Borough Officials and Developer Regarding Developer's Escrow
T.	Emails Related to November 21, 2016 Meeting
U.	Transcript of Excerpts of Meeting of Governing Body, January 17, 2017
V.	State of Basis for Blight Study Investigation.
W.	December 29, 2016 Correspondence to Land Use Board from McKirdy & Riskin
X.	Transcript of Excerpts of January 5, 2017 Meeting of Land Use Board
Y.	December 29, 2016 Correspondence to Governing Body from McKirdy & Riskin