

**BOROUGH OF EMERSON  
COUNTY OF BERGEN, NEW JERSEY  
RESOLUTION** **No: 264-18**

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**RE: RESOLUTION AUTHORIZING THE EXECUTION OF A MEMORANDUM OF AGREEMENT BETWEEN THE BOROUGH OF EMERSON, 214 KINDERKAMACK PROPERTIES, LLC AND EMERSON REDEVELOPERS URBAN RENEWAL, LLC**

**WHEREAS**, 214 Kinderkamack Properties, LLC, a limited liability company organized under the laws of the State of New Jersey, (“214 Kinderkamack”) is the owner of certain property known on the Official Tax Map of the Borough of Emerson, County of Bergen, State of New Jersey as Block 419, Lots 2, 3 & 4 (the “Property”); and

**WHEREAS**, the Borough of Emerson (“Borough”), invoking the Local Redevelopment and Housing Law (“LRHL”), N.J.S.A. 40A:12A-1 et seq., adopted Resolution No 199-04 on September 7, 2004 to designate the Property along with several other properties in the Borough’s Central Business District as an area in need of redevelopment; and

**WHEREAS**, the Borough on January 8, 2016, issued a Request for Proposals seeking a developer for the “Central Business District Redevelopment Project” (the “Block 419 Project”); and

**WHEREAS**, on April 5, 2016, the Borough adopted Resolution No. 129-16 approving JMF Properties as the developer for the Block 419 Project and authorizing the Borough to enter into a redevelopment agreement with JMF Properties; and

**WHEREAS**, on June 14, 2016, the Borough adopted Resolution No. 173-16 approving the execution of a Redevelopment Agreement with Emerson Redevelopers Urban Renewal, LLC (“ERUR”), an affiliate of JMF Properties; and

**WHEREAS**, after an updated study was conducted by the Borough’s Planner, the Borough adopted Resolution No 58-17 to re-designate the Property along with other properties in the Central Business District as a Condemnation Redevelopment Area; and

**WHEREAS**, 214 Kinderkamack filed an action in lieu of prerogative writs against the Borough and the Borough's Land Use Board on March 6, 2017, in the Superior Court of New Jersey, Law Division, Bergen County, Docket No. BER-L-1660-17, challenging the designation of the Property as Condemnation Redevelopment Area ("Designation Challenge"); and

**WHEREAS**, the Block 419 Project is included in the Court approved settlement in the Borough's Declaratory Judgment Action in the Superior Court of New Jersey, Law Division, Bergen County, In Re Application of the Borough of Emerson, Docket No. BER-I-6301-15 ("DJ Action"); and

**WHEREAS**, subsequent to the filing of the Designation Challenge and the court's approval of the settlement agreement in the DJ Action, 214 Kinderkamack, ERUR and the Borough (referred to herein collectively as the "Parties" and individually as "Party") have engaged in negotiations for the sale of the Property from 214 Kinderkamack to ERUR to avoid the pending litigation in the Designation Challenge and any future eminent domain actions; and

**WHEREAS**, the Parties have agreed to terms and conditions to resolve the Designation Challenge and arrange for the sale of the Property by 214 Kinderkamack to ERUR without the use of eminent domain and in accordance with the terms of the Memorandum of Agreement attached hereto as Exhibit A; and

**WHEREAS**, the Mayor and Borough Council wish to authorize the execution of the attached Memorandum of Agreement.

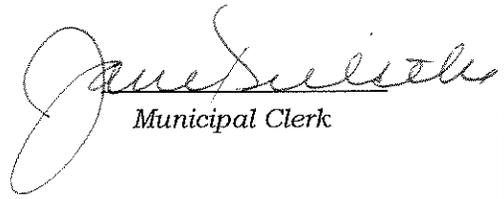
**NOW, THEREFORE, BE IT RESOLVED**, by the Governing Body of the Borough of Emerson, County of Bergen, State of New Jersey, as follows:

1. That the Mayor is hereby authorized to execute and the Borough Clerk is hereby authorized to attest to the Memorandum of Agreement in form and sustenance acceptable to the Borough Attorney, attached hereto as Exhibit A.
2. The Mayor, officers, professionals and employees of the Borough are hereby authorized and directed to take any and all steps necessary to effectuate the purposes of this Resolution.
3. This Resolution shall take effect as herein provided.

COUNCIL	M O V E D	S E C O N D E D	A Y E S	N A Y E S	A B S E N T	A B S T A I N
DiPaola						X
Bayley			X			
Wolf					X	
Knoller			X			
Falotico	X		X			
Downing		X	X			

*I hereby certify that the above Resolution was duly adopted by the Borough of Emerson at a meeting held on October 16, 2018.*

Attest:



Municipal Clerk



## MEMORANDUM OF AGREEMENT

This Memorandum of Agreement, dated October \_\_\_\_\_, 2018 ("MOA"), by and among:

**214 Kinderkamack, LLC**, a limited liability company organized under the laws of the State of New Jersey, with offices at c/o ECI, 58 Ware Road, Upper Saddle River, New Jersey 07458, and its successors and assigns ("214 Kinderkamack"); and

**Borough of Emerson**, a municipal corporation of the State of New Jersey, with administrative offices at Municipal Building, 146 Linwood Avenue, Emerson, New Jersey 07630 ("Borough"); and

**Emerson Redevelopers Urban Renewal, LLC**, a limited liability company organized under the laws on the State of New Jersey, with offices at 80 South Jefferson Road, Suite 202, Whippany, New Jersey 07981 and its affiliates, successors and assigns ("ERUR").

**WHEREAS**, 214 Kinderkamack is the owner of certain property located at the corner of Kinderkamack Road and Lincoln Boulevard, and shown as Block 419, Lots 2, 3, & 4 on the Official Tax Map of the Borough of Emerson, County of Bergen, State of New Jersey ("Property"); and

**WHEREAS**, the Borough, invoking the Local Redevelopment and Housing Law ("LRHL"), *N.J.S.A. 40A:12A-1 et seq.*, adopted Resolution No. 199-04 on September 7, 2004 to designate the Property along with several other properties in the Borough's central business district, as an area in need of redevelopment; and

**WHEREAS**, the Borough, invoking the LRHL, adopted Ordinance No. 1305-06 on July 11, 2006 to implement recommendations set forth in the Borough of Emerson Redevelopment Plan dated March 2006 ("Redevelopment Plan"); and

**WHEREAS**, the LRHL was amended by P.L. 2013, c. 159, effective September 6, 2013, to, *inter alia*, permit a municipality to designate a "Non-Condensation Redevelopment Area" in which the power of eminent domain is expressly prohibited, or to designate a "Condensation Redevelopment Area" in which, the municipality may acquire property by condemnation, subject to certain requirements set forth in the statute; and

**WHEREAS**, the Borough on January 8, 2016, issued a Request for Proposals seeking a developer for the "Central Business District Redevelopment Project – Block 419, Lots 1, 2, 3, 6.01, 6.02, 7, 8, 9 & 10" ("Block 419 Project"); and

**WHEREAS**, on April 5, 2016, the Borough adopted Resolution No. 129-16 approving JMF Properties ("JMF") as the developer for the Block 419 Project and authorizing the Borough to enter into a redevelopment agreement with JMF; and

**WHEREAS**, on June 14, 2016, the Borough adopted Resolution No. 173-16 approving the execution of an Redevelopment Agreement with ERUR, an affiliate of JMF, and on that same date

entered a Redevelopment Agreement with ERUR for the Block 419 Project (“Redevelopment Agreement”); and

**WHEREAS**, the Borough, invoking the LRHL and over the objection of 214 Kinderkamack, adopted Resolution No. 58-17 on January 17, 2017 to designate the Property along with several other properties, as a Condemnation Redevelopment Area; and

**WHEREAS**, 214 Kinderkamack on March 6, 2017, filed an action in lieu of prerogative writs against the Borough and the Borough’s Land Use Board in the Superior Court of New Jersey, Law Division, Bergen County, Docket No. BER-L-1660-17, challenging *inter alia*, the 2004 designation of the Property as an area in need of redevelopment and the 2017 designation of the Property as a Condemnation Redevelopment Area (“PW litigation”); and

**WHEREAS**, the Block 419 Project, a proposed mixed use development with ground floor retail space and 147 apartment units, 22 of which will be set aside as Low and Moderate Income (“LMI”) units; and

**WHEREAS**, in accordance with the *Mount Laurel* Doctrine, set forth in the line of cases handed down by the New Jersey Supreme Court imposing an obligation on municipalities to provide a realistic opportunity for a fair share of the region’s LMI housing and the Fair Housing Act, *N.J.S.A. 52:27D-301 et seq.* (“FHA”) the Borough initiated a compliance proceeding now pending before the Superior Court of New Jersey, Law Division, Bergen County by way of a declaratory judgment action captioned *In re Application of the Borough of Emerson*, Docket No. BER-L-6300-15 (“DJ litigation”); and

**WHEREAS**, the Block 419 Project is included in the court approved settlement in the DJ litigation between the Borough and the advocate for LMI housing, Fair Share Housing Center; and

**WHEREAS**, ERUR requires ownership and control of the Property to implement the Block 419 Project; and

**WHEREAS**, the Borough claims to have authority under the LRHL to acquire the Property by condemnation; and

**WHEREAS**, 214 Kinderkamack, by way of the PW litigation, is challenging the 2004 and 2017 designations of the Property under the LRHL and as such, contests the Borough’s authority to take the property by condemnation under the LRHL; and

**WHEREAS**, the Borough desires to have ERUR develop the Block 419 Project to meet its commitments for the development of LMI units under its court approved settlement agreement in the DJ litigation; and

**WHEREAS**, the Borough claims to have authority under the FIIA to acquire the Property by condemnation for the Block 419 Project; and

**WHEREAS**, 214 Kinderkamack objects to the Borough’s claimed authority to take the property by condemnation for the Block 419 Project under the FHA; and

**WHEREAS**, subsequent to the filing of the PW litigation and the court's approval of the settlement agreement in the DJ litigation, 214 Kinderkamack, ERUR, and the Borough (referred to herein collectively as the "Parties" and individually as "Party") have engaged in negotiations for the sale of the Property from 214 Kinderkamack to ERUR to avoid the pending litigation and any future condemnation action under either the LRHL or FHA; and

**WHEREAS**, the Parties have agreed to terms and conditions to resolve the PW litigation and arrange for the sale of the Property by 214 Kinderkamack to ERUR; and

**WHEREAS**, contemporaneous with the execution of this MOA, 214 Kinderkamack and ERUR have entered into a Real Estate Purchase and Sale Agreement by and between 214 Kinderkamack and ERUR dated October \_\_\_\_\_, 2018 ("PSA") for the sale of the Property from 214 Kinderkamack to ERUR and ERUR having paid to 214 Kinderkamack a non-refundable deposit of five percent (5%) of the purchase price for Property set forth in the PSA ("Purchase Price"); and

**WHEREAS**, as a condition of the execution of the PSA and payment of the nonrefundable deposit, 214 Kinderkamack has agreed to the voluntary dismissal of the pending PW litigation without prejudice; and

**WHEREAS**, as a condition of the execution of the PSA and payment of the nonrefundable deposit, 214 Kinderkamack has agreed to sign any consent necessary for applications required for the Block 419 Project; and

**WHEREAS**, as a condition of the execution of the PSA and payment of the nonrefundable deposit, 214 Kinderkamack has agreed not to object to the Block 419 Project in any forum; and

**WHEREAS**, as a condition of the execution of the PSA and payment of the nonrefundable deposit, 214 Kinderkamack has agreed it will not take a position adverse to the Borough in the pending DJ litigation; and

**WHEREAS**, consonant with the foregoing agreements, in the event PSA is terminated for any reason as provided therein, the Borough shall terminate ERUR's status as the designated redeveloper for the subject property and the Borough shall not take any action to renew the designation of ERUR, nor shall the Borough approve a new redeveloper who is affiliated with ERUR or any principal thereof, including principals of JMF, their family members or their respective Affiliates (as that term, Affiliates, is defined in the PSA); and

**WHEREAS**, consonant with the foregoing agreements, in the event PSA is terminated for any reason as provided therein, the Borough shall not file any action to take the Property by condemnation under either the LRHL or the FHA or any other alleged public use; and

**WHEREAS**, consonant with the foregoing agreements, in the event PSA is terminated for any reason as provided therein, the Borough shall rescind the 2004 designation of the Property as an area in need of redevelopment and 2017 designation of the Property as Condemnation

Redevelopment Area, and may approve the designation of the Property as a Non-Condernation Redevelopment Area; and

**WHEREAS**, consonant with the foregoing agreements, upon the transfer of title from 214 Kinderkamack to ERUR as set forth in the PSA ("Closing"), 214 Kinderkamack shall dismiss the PW litigation with prejudice; and

**WHEREAS**, the Parties desire to set forth their mutual agreement and understanding of their goals, objectives and obligations in connection with the resolution of the PW litigation, the avoidance of future litigation as to the Borough's claimed right to condemn under the FHA, and the sale of the subject property by 214 Kinderkamack to ERUR;

**NOW THEREFORE**, the Parties hereby enter this MOA to evidence the following general agreements:

**OBLIGATIONS OF THE PARTIES.**

1. Immediately upon the contemporaneous execution of this MOA by the Parties and the PSA by both 214 Kinderkamack and ERUR and payment by ERUR of the non-refundable deposit to 214 Kinderkamack in the amount of five percent (5%) of the Purchase Price:
  - a. 214 Kinderkamack and the Borough shall execute a Stipulation of Dismissal Without Prejudice in the form annexed hereto as **Exhibit A** and file same with the Superior Court of New Jersey, Law Division, Bergen County, for the voluntary dismissal of the PW litigation without prejudice.
  - b. 214 Kinderkamack agrees that while the PSA is in effect or, upon Closing, it shall not refile the PW litigation or initiate any other legal challenge to:
    - i. Any action taken by the Borough in furtherance of the Block 419 Project;
    - ii. The Redevelopment Plan;
    - iii. Any other agreement between the Borough and ERUR; or
    - iv. Any approval obtained by ERUR for the Block 419 Project.
  - c. 214 Kinderkamack agrees to sign any consent necessary for applications for land use approvals required for the Block 419 Project; and.
2. Upon the contemporaneous execution of this MOA by the Parties and the PSA by both 214 Kinderkamack and ERUR, the Borough agrees that while the PSA is in effect it shall not seek to acquire the Property, or any portion thereof, by condemnation for any reason, including but not limited to under the LRHL, FHA or any other alleged public use.
3. The Parties acknowledge, understand and agree that the PSA provides:
  - a. A due diligence period of thirty (30) days.
  - b. Closing shall occur within sixty (60) days of the completion of due diligence ("Closing Deadline").

- c. The sale of the Property by 214 Kinderkamack to ERUR is "As Is, Where Is" and, if, during due diligence an area of concern ("AOC") is identified, ERUR may:
    - i. Proceed to closing, without making any request for a reduction in the Purchase Price or withholding any portion of the deposit; or
    - ii. Terminate the PSA on or before expiration of the due diligence period.
  - d. In the event ERUR seeks a reduction in purchase price for any reason, 214 Kinderkamack may terminate the PSA in accordance with the provisions set forth therein.
  - e. At the close of due diligence, should ERUR wish to proceed with the purchase it shall, before the expiration of the thirty (30) day due diligence period, notify 214 Kinderkamack in writing and pay 214 Kinderkamack a second non-refundable deposit of five percent (5%) of the Purchase Price.
    - i. In the event ERUR fails to make the second non-refundable deposit in the amount of five percent (5%) of the Purchase Price at the completion of due diligence, 214 Kinderkamack may terminate the PSA in accordance with the provisions set forth therein.
  - f. In the event ERUR fails to close within sixty (60) days of the Closing Deadline, 214 Kinderkamack may terminate the PSA.
4. In the event the PSA is terminated for any reason as set forth in Paragraph 3.c.ii; 3.d; 3.e.i; and/or 3.f above ("Termination Event"):
- a. The Borough shall, within sixty (60) days of such Termination Event, adopt a resolution to terminate ERUR's status as the designated redeveloper for the Property:
    - i. Notwithstanding any rights it may have under the Redevelopment Agreement, including, but not limited to, Section 5.01 (to request that the Borough acquire property by condemnation) and Section 8.03 (the right to specific performance) ERUR, its principals and Affiliates, shall not object to or contest the rescission, termination, or nonrenewal of ERUR's status as the designated redeveloper of the Property.
    - ii. The Borough shall not renew the designation of ERUR, nor shall the Borough approve a new redeveloper for the Property who is affiliated with ERUR, JMF or any principals thereof, including principals of JMF, their family members or their respective Affiliates (as defined in the PSA).
  - b. The Borough shall, within sixty (60) days of such Termination Event, adopt a resolution to rescind the 2004 designation of the Property as an area in need of

redevelopment and 2017 designation of the Property as Condemnation Redevelopment Area and may maintain the designation as a Non-Condemnation Redevelopment Area.

- c. The Borough shall not file for condemnation to acquire the Property, or any portion thereof, for any reason, including but not limited to under the LRHL, FHA or any other alleged public use.
5. To the extent this MOA modifies, amends or changes the rights and obligations of the Borough and ERUR under the Redevelopment Agreement, it is agreed that this MOA is a permitted modification under Section 14.07 of the Redevelopment Agreement.

#### **REPRESENTATIONS & WARRANTIES.**

1. Each Party to this MOA represents and warrants to the other Parties that:
  - a. It has full power, authority and legal right to execute and perform this MOA;
  - b. It has taken all necessary legal and corporate or limited liability company action to authorize the execution and performance of this MOA;
  - c. This MOA constitutes the legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms; and
  - d. It shall act in good faith to give effect to the intent of this MOA and to take such other action as may be necessary or convenient to consummate the purpose and subject matter of this MOA, consistent with its terms.

**TERMINATION.** This MOA shall terminate only upon Closing, at which time 214 Kinderkamack and the Borough shall execute a Stipulation of Dismissal With Prejudice in the form annexed hereto as **Exhibit B** and file same with the Superior Court of New Jersey, Law Division, Bergen County, for the voluntary dismissal of the PW litigation without prejudice.

**NOTICE.** Any notices required or permitted to be given under this MOA shall be sufficiently given if delivered in person, by facsimile providing a transmission receipt or delivered by a nationally recognized overnight delivery service, and addresses above. Notice shall be deemed received when delivered or signed for.

**ENTIRE AGREEMENT.** This MOA constitutes the entire agreement among the Parties relative to the subject matter at this time, and other than the PSA, there are no oral or written agreements between any of the Parties, nor any representations made by any of the Parties relative to the subject matter, which are not expressly set forth herein.

**CHOICE OF LAW.** This MOA has been negotiated and executed in New Jersey; it shall be construed and governed in accordance with the laws of the State of New Jersey, without application of choice of law or conflicts of laws principles.

**AMENDMENT.** This MOA may be modified or amended if such modification or amendment is in in writing and signed by each Party to this MOU.

**NO WAIVER.** Except as otherwise expressly provided herein, no waiver of any rights or obligations hereunder shall be deemed to have occurred unless in writing signed by the Party against whom such waiver is asserted, and no waiver shall be deemed a waiver of any other right or subsequent obligation herein.

**ORIGINALS AND COUNTERPARTS.** This MOA may be executed by facsimile or electronic signature, which shall be deemed an original for all purposes. This MOA may be executed in any number of identical counterparts, each of which for all purposes is deemed an original, and all of which constitute collectively one Memorandum of Agreement, but in making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

**THE PARTIES HERETO** have executed this Memorandum of Agreement as of the day and year first set forth above.

**214 Kinderkamack Properties, L.L.C.**

**Emerson Redevelopers Urban Renewal, LLC**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: Alexander Lapatka

Name: \_\_\_\_\_

Title: Managing Member

Title: \_\_\_\_\_

Dated: October \_\_\_\_, 2018

Dated: October \_\_\_\_, 2018

**Borough of Emerson**

By: \_\_\_\_\_

Name: Louis Lamatinia

Title: Mayor

Dated: October \_\_\_\_, 2018

EXHIBIT A

214 KINDERKAMACK, LLC a New Jersey  
Limited Liability Corporation,

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY  
DOCKET NO. BER-L-1660-17

CIVIL ACTION

STIPULATION OF DISMISSAL  
WITHOUT PREJUDICE

It is hereby stipulated and agreed that Plaintiff, 214 Kinderkamack, LLC dismisses all claims alleged in the Complaint in Lieu of Prerogative Writs in the above-captioned matter without prejudice as against Defendants, the Borough of Emerson and Borough of Emerson Municipal Land Use Board. All parties shall bear their own costs.

**MCKIRDY, RISKIN, OLSON  
& DELLAPELLE, P.C.**  
Attorneys for Plaintiff,  
214 Kinderkamack, LLC

**DECOTIIS, FITZPATRICK, COLE  
& GIBLIN, LLP**  
Attorneys for Defendant,  
Borough of Emerson

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

Dated: October \_\_\_\_, 2018

By: \_\_\_\_\_  
DOUGLAS F. DOYLE

Dated: October \_\_\_\_, 2018

**MORRISON MAHONEY, LLP**  
Attorneys for Defendant,  
Borough of Emerson Municipal  
Land Use Board

By: \_\_\_\_\_  
CHRISTOPHER E. MARTIN

Dated: October \_\_\_\_, 2018

**EXHIBIT B**

214 KINDERKAMACK, LLC a New Jersey  
Limited Liability Corporation,

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY  
DOCKET NO. BER-L-1660-17

CIVIL ACTION

**STIPULATION OF DISMISSAL  
WITH PREJUDICE**

It is hereby stipulated and agreed that Plaintiff, 214 Kinderkamack, LLC dismisses all claims alleged in the Complaint in Lieu of Prerogative Writs in the above-captioned matter with prejudice as against Defendants, the Borough of Emerson and Borough of Emerson Municipal Land Use Board. All parties shall bear their own costs.

**MCKIRDY, RISKIN, OLSON  
& DELLAPELLE, P.C.**  
Attorneys for Plaintiff,  
214 Kinderkamack, LLC

**DECOTIIS, FITZPATRICK, COLE  
& GIBLIN, LLP**  
Attorneys for Defendant,  
Borough of Emerson

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

Dated: October \_\_\_\_, 2018

By: \_\_\_\_\_  
DOUGLAS F. DOYLE

Dated: October \_\_\_\_, 2018

**MORRISON MAHONEY, LLP**  
Attorneys for Defendant,  
Borough of Emerson Municipal  
Land Use Board

By: \_\_\_\_\_  
CHRISTOPHER E. MARTIN

Dated: October \_\_\_\_, 2018

