GIBLIN & GANNAIO
Brian T. Giblin, Sr. - 024321987
Brian T. Giblin, Jr. - 113242014
2 Forest Ave - Suite 200
Oradell, New Jersey 07649
(201) 262 - 9500 / (201) 262 - 8107 (f)
Attorneys for Plaintiff
Borough of Emerson

The Borough of Emerson, Plaintiff, vs. Emerson Redevelopers Urban Renewal, LLC and JMF Properties, LLC. Defendants.	SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY - LAW DIVISION DOCKET NO.: CIVIL ACTION **COMPLAINT**

Plaintiff, the Borough of Emerson, a municipal corporation with a principle place of business located at, 146 Linwood Avenue, Emerson, New Jersey, by way of a Complaint against the Defendants, says:

PARTIES

1) Plaintiff, Borough of Emerson (hereinafter "Plaintiff" or "Emerson"), is a municipal corporation organized under the laws of the State of New Jersey and has an address of 146 Linwood Avenue, Emerson, New Jersey 07630.

2) Defendant, Emerson Redevelopers Urban Renewal, LLC. (hereinafter "Defendant" or "Redeveloper") is a New Jersey limited liability company with its principal place of business located in New Jersey.

3) Defendant, JMF Properties, LLC. (hereinafter "JMF" or "JMF Properties") is a New Jersey limited liability company with its principal place of business located in New Jersey.

BACKGROUND FACTS COMMON TO ALL COUNTS

4) In 2015, Emerson filed a declaratory judgment action in Superior Court for a judicial determination of its fair share obligation and a plan for meeting that obligation in an action entitled *In the Matter of Application of the Borough of Emerson, Bergen County, New Jersey, for a Declaratory Judgment*, Superior Court of New Jersey, Bergen County, Dock No.: Ber-L-6300-15 (the "Mt. Laurel Litigation").

5) The Mt. Laurel Litigation was ultimately settled, and a "Conditional Final Judgment of Compliance and Repose" was entered on January 25, 2019.

6) As part of the settlement of the Mt. Laurel Litigation, Emerson entered into a Redevelopment Agreement on or about June 14, 2016, with Defendant's predecessor.

7) The Redevelopment Agreement expressly stated terms and conditions for the Redeveloper to redevelop a section of downtown Emerson known as "Block 419" (the "Project"). It authorized redevelopment of Block 419 for a mixed use inclusionary development for the property located on Kinderkamack Road in Emerson, between Linwood Avenue and Lincoln Boulevard.

8) The Project, among other things, allows the Defendant, as Redeveloper, to build a mixed use inclusionary apartment building, with a 20% set aside for fair share housing units, including 29 units of low and moderate income housing.

AMENDMENTS TO THE REDEVELOPMENT AGREEMENT

9) There were several changes brought about by three separate amendments to the Redevelopment Agreement entered into between the Borough of Emerson and Defendant Emerson Redevelopers Urban Renewal, LLC, all of which amendments provide additional benefits to the Redeveloper.

10) The First Amendment to the Redevelopment Agreement is dated October 4, 2016.

11) The First Amendment adds a single lot, namely Lot 9 Block 419, also known as 176 Kinderkamack Road, to the redevelopment area set forth in the original Agreement. There are no other substantive changes contained in the First Amendment.

12) The Second Amendment to the Redevelopment Agreement is dated November 20, 2017.

13) The Second Amendment clarifies the definition of "Affordable Housing Requirements." In addition, pursuant to Paragraph 6 of the Second Amendment, it allows the Redeveloper to request, "the Borough assist it in purchasing such or acquiring such properties as permitted under (eminent domain authority)."

14) In addition, the Second Amendment states that, in the event the Borough is asked to acquire property on behalf of the Redeveloper, the "Redeveloper shall pay and reimburse the Borough for any and all costs it may incur in assisting the Redeveloper in purchasing or acquiring such properties..."

15) In fact, Defendant requested the Borough to, and the Borough has, commenced condemnation proceedings against two tenants who failed and refused to vacate the subject property.

THIRD AMENDMENT TO THE REDEVELOPMENT AGREEMENT

16) Initially, it must be noted that the Third Amendment was signed by Defendant on the last day of 2018 (December 31, 2018), after having been hurriedly approved on December 18, 2018, before the former administration left office and turned the government of Emerson over to a newly elected administration.

17) ¶3 of the Third Amendment modifies §4.04 of the prior agreement regarding the Redeveloper's required contribution to construct an Emergency Municipal Services Building for the Borough. The operative language of the paragraph states, for the first time, that "the Borough shall, within one (1) year from the adoption of this Third Amendment, identify the property upon which the Emergency Municipal Services Building is to be constructed and the Borough shall, at its sole cost and expense, provide all necessary site plans, engineering materials and architectural plans, secure all necessary local, county and state approvals and permits, including building permits, from all agencies having jurisdiction over the project."

18) After reciting the obligations of the Borough, as set forth above, the paragraph then proceeds to impose, for the first time, a deadline for the Borough to comply with its obligations. The paragraph states "in the event the Borough fails to deliver said plans, approvals and permits within said one (1) year period, the Redeveloper shall be relieved

from all obligations to construct the Emergency Municipal Services Building."

19) ¶4 of the Third Amendment to the Redevelopment Agreement also modifies Exhibit "F" of the original Redevelopment Agreement and actually reduces the Redeveloper's obligation to pay a share of the costs of improvements to the northwest corner from $717,000 to $398,000, resulting in savings to the Redeveloper of $319,000 based solely on a revised estimate prepared by Redeveloper.

20) ¶5 of the Third Amendment to the Redevelopment Agreement also tolls the Redeveloper's obligation to comply with a project schedule that had previously been entered into based upon the Redeveloper's failure to acquire property that it did not own but is needed for the redevelopment.

21) ¶6 of the Third Amendment discusses the change in ownership of the Redeveloper, whereby the ownership of Redeveloper was changed by consent of Emerson per paragraph 6.01 of the Redevelopment Agreement. The change in ownership of the Redeveloper is depicted as :

Name	Address	Percentage Ownership Interest
Yaakov Klugmann	Accurate Builders & Developers 742 Ocean Avenue Lakewood, NJ 08701	51%
Giuseppi Forgione	JMF Properties 80 S. Jefferson Road, Suite 202 Whippany, NJ 07981	49%

This is a change in the ownership of the Redeveloper from that which existed at the time Redeveloper was selected by Emerson. The original redeveloper of the property that signed the Agreement was:

Giuseppi Forgione	JMF Properties 80 S. Jefferson Road, Suite 202 Whippany, NJ 07981	50%
Steven Kalafer		50%

22) Changes in ownership of the Redeveloper are restricted and in some respects prohibited under Article 6 of the Redevelopment Agreement entitled "Prohibitions." Any transfer in violation of Article 6 is an Event of Default under Article 8. Paragraph 6 of the Redevelopment Agreement.

23) Paragraph 6.06 of the Redevelopment Agreement entitled Conditions of Transfer provides that Emerson is entitled to require specific information as to the transferee's suitability to perform as Redeveloper, among which is subsection 6.06(ii) which states:

> (ii) any proposed transferee, by instrument in writing reasonably acceptable to the Borough, will, for itself and its Transferees, and expressly for the benefit of the Borough, have expressly assumed all of the relevant obligations of the Redeveloper under this Agreement with respect to the Project and agrees to be subject to all the Covenants and Restrictions to which the Redeveloper is subject.

Upon information and belief, Defendants' are in breach of this condition as no such writing was provided by transferee Yaakov Klugmann, a Developer Agreement was never signed, and environmental investigation materials requested by the Borough were never provided.

24) ¶7 of the Third Amendment acknowledges the ownership interest of the Redeveloper as set forth in Exhibit "B" to the original Redevelopment Agreement.

25) ¶8 of the Third Amendment is not substantive and merely sets forth a "notice address" for the parties.

26) ¶9 of the Third Amendment provides, for the first time, that the Redeveloper shall submit versions of the site plan and architectural plans to a sub-committee of the governing body, which sub-committee has only a limited time to review the plans. In addition, the paragraph states that sub-committee's sole purpose is to confirm that the plans are consistent with the redevelopment.

27) Overall, the Third Amendment to the Redevelopment Agreement substantially changes the ownership of the Redeveloper, the obligation of the Redeveloper with respect to building the Emergency Municipal Services Building as further outlined in this Complaint, provides savings to the Redeveloper for improvements required to the

northwest corner of the project, and an extension of time, with no apparent benefit given to the Borough.

28) The most shocking change effected by the Third Amendment concerned section 4.04 of the Redevelopment Agreement entitled "Redeveloper Contribution for Emergency Municipal Services Building," which not only changed the manner in which Redeveloper would construct the building, but also imposed a penalty of forfeiture on Emerson based on an arbitrary timetable imposed by the Redeveloper.

29) Pursuant to the original "Redevelopment Agreement" by and between the Borough of Emerson and Emerson Redevelopers Urban Renewal, LLC, Dated June 14, 2016, Section 4.04 "Emergency Municipal Services Building," stated:

> The Borough has dedicated and shall transfer Block 419 Lot 7 to Redeveloper for the Project ("Dedicated Lot") which is currently utilized by the Borough Ambulance Corp and has a fair market value of $500,000. In consideration therefore the Redeveloper shall construct at its sole cost and expense an Emergency Municipal Services Building as defined hereinabove. The Borough shall provide the Redeveloper the property as well as all of the site plans, architectural and engineering plans at the Borough's sole cost and expense and upon the completion of the building the Borough shall pay and reimburse Redeveloper all of the costs associated with the construction of the Emergency Municipal Services Building, less the direct and allocatable costs associated with Ambulance portion of the building as the parties may agree, which in no case shall exceed the fair market value of the Dedicated Lot. In the event the parties cannot agree on such reimbursable costs to the Redeveloper, the party's attorney shall select a retired Judge from Bergen County to mediate and definitively determine such costs to be reimbursed to the Redeveloper and such costs for such mediator shall be shared by the parties equally.
>
> The original obligation of Redeveloper is to construct the Emergency Municipal Services Building at its sole cost and expense up to an amount of $500,000.00 in consideration for Emerson transferring the Dedicated Lot, being the then current site of the Ambulance building, Block 419 Lot 7. The allocation of funds is to be for the Ambulance portion of the new facility. Emerson is to identify the site and provide all plans and approvals to the Redeveloper. The $500,000.00 is the agreed upon value for receipt of the Dedicated Lot.

The Language of this Section was then amended approximately two years later, on December 31, 2018, pursuant to the Third Amendment to the Redevelopment

Agreement, under Section 4.04, "Redeveloper Contribution for Emergency Municipal Services Building" which states:

> The Borough has dedicated and shall transfer Block 419, Lot 7, to Redeveloper for the Project ("Dedicated Lot") which is currently utilized by the Borough Ambulance Corp. and has a fair market value of $500,000. In consideration therefore, the Redeveloper shall serve as the general contractor pursuant to a separate general contractor's agreement to be negotiated by the parties, and shall construct an Emergency Municipal Services Building as defined hereinabove. The Borough shall, within one (1) year from the adoption of this Third Amendment, identify the property upon which the Emergency Municipal Services Building is to be constructed and the Borough shall, at its sole cost and expense, provide all necessary site plans, engineering materials and architectural plans and secure all necessary local, county and state approvals and permits, including building permits, from all agencies having jurisdiction over the project. In the event that the Borough fails to deliver said plans, approvals and permits within said 1-year period, the Redeveloper shall be relieved from all obligations to construct the Emergency Municipal Services Building.

30) The Third Amendment changed Section 4.04 in that it now requires that:

> 1. Redeveloper will now only serve as the general contractor to construct the building pursuant to a separate agreement to be negotiated between the parties. As of this date no such agreement has been provided by Redeveloper.
>
> 2. Emerson is required to identify the site for the new building and provide all plans and approvals to Redeveloper within one (1) year of the date of the Third Amendment.
>
> 3. Should Emerson fail to comply with the one year time period, Redeveloper is released from any obligation to construct the Emergency Municipal Services Building and apparently has no other obligation to compensate Emerson for the market value ($500,000.00) of the dedicated lot.

31) Despite the parties agreeing to the value of $500,000.00 for Block 419 Lot 7 which was transferred by the Borough to the Redeveloper, no appraisal of the property was ever performed.

32) Under Section 4.04, as amended by the Third Amendment, the fact that Emerson allegedly has not complied with the requirements led the Redeveloper to claim that it is permitted to retain the Dedicated Lot without paying for it and Emerson would suffer forfeiture.

33) At no time under any plan submitted and approved was the Emergency Municipal Services Building to be constructed on the Redevelopment Project site on which the Ambulance Corps building was located.

34) The failure of Emerson to meet the requirements of the arbitrary condition of the one (1) year window does not impact the completion of the Redevelopment project.

35) By Deed dated March 15, 2019, and recorded on May 22, 2019, Mayor Danielle DiPaola transferred the Dedicated Lot to Redeveloper, as required under Section 4.04, and Redeveloper now owns said lot. In fact, Emerson also provided additional land to the Redeveloper at no cost which included the lands resulting from the vacation of Kenneth Avenue and land on block 419 used for surface parking used by Borough residents for commuter parking.

36) The Redevelopment Agreement also provides for extensions of time under various other sections of the Agreement, as well as for cooperation of the parties with respect to completing the project.

37) Article 13 of the Redevelopment Agreement provides under Cooperation and Compliance as follows:

> 13.01. Implementation of Agreement and Redevelopment Plan. The parties hereto agree to cooperate with each other and to provide all necessary and reasonable documentation, certificates and consents in order to satisfy the terms and conditions hereof and the terms and conditions of the Plan. The Borough further agrees to cooperate as may reasonably be requested by any mortgagee of the Redeveloper in connection with obtaining financing for the Project; provided, however, that all Borough costs associated with such action shall be borne by Redeveloper.

38) In addition, the definition of "Tolling Event" under Article 1 "Definitions" provides for extensions of time for performance that can arise by "(iii) any reasonable request by one party to the other to extend the time for performance of any obligation, requirement, commitment, or responsibility arising pursuant to this Agreement."

39) Emerson has repeatedly attempted to obtain an extension of time to comply with the requirements of section 4.04 as amended by the Third Amendment however Redeveloper has consistently refused.

40) The actions of the Redeveloper in refusing to grant the Borough an extension of time to comply with the terms of the Third Amendment. are motivated by the Redevelopers need to reduce the costs of the project and avoid its obligations under the Redevelopment Agreement.

41) The actions of Redeveloper in refusing to consent to an extension are in bad faith and violate the express provisions of the Redevelopment Agreement.

42) Redeveloper will experience no detriment in granting an extension of time to Emerson.

43) Redeveloper has been unjustly enriched by retaining the Dedicated Lot and other property and refusing to pay any consideration for same.

44) The funds needed to construct the Emergency Municipal Services Building derived from transfer of the Designated Lot to Redeveloper are public funds needed to fulfill a necessary municipal service, and if they are forfeited to Redeveloper it shall constitute an inequitable hardship and expense on Emerson, which should not be permitted.

45) Emerson is entitled to payment of its reasonable costs and attorney fees from Redeveloper upon prevailing in its enforcement of its rights under the Redevelopment Agreement pursuant to section 3.04 of the Redevelopment Agreement.

COUNT I

EXCUSE OF CONDITION

46) Plaintiff repeats and realleges each and every previous paragraph contained in this complaint as though set forth at length herein.

47) The condition imposed by the Third Amendment requiring Emerson to provide the location, all plans and all approvals to the Redeveloper within one (1) year for the Emergency Municipal Services Building causes an extreme forfeiture and penalty to the Borough.

48) The existence or occurrence of the said condition, added as an amendment to section 4.04 after the terms for performance of the respective obligations of the parties were previously established two years prior, forms no essential part of the exchange for the performance by Redeveloper of its obligation to construct the Emergency Municipal Services Building and is arbitrary, capricious and unreasonable.

49) The actions of the Redeveloper in refusing to grant an extension of time for performance are in bad faith.

WHEREFORE, the plaintiffs demand judgment against the Defendant as follows:

a) For excuse of the said condition, or in the alternative, for a reasonable extension of time to comply therewith;
b) Attorneys fees and costs of suit as permitted under Section 3.04 of the redevelopment agreement; and,
c) Such other and further relief as the court deems just and equitable

COUNT II

EQUITABLE EXCUSE OF CONDITION

50) Plaintiff repeats and realleges each and every previous paragraph contained in this complaint as though set forth at length herein.

51) The effect of the express condition in section 4.04 of the Redevelopment Agreement added by the Third Amendment requiring that Plaintiff comply with requirements established under an arbitrary timetable or face forfeiture of its right to compensation from Redeveloper results in a forfeiture by Emerson of property with an agreed value of $500,000.00.

52) The forfeiture by Emerson yields a windfall to Redeveloper who avoids the obligation to pay compensation of the equivalent of $500,000.00 to Emerson and retains title to the Designated Lot transferred by Emerson, which has a value of $500,000.00, thereby resulting in Redeveloper retaining value of $1,000,000.00, which is a considerable amount above what Redeveloper is entitled to under the Redevelopment Agreement.

53) Redeveloper has been unjustly enriched.

54) The money forfeited by the Plaintiff constitute public funds for which a necessary public purpose, namely, the construction of an ambulance corps building within an Emergency Municipal Services Complex. Plaintiff's loss of such funds would constitute a need to resort to excess taxation of the residents of Plaintiff, and postponement or cancellation of the Emergency Municipal Services Building Project, which constitutes an extraordinary circumstance and/or countervailing equity.

55) Redeveloper will not be prejudiced as it will only be required to provide to Plaintiff what was originally bargained for in the Redevelopment Agreement.

56) The forfeiture by Emerson constitutes a penalty, is inequitable, and should not be permitted.

WHEREFORE, the Plaintiffs demand judgment against the Defendant for the following relief:

(a) For the excuse of the express condition added to section 4.04 pursuant to the Third Amendment;
(b) For an Order requiring Redeveloper to perform its obligations under Section 4.04 in the absence of the said condition;
(c) For a finding that Redeveloper has been unjustly enriched;
(d) Attorneys fees and costs of suit as permitted under section 3.04 of the Redevelopment Agreement;
(e) All such other and further relief as the Court deems just and equitable.

COUNT III

BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

54) Plaintiff repeats and re-alleges each and every previous paragraph contained in the Complaint as though more fully set forth herein.

55) Every contract contains a covenant of good faith and fair dealing whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

56) Plaintiff is entitled to receipt of performance from the Redeveloper regarding construction of the Emergency Municipal Services Building under section 4.04 of the Redevelopment Agreement.

57) The insertion by Redeveloper of a forfeiture/penalty clause in the Third Amendment requiring a forfeiture by Plaintiff if it could not perform certain obligations in an arbitrary timeframe, a requirement added two (2) years after the original Redevelopment Agreement was signed and the obligations of the parties had been previously determined, was done in bad faith.

58) The refusal of Redeveloper to consent to extensions of time as anticipated by Emerson, where such extensions had previously been readily extended to Redeveloper, and were anticipated in sections of the Redevelopment Agreement such as "Tolling and Covenant to Cooperate," was done in bad faith as a result of the Defendant's actions, and Plaintiff has been damaged.

WHEREFORE, the Plaintiffs demand judgment against the defendant for the following relief:

(a) Striking of the condition in section 4.04 requiring performance by Plaintiff in one year or face forfeiture;
(b) Compensatory damages;
(c) Attorney's fees and costs of suit as permitted under section 3.04 of the Redevelopment Agreement; and,
(d) All other such relief the Court deems just and equitable.

COUNT IV

EQUITABLE BILL OF DISCOVERY

59) Plaintiff repeats and re-alleges each and every previous paragraph contained in the Complaint as though more fully set forth herein.

60) Defendant, JMF Properties, are in possession of knowledge and information relating to the claims relevant to this matter, including, but not limited to, documents, negotiations, plans, proposals, and conversations with the Borough and its officials regarding the proposed development.

61) Plaintiff is afforded the right in equity to obtain and enforce a bill for discovery from JMF Properties to compel disclosure of the knowledge and information set forth above. *See, Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 506-08 (Super. Ct. 1977); *Davila v. Cont'l Can Co.*, 205 N.J. Super. 205, 207-08 (App. Div. 1985).

WHEREFORE, the Plaintiffs demand judgment against Defendant JMF Properties compelling each to provide the Borough of Emerson with discovery of information all relevant hereto.

Respectfully Submitted,

GIBLIN & GANNAIO, ESQS.
Attorneys for Plaintiff

BY: _____
BRIAN T. GIBLIN, SR., ESQ.

DESIGNATION OF TRIAL COUNSEL

The Plaintiff, Borough of Emerson, hereby designates Brian T. Giblin, Sr., as trial counsel with regard to all claims to the above matter.

CERTIFICATION

Pursuant to R. 4:5-1, the Plaintiffs hereby certify that the within matter of controversy is subject to one other pending action captioned, "Emerson Redevelopers Urban Renewal, LLC. vs. The Borough of Emerson, New Jersey, and Danielle DiPaola" Docket No.: 2:20-cv-04728-MCA-MAH, which is before the United States District Court, District of New Jersey, and one prior action captioned, *In the Matter of Application of the Borough of Emerson, Bergen County, New Jersey, for a Declaratory Judgment*, Superior Court of New Jersey, Bergen County, Dock No.: Ber-L-6300-15 (the "Mt. Laurel Litigation").

Respectfully Submitted,

GIBLIN & GANNAIO, ESQS.
Attorney for Plaintiff

BY: _____
BRIAN T. GIBLIN, SR., ESQ.

Civil Case Information Statement

Case Details: BERGEN | Civil Part Docket# L-003359-20

Case Caption: THE BOROUGH OF EMERS ON VS EMERSON REDEVELOPERS
Case Initiation Date: 06/10/2020
Attorney Name: BRIAN THOMAS GIBLIN
Firm Name: GIBLIN & GANNAIO
Address: 2 FOREST AVE
ORADELL NJ 07649
Phone: 2012629500
Name of Party: PLAINTIFF : The Borough of Emerson
Name of Defendant's Primary Insurance Company (if known): Unknown

Case Type: CONTRACT/COMMERCIAL TRANSACTION
Document Type: Complaint
Jury Demand: NONE
Is this a professional malpractice case? NO
Related cases pending: YES
If yes, list docket numbers: Docket No.: 2:20-cv-04728-MCA-MAH, which is before the United States District Court
Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

Are sexual abuse claims alleged by: The Borough of Emerson? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? NO

If yes, is that relationship:

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

Please check off each applicable category: Putative Class Action? NO **Title 59?** NO **Consumer Fraud?** NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

06/10/2020
Dated

/s/ BRIAN THOMAS GIBLIN
Signed