

**LOCUST AVENUE PROJECT SETTLEMENT AGREEMENT**



**THIS SETTLEMENT AGREEMENT** (“Agreement”) made this 13<sup>th</sup> day of \_\_\_\_\_, 2016, by and between:

**TOWNSHIP OF BERKELEY HEIGHTS**, a municipal corporation of the State of New Jersey, County of Union, having an address at 29 Park Avenue, Berkeley Heights, New Jersey 07922 (hereinafter the “Township”);

And

**BERKELEY DEVELOPERS, LLC**, a New Jersey limited liability company, having an address at c/o Wilf Law Firm, LLP, 820 Morris Turnpike, Suite 201, Short Hills, New Jersey 07078 (hereinafter “Berkeley Developers”);

Collectively, the Township and Berkeley Developers shall be referred to as the “Parties.”

**WHEREAS**, on March 24, 2015, the Township Council (“Council”) of the Township adopted a resolution in which the Township reaffirmed its voluntary commitment to satisfy its affordable housing obligations, however they may ultimately be defined by the New Jersey Council on Affordable Housing (“COAH”) or a court; and

**WHEREAS**, in compliance with the New Jersey Supreme Court’s decision in In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015), on or about July 2, 2015, the Township filed an action with the Superior Court of New Jersey (“Court”), entitled In the Matter of the Application of the Township of Berkeley Heights, County of Union, Docket No. UNN-L-2405-15, seeking a Judgment of Compliance and Repose approving its Affordable Housing Plan (as defined herein), in addition to related reliefs (the “Compliance Action”); and

**WHEREAS**, on or about August 20, 2015, Berkeley Developers filed a Motion to Intervene in the Compliance Action (“Berkeley Developers Intervention”) and such intervention was granted by the Court on October 9, 2015; and

**WHEREAS**, Berkeley Developers is the owner of the real property known and designated as Block 1901, Lot 35 (“Property”) according to the Township’s tax and assessment maps, and is commonly known as 100 Locust Avenue; and

**WHEREAS**, the Township intends to prepare a Housing Element and Fair Share Plan (hereinafter “Affordable Housing Plan”), that will be adopted by the Planning Board of the Township (“Planning Board”), endorsed by the Township Council, and submitted to the Court for review and approval; and

**WHEREAS**, said Affordable Housing Plan will include the Property as an inclusionary development at a density of 196 rental residential units, including a 15% set aside for units to be affordable to low or moderate income households; and

**WHEREAS**, the Planning Board is not a party to this Agreement but the Parties understand and anticipate that the Planning Board will abide by the terms of this Agreement as set forth below for the purpose of facilitating a resolution of the Berkeley Developers Intervention; and

**WHEREAS**, the Township will seek the Court's approval of the Affordable Housing Plan in connection with the Compliance Action and, regardless of the Court's approval or disapproval of the Affordable Housing Plan and the ultimate disposition of the Compliance Action, the Parties intend to be bound by this Agreement provided this Agreement is approved by the Court; and

**WHEREAS**, after ongoing discussions, negotiations and mediations, the Township and Berkeley Developers entered into a Memorandum of Understanding on February 23, 2016 ("MOU"), attached hereto as Exhibit A, which memorialized the agreed upon terms of an inclusionary development on the Property; and

**WHEREAS**, Berkeley Developers is amenable to fully and finally resolving the Berkeley Developers Intervention premised upon securing the right to construct a 196-unit rental residential inclusionary development on the Property; and

**WHEREAS**, more specifically, pursuant to the terms successfully negotiated by the Township and Berkeley Developers in the MOU, and subject to the details delineated herein, Berkeley Developers intends to develop the Property as an inclusionary development consisting of 196 age-restricted rental residential units including 29 affordable housing units ("Inclusionary Development"); and

**WHEREAS**, to ensure that the Inclusionary Development generates affordable housing credits to be applied to the Township's Round 3 affordable housing obligation, the affordable units within the Inclusionary Development shall be developed in accordance with COAH prior round regulations, the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et seq. ("UHAC") and all other applicable law, and said Inclusionary Development shall be deed restricted for a period of 30 years; and

**WHEREAS**, to further effectuate this settlement, and provided that the Property meets the criteria for the Township to declare the Property as a "non-condemnation redevelopment area" pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. ("Redevelopment Law"), the Township shall designate the Property as a non-condemnation redevelopment area, adopt a redevelopment plan for the Property that permits the Inclusionary Development, and enter into a redevelopment agreement, including the PILOT Agreement (defined below), with Berkeley Developers as the designated redeveloper of the Property, all in accordance with the Redevelopment Law (collectively, the "Redevelopment Approvals") and as set forth in greater detail in Section 4.1 herein; and

**WHEREAS**, the Parties wish to enter into this Agreement, setting forth the terms, conditions, responsibilities and obligations of the Parties, and seek the Court's approval of this

Agreement at a Fairness Hearing; and

**NOW, THEREFORE**, in consideration of the promises, the mutual obligations contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the Parties, the Parties hereto, each binding itself, its successors and assigns, do hereby covenant and agree, each with the other, as follows:

### **ARTICLE I – PURPOSE**

**1.1** The purpose of this Agreement is to settle the Berkeley Developers Intervention and to create a realistic opportunity for the construction of the Inclusionary Development, and to generate affordable housing credits for the Township to apply to any Round 3 obligation assigned to it. The Parties have agreed to the design of the elevation for the proposed buildings, which is depicted in **Exhibit B.1** as attached hereto and made a part hereof. The Parties have agreed to the concept plan layout for the proposed buildings, which is depicted in **Exhibit B.2** as attached hereto and made a part hereof. The Inclusionary Development shall be subject to the Design Standards attached hereto and made a part hereof as **Exhibit C**, which has also been reviewed and approved by Berkeley Developers, the Township and the Township’s professionals. Notwithstanding the foregoing, nothing in this Agreement shall prevent the Parties from continuing to work together to revise the plans for an improved design and layout, subject to the terms of this Agreement. The Inclusionary Development shall be further subject to the following requirements:

**1.1.1 Density**. The residential development of the Property shall be developed with a density of 196 residential units, inclusive of an affordable housing component that is described in greater detail in Section 3.1 herein.

**1.1.2 Age Restrictions**. The residential development of the Property shall be one hundred (100%) percent age-restricted with a head of household with a minimum of age of 55 years old for residents, subject to compliance with federal law, except that no more than five (5) residential units may be occupied by employees of Berkeley Developers or the operating entity for the Inclusionary Development, who are employed as superintendents for the Inclusionary Development and who may have younger members of their households residing on-site. Berkeley Developers shall provide certified payroll records documenting any employer who it states are employed as superintendents on this property and have members of their household under the age of eighteen who reside in this development.

**1.1.3 Setbacks**. The residential development of the Property shall have a minimum front yard setback of one hundred (100) feet, a minimum side yard setback (each side) of thirty-five (35) feet, and a minimum rear yard setback of fifty (50) feet.

### **ARTICLE II - BASIC TERMS AND CONDITIONS**

**2.1** This Agreement is subject to Court approval following a duly noticed “Fairness Hearing,” which has been scheduled by the Court for October 17, 2016. The Township is responsible for the preparation and cost of the notice of the Fairness Hearing, which has already

been provided by the Township. The Parties will work together to ensure that the Court approves the Agreement at the currently scheduled Fairness Hearing or promptly thereafter, if rescheduled by the Court.

**2.2** In the event of any legal challenges to the Court's approval of this Agreement or the Redevelopment Approvals, the Parties must diligently defend any such challenge and shall cooperate with each other regarding said defense. In addition, if any such challenge results in a modification of this Agreement or the Inclusionary Development, the Parties must negotiate in good faith with the intent to draft a mutually-acceptable amended Agreement, provided that no such modification requires an increase or decrease in density than that agreed upon and reflected in the within Agreement.

**2.3** This Agreement does not purport to resolve all of the issues before the Court raised in the Compliance Action.

### **ARTICLE III – BERKELEY DEVELOPERS OBLIGATIONS**

**3.1 Affordable Housing Set-Aside.** Berkeley Developers shall have an obligation to deed-restrict fifteen percent (15%) of the residential units in the Inclusionary Development (equivalent to 29 units) as very low, low or moderate income affordable units. Any such affordable units shall be one-bedroom units and shall comply with UHAC, applicable COAH affordable housing regulations, any applicable order of the Court, and other applicable laws.

**3.1.1** In addition, the affordable units shall remain affordable rental units for a period of thirty (30) years ("Deed-Restriction Period") so that the Township may count the units against its obligations to provide age-restricted rental housing. This obligation includes, but is not limited to, the Developer's obligation to comply with bedroom distribution requirements, very low/low/moderate income split requirements, pricing requirements, affirmative marketing requirements, candidate qualification and screening requirements and deed restriction requirements.

**3.1.2** The distribution of the affordable housing units shall be in compliance with COAH's Round Two substantive regulations, N.J.A.C. 5:93, which the Parties believe will govern the issue, or as approved by the Special Master and the Court.

**3.1.3** Berkeley Developers shall contract with an experienced administrative agent ("Administrative Agent") for the administration of the affordable units and shall have the obligation to pay all costs associated with properly deed restricting the affordable units in accordance with UHAC and other applicable laws for the Deed-Restriction Period. Berkeley Developers and its Administrative Agent, shall work with the Township and the Township's Administrative Agent regarding any affordable housing monitoring requirements imposed by COAH or the Court.

**3.1.4** The Parties agree that the affordability controls shall expire at the end of 30 years after the date of the initial occupancy of the affordable unit. At the end of the Deed-Restriction Period, the Township shall cooperate with the developer to facilitate the developer's

ability to exercise its right to have the deed restriction last for only 30 years subject to the requirements of N.J.A.C. 5:80-26.11(b) of UHAC.

3.1.5 The Parties agree that the affordable units are to be included in the Affordable Housing Plan to be approved and credited by the Court in the Compliance Action, and that the credits will be applied against any Round 3 obligation assigned to the Township, and that the affordable units may be credited within the permitted twenty-five (25%) percent limitation for age-restricted affordable housing as set forth under COAH's Round Two substantive regulations.

3.1.6 Upon written notice, Berkeley Developers shall provide detailed information requested by the Township or the Township's Administrative Agent, within 30 days concerning Berkeley Developers' compliance with UHAC and other applicable laws.

**3.2 Obligation Not To Oppose Township's Application for Approval of its Affordable Housing Plan.** As it pertains to the Property, Berkeley Developers shall not directly or indirectly oppose or undertake any action to interfere with, nor participate in, the Court's adjudication of the Township's affordable housing obligations and compliance standards. Berkeley Developers shall also not directly or indirectly oppose or undertake any action to interfere with the Court's approval and/or implementation of the Affordable Housing Plan, as it may be amended in any form, unless the Affordable Housing Plan deprives Berkeley Developers of any rights created hereunder, or unless any other defendants or interested parties undertake any action to obstruct or impede Berkeley Developers from securing such approvals as it needs to develop the Inclusionary Development on the Property.

**3.3 Obligation to Withdraw As An Intervenor in the Township's Compliance Action.** Upon the Court's approval of this Agreement at the Fairness Hearing, Berkeley Developers shall no longer continue to participate in the Compliance Action, except for the limited circumstances described in Section 3.2 of this Agreement, and shall formally be dismissed from the Township's Compliance Action.

**3.4 Traffic Study & Related Improvements.**

a. Within forty-five (45) days of the Effective Date (as this term is defined herein) of this Agreement Berkeley Developers shall provide to the Township a traffic study for the proposed Inclusionary Development ("Traffic Study"). The Traffic Study shall address the traffic impact of the proposed Inclusionary Development on the Township's traffic circulation and roadways. If determined necessary by the Township's Traffic Engineer, in the Township's Traffic Engineer's reasonable discretion, Berkeley Developers shall pay for the design and construction of a traffic light ("Traffic Light") at the intersection of Locust Avenue and Snyder Avenue. Berkeley Developers shall have the right to review and provide comments on the plans and related schematics for the Traffic Light. The Redevelopment Plan shall not be adopted by the Planning Board until the Traffic Study has been completed, and if it is determined by the Township that a traffic light is required at the intersection of Locust Avenue and Snyder Avenue, that the preliminary design and estimated construction cost of the traffic light is outlined within the Redevelopment Plan.

b. Notwithstanding the foregoing in subsection 3.4.a, the Parties recognize that the installation of the Traffic Light is governed by the New Jersey Department of Transportation (“NJDOT”). If NJDOT does not approve the installation of the Traffic Light as a result of the initial Traffic Study, Berkeley Developers shall have an ongoing obligation to install the Traffic Light for the duration of the PILOT Agreement (defined in subsection 4.1). Berkeley Developers shall reapply to the NJDOT for the installation of the Traffic Light upon receipt of a written request from the Township Engineer and provided that conditions have changed so that there is reason to believe that the NJDOT will approve the Traffic Light; provided that the Township shall not make such a request more than once every five (5) years. The Township shall have the right to provide its own traffic study, at the Township’s sole discretion, to support any application to the NJDOT for the approval of the Traffic Light. Berkeley Developers shall be responsible for the costs of the installation of the Traffic Light.

#### **ARTICLE IV - OBLIGATIONS OF THE TOWNSHIP**

##### **4.1 Obligation To Effect Redevelopment Approvals.**

a. As of the Effective Date of this Agreement, the Township has already adopted a resolution (“Initial Resolution”) directing the Planning Board to undertake a preliminary investigation of the Property to determine if the Property meets the criteria for designation as a “non-condemnation redevelopment area” in accordance with N.J.S.A. 40A:12A-5 and -6. Within thirty (30) days of the Planning Board’s recommendation that the Property be designated as a non-condemnation redevelopment area, the Township shall adopt a resolution formally designating the Property as a non-condemnation redevelopment area (“Redevelopment Area Designation”). Within ninety (90) days of the date of the Redevelopment Area Designation, which occurred on or about August 23, 2016, the Township shall prepare a redevelopment plan in accordance with N.J.S.A. 40A:12A-7 permitting the Inclusionary Development as-of-right (“Redevelopment Plan”), introduce the Redevelopment Plan by ordinance on first reading, and adopt a resolution referring the Redevelopment Plan to the Planning Board for review and recommendation. Within the lesser of (a) thirty (30) days from the date of the Planning Board’s final review and recommendation of adoption of the Redevelopment Plan, or (b) forty-five (45) days from the date the of the Township’s introduction of the Ordinance adopting the Redevelopment Plan and referring same to the Planning Board, the Township shall adopt the Redevelopment Plan by ordinance on second reading (“Ordinance”).

b. Within thirty (30) days of the date of the adoption of the Ordinance, the Township shall negotiate a redevelopment agreement with Berkeley Developers (“Redevelopment Agreement”) and adopt resolutions approving the Redevelopment Agreement and designating Berkeley Developers as the exclusive redeveloper of the Property. The Redevelopment Agreement shall be reasonably satisfactory to both the Township and Berkeley Developers and upon final approval of the redevelopment plan and in connection with the entering of the redevelopment agreement, the residential development shall be subject to a Payment in Lieu of Taxes (PILOT) agreement (“PILOT Agreement”) between the Township and Berkeley Developers, the specific terms of which shall be further negotiated between the Parties. The Township and Berkeley Developers shall execute the Redevelopment Agreement promptly after

the Township's adoption of the resolution approving same. In connection with the above actions, the Township shall comply with all applicable procedural requirements set forth in the Redevelopment Law and the case law interpreting same, including, but not limited to, legal notice requirements. All of the time periods set forth in this Section 4.1 may be subject to extension of time, which shall be reasonably agreed upon by the Parties, if at no fault of either Party the required actions cannot be completed within the time periods established.

c. The parameters of the PILOT Agreement discussed in Section 4.b above shall be agreed to between the Parties within (45) days of the execution of this Agreement. Berkeley Developers has proposed terms for the PILOT Agreement as set forth and attached hereto as **Exhibit D**, which are being reviewed by the appropriate Township officials and professionals, and are subject to the Township's response and the Parties' final agreement of same.

**4.2 Obligation To Preserve The Redevelopment Approvals.** The Redevelopment Approvals shall not be amended or rescinded except upon the application of Berkeley Developers or by Order of the Court.

**4.3 Representation regarding Sufficiency of Water and Sewer:** The Township agrees to reasonably comply with Berkeley Developers' investigation and inquiry into the sufficiency of potable water and sewer capacity to service the proposed Inclusionary Development. Any water, sewer or any other utility infrastructure or improvements, studies, analysis required for the development of the proposed Inclusionary Development shall be at the cost and expense of Berkeley Developers, subject to the pro-rata allocation under the Municipal Land Use Law.

**4.4 Obligation To Cooperate:** The Township acknowledges that in order for Berkeley Developers to construct its Inclusionary Development, Berkeley Developers will be required to obtain any and all necessary and applicable agreements, approvals, and permits from all relevant public entities and utilities; such as, by way of example only, the Township, the Planning Board, the County of Union, the Union County Planning Board, the New Jersey Department of Environmental Protection, the New Jersey Department of Transportation, the Somerset-Union Soil Conservation District and the like, including the Township's ordinance requirements as to site plan and subdivision (the "Required Approvals") and the Redevelopment Plan. The Township agrees to use all reasonable efforts to assist Berkeley Developers in its undertakings to obtain the Required Approvals.

**4.5 Obligation to Refrain From Imposing Cost-Generative Requirements.** The Township recognizes that the Redevelopment Approvals, this Agreement all contemplate the development of an "inclusionary development" within the meaning of the Mount Laurel doctrine, and Berkeley Developers shall be entitled to any benefits, protections, and obligations afforded to developers of inclusionary developments, other than what Berkeley Developers agreed to in the Memorandum of Understanding and this Agreement.

## ARTICLE V – OBLIGATIONS OF THE PLANNING BOARD

**5.1 Obligation to Participate in Redevelopment Approvals with Reasonable Diligence.** Notwithstanding any other provision of Article V, the Parties understand that the Planning Board is not a party to this Agreement, but the Parties anticipate that the Planning Board will honor the provisions set forth herein. At the time of the execution of this Agreement, the Township has already adopted the Initial Resolution, the Planning Board has already completed its preliminary investigation of the Property, and the Township has designated the Property as an area in need of redevelopment, meeting the criteria for designation as a “non-condemnation redevelopment area” in accordance with N.J.S.A. 40A:12A-5 and -6. The costs of the preparation of this preliminary investigation study and the preparation of the redevelopment plan and related work shall be borne by Berkeley Developers through an escrow agreement with the Township.

**5.2 Obligation to Process Berkeley Developers’ Development Applications with Reasonable Diligence.** The Planning Board shall expedite the processing of Berkeley Developers’ development applications following Court approval of this Agreement following a duly noticed Fairness Hearing in accordance with N.J.A.C. 5:93-10.1(a) and within the time limits imposed by the MLUL. In the event of any appeal of the Redevelopment Approvals, Court approval of this Agreement, the Planning Board shall process and take action on any development application by Berkeley Developers for the Property which decision may be conditioned upon the outcome of any pending appeal.

**5.3 Obligation to Refrain From Imposing Cost-Generative Requirements.** The Planning Board recognizes that the Redevelopment Approvals and this Agreement all contemplate the development of an “inclusionary development” within the meaning of the Mount Laurel doctrine, and Berkeley Developers shall be entitled to any benefits, protections, and obligations afforded to developers of inclusionary developments. Nothing shall prevent Berkeley Developers from applying for a waiver or bulk variance from any standard imposed by the Redevelopment Plan and/or the Township’s Land Use and Development Ordinance as applicable, and the standards set forth in the MLUL and/or the Redevelopment Law, as applicable, shall determine if Berkeley Developers is entitled to this relief or from seeking a waiver or de minimus exception to any standard or requirement of the Residential Site Improvement Standards under the applicable regulations. Notwithstanding the above, the Township Council and Township Planning Board are under no contractual obligation to grant or approve any request for a variance, waiver or de minimus exception.

## ARTICLE VI – MUTUAL OBLIGATIONS

**6.1 Escrow Agreement.** Within thirty (30) days of the Effective Date (as this term is defined herein), the Township and Berkeley Developers shall enter into an escrow agreement for the deposit of monies in escrow with the Township to be utilized to tender payment of reasonable fees for professional services, including legal, engineering and planning services, construction inspection services, being provided in conjunction with the Redevelopment Approvals and the review and construction inspection of the Inclusionary Development and any off-site and off-tract improvements. This Agreement shall be in addition to and in conjunction with the existing

Escrow Agreement entered between the Parties to cover the planning costs relating to the preliminary investigation.

**6.2 Obligation To Comply with State Regulations:** The Parties shall comply with any and all Federal, State, County and local laws, rules, regulations, statutes, ordinances, permits, resolutions, judgments, orders, decrees, directives, interpretations, standards, licenses, approvals, and similarly binding authority, applicable to the Inclusionary Development or the performance by the Parties of their respective obligations or the exercise by the Parties of their respective rights in connection with this Agreement.

**6.3 Mutual Good Faith, Cooperation and Assistance.** The Parties shall exercise good faith, cooperate, and assist each other in fulfilling the intent and purpose of this Agreement, including, but not limited to, the approval of this Agreement by the Court, the Redevelopment Approvals, the development of the Property consistent with the terms hereof, and the defense of any challenge with regard to any of the foregoing.

**6.4 Failure to Effect Redevelopment Approvals.** If the Township fails to effect the Redevelopment Approvals within the time frames set forth in Section 4.1 or the Parties fail to agree on a PILOT Agreement as set forth in Section 4.1, then, at the option of Berkeley Developers, in its sole discretion and by prior written notice to the Township in accordance with Article IX of this Agreement, the Parties shall be restored to the status quo ante to the date hereof and all claims and defenses available now shall be available to the Parties.

**6.4.1** In the event that the Redeveloper decides that the Parties shall be restored to the status quo ante to the date hereof and all claims and defenses available now shall be available to the Parties, no Party shall be entitled to use this Agreement, or negotiations in conjunction therewith, to attempt to prejudice the other in any future proceedings.

**6.5 Defense of Agreement.** Each Party exclusively shall be responsible for all costs which they may incur in obtaining Court approval of this Agreement and any appeal therefrom, or from effecting the Redevelopment Approvals or the approval of the Affordable Housing Plan or any part thereof. The Parties shall diligently defend any such challenge.

## **ARTICLE VII - AFFORDABLE HOUSING CREDITS**

**7.1** Upon written notice, Berkeley Developers agrees to supply the Township and the Township's Administrative Agent, all documents within 30 days within its possession that may be reasonably necessary to demonstrate the creditworthiness of the affordable units.

## **ARTICLE VIII - COOPERATION AND COMPLIANCE**

**8.1 Implementation And Enforcement Of Agreement:** The Parties agree to cooperate with each other, provide all reasonable and necessary documentation, and take all necessary actions to satisfy the terms and conditions hereof and assure compliance with the terms of this Agreement, subject to prior written agreement between the Parties on payment by the requesting party of the requested party's direct costs and expenses in connection with such assistance. The Township's obligation to cooperate shall be further conditioned upon Berkeley

Developers paying and maintaining current real estate taxes, subject to any Exemption for the Inclusionary Development.

**ARTICLE IX - NOTICES**

**9.1 Notices:** Any notice or transmittal of any document required, permitted or appropriate hereunder and/or any transmittal between the Parties relating to the Property (herein "Notice[s]") shall be written and shall be served upon the respective Parties by facsimile or by certified mail, return receipt requested, or recognized overnight or personal carrier such as, for example, Federal Express, with certified proof of receipt, and, where feasible (for example, any transmittal of less than fifty (50) pages), and in addition thereto, a facsimile delivery shall be provided. All Notices shall be deemed received upon the date of delivery set forth in such certified proof, and all times for performance based upon notice shall be from the date set forth therein. Delivery shall be affected as follows, subject to change as to the person(s) to be notified and/or their respective addresses upon ten (10) days' notice as provided herein:

**TO BERKELEY DEVELOPERS:**

**Berkeley Developers, LLC**  
Tony DiGiovanni  
820 Morris Turnpike, Suite 201  
Short Hills, NJ 07078  
Fax: (973) 467-4628

**WITH COPIES TO:**

**Bisgaier Hoff, LLC**  
Attention: Robert Kasuba Esq.  
25 Chestnut St., Suite 3  
Haddonfield, NJ 08033  
Fax: (856) 795-0312

**TO THE TOWNSHIP OF BERKELEY HEIGHTS:**

**Township of Berkeley Heights**  
Attention: John Bussiculo, Township Administrator  
29 Park Avenue  
Berkeley Heights, NJ 07922  
Fax: (908) 464-6081

**WITH COPIES TO:**

**McElroy Deutsch Mulvaney & Carpenter, LLP**  
Attention: Joseph Sordillo, Esq.  
PO Box 2075  
1300 Mount Kemble Avenue  
Morristown, NJ 07960  
Fax: (973) 425-0161

**AND TO:**

**Jeffrey R. Surenian and Associates, LLC**

Attention: Erik C. Nolan, Esq.  
707 Union Avenue, Suite 301  
Brielle, NJ 08730  
Fax: (732) 612-3101

In the event any of the individuals identified above has a successor, the individual identified shall name the successor and notify all others identified of their successor.

## **ARTICLE X - MISCELLANEOUS**

**10.1 Severability:** Unless otherwise specified, it is intended that the provisions of this Agreement are to be severable. The validity of any article, section, clause or provisions of this Agreement shall not affect the validity of the remaining articles, sections, clauses or provisions hereof. If any section of this Agreement shall be adjudged by a court to be invalid, illegal, or unenforceable in any respect, such determination shall not affect the remaining sections.

**10.2 Successors Bound:** The provisions of this Agreement shall run with the land, and the obligations and benefits hereunder shall be binding upon and inure to the benefit of the Parties, their successors and assigns, including any person, corporation, partnership or other legal entity which at any particular time may have a fee title interest in the Property which is the subject of this Agreement. This Agreement may be enforced by any of the Parties, and their successors and assigns, as herein set forth.

**10.3 Governing Law:** This Agreement shall be governed by and construed by the laws of the State of New Jersey.

**10.4 No Modification:** This Agreement may not be modified, amended or altered in any way except by a writing signed by each of the Parties.

**10.5 Effect of Counterparts:** This Agreement may be executed simultaneously in one (1) or more facsimile or e-mail counterparts, each of which shall be deemed an original. Any facsimile or e-mail counterpart forthwith shall be supplemented by the delivery of an original counterpart pursuant to the terms for notice set forth herein.

**10.6 Voluntary Agreement:** The Parties acknowledge that each has entered into this Agreement on its own volition without coercion or duress after consulting with its counsel, that each party is the proper person and possess the authority to sign the Agreement, that this Agreement contains the entire understanding of the Parties and that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.

**10.7 Interpretation:** Each of the Parties hereto acknowledges that this Agreement was not drafted by any one of the Parties, but was drafted, negotiated and reviewed by all Parties, and, therefore, the presumption of resolving ambiguities against the drafter shall not apply. Each of the Parties expressly represents to the other Parties that: (a) it has been represented by counsel in connection with negotiating the terms of this Agreement; and (b) it has conferred due authority for execution of this Agreement upon the person(s) executing it.

**10.8 Necessity of Required Approvals:** The Parties recognize that the site plans

required to implement the Inclusionary Development provided in this Agreement, and such other actions as may be required of the Planning Board or Township under this Agreement, cannot be approved except on the basis of the independent reasonable judgment by the Planning Board and the Township Council, as appropriate, and in accordance with the procedures established by law. Nothing in this Agreement is intended to constrain that judgment or to authorize any action not taken in accordance with procedures established by law. Similarly, nothing herein is intended to preclude Berkeley Developers from appealing any denials of or conditions imposed by the Planning Board in accordance with the MLUL or taking any other action permitted by law.

**10.9 Schedules:** Any and all Exhibits and Schedules annexed to this Agreement are hereby made a part of this Agreement by this reference thereto. Any and all Exhibits and Schedules now and/or in the future are hereby made or will be made a part of this Agreement with prior written approval of both Parties.

**10.10 Entire Agreement:** This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior oral and written agreements between the parties with respect to the subject matter hereof except as otherwise provided herein.

**10.11 Conflict Of Interest:** No member, official or employee of the Township or the Planning Board shall have any direct or indirect interest in this Agreement, nor participate in any decision relating to the Agreement which is prohibited by law, absent the need to invoke the rule of necessity.

**10.12 Effective Date:** Anything herein contained to the contrary notwithstanding, the effective date ("Effective Date") of this Agreement shall be the date upon which the last of the Parties to execute this Agreement has executed and delivered this Agreement.

**10.13 Waiver.** The Parties agree that this Agreement is enforceable. Each of the Parties waives all rights to challenge the validity or the ability to enforce this Agreement. Failure to enforce any of the provisions of this Agreement by any of the Parties shall not be construed as a waiver of these or other provisions.

**10.14 Captions.** The captions and titles to this Agreement and the several sections and subsections are inserted for purposes of convenience of reference only and are in no way to be construed as limiting or modifying the scope and intent of the various provisions of this Agreement.

**10.15 Default.** In the event that any of the Parties shall fail to perform any material obligation on its part to be performed pursuant to the terms and conditions of this Agreement, unless such obligation is waived by all of the other Parties for whose benefit such obligation is intended, or by the Court, such failure to perform shall constitute a default of this Agreement. Upon the occurrence of any default, the non-defaulting Party shall provide notice of the default and the defaulting Party shall have a reasonable opportunity to cure the default within forty-five (45) days. In the event the defaulting Party fails to cure within forty-five (45) days or such reasonable period of time as may be appropriate, the Party(ies) for whose benefit such obligation is intended shall be entitled to exercise any and all rights and remedies that may be available in equity or under the laws of the State of New Jersey, including the right of specific performance to

the extent available. Further, the Parties may apply to the Court for relief, by way of a motion for enforcement of litigant's rights.

**10.16 Notice of Actions.** The Parties and their respective counsel agree immediately to provide each other with notice of any lawsuits, actions or governmental declarations threatened or pending by third parties of which they are actually aware which may affect the provisions of this Agreement.

**10.17 Construction, Resolution of Disputes.** This Agreement has been entered into and shall be construed, governed and enforced in accordance with the laws of the State of New Jersey without giving effect to provisions relating to the conflicts of law. Jurisdiction of any litigation ensuing with regard to this Agreement exclusively shall be in the Superior Court of New Jersey, with venue in Union County. Service of any complaint may be effected consistent with the terms hereof for the delivery of "Notices," hereinafter defined. The Parties waive formal service of process. The Parties expressly waive trial by jury in any such litigation.

**10.18 Conflicts.** The Parties acknowledge that this Agreement cannot be affected by the Compliance Action or any amendments to the Township's Affordable Housing Plan or Land Use and Development Ordinances and this Agreement shall control with respect to those matters as applied to the Property. Upon the entry of a Judgment of Compliance and Repose in the Township's Compliance Action, and after the Compliance Action is concluded, the Court shall retain jurisdiction to ensure compliance with the terms and conditions of this Agreement. As to any inconsistencies between the Redevelopment Approvals and this Agreement, the Redevelopment Approvals shall control.

**10.19 Recitals.** The recitals of this Agreement are incorporated herein and made a part hereof.

**THE REMAINDER OF THIS PAGE IS PURPOSEFULLY BLANK**

**IN WITNESS WHEREOF**, the Parties hereto have caused this Agreement to be properly executed, their corporate seals affixed and attested and this Agreement to be effective as of the Effective Date.

Witness/Attest:

BERKELEY DEVELOPERS, LLC

By: MARK WILF

Smith E Ts

By: [Signature]  
MANAGING MEMBER

Dated: 10-13-2016

Witness/Attest:

TOWNSHIP OF BERKELEY HEIGHTS

By: ROBERT WOODRUFF

as its MAYOR

[Signature]

By: [Signature]  
Robert Woodruff, Mayor

Dated: 10/13/16