

MOVIE THEATER SITE SETTLEMENT AGREEMENT

[Signature] **THIS SETTLEMENT AGREEMENT** (“Agreement”) made this 13th day of February, 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

LOCKHERN PROPERTY, LLC, a New Jersey limited liability company, having an address at P.O. Box 39, Livingston, New Jersey 07039, (hereinafter “Lockhern”);

Collectively, the Township and Lockhern 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 September 8, 2015, Lockhern filed a Motion to Intervene in the Compliance Action (“Lockhern Intervention”), and such intervention was granted by the Court on October 15, 2015; and

WHEREAS, Lockhern is the owner of the real property known and designated as Block 702, Lot 13 (“Property”) according to the Township’s tax and assessment maps, and is commonly known as 450 Springfield 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, endorsed by the Township Council, and submitted to the Court for review and approval; and

WHEREAS, the Affordable Housing Plan will include the Property as an inclusionary development at a density of 20 rental residential units, including a 15% set aside for units to be affordable to very low, low and moderate income households; and

WHEREAS, the Planning Board is not a party to this Settlement 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 Lockhern 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 Lockhern entered into a Memorandum of Understanding on August 23, 2016 ("MOU"), attached hereto as **Exhibit A**, which memorialized the agreed upon terms of an inclusionary development on the Property; and

WHEREAS, Lockhern is amenable to fully and finally resolving the Lockhern Intervention premised upon securing the right to construct a 20-unit rental residential inclusionary development with retail on the Property; and

WHEREAS, more specifically, pursuant to the terms successfully negotiated by the Township and Lockhern in the MOU, and subject to the details delineated herein, Lockhern intends to develop the Property as an inclusionary development consisting of 20 rental residential units including three (3) affordable housing units, with a minimum of 4,000 square feet of retail space ("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 obligations, 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 from the initial occupancy of the affordable units; 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 with Lockhern as the designated redeveloper of the Property, all in accordance with the Redevelopment Law (collectively, the "Redevelopment Approvals"); 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 Lockhern 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 Inclusionary Development shall be substantially consistent with the concept plan, floor plans and elevations attached hereto and made a part hereof as **Exhibit B**, which has been reviewed and approved by the Township and the Township's professionals, and shall be further subject to the following requirements:
 - 1.1.1 Density. The mixed-use development of the Property shall be developed with a density of 20 residential units, inclusive of an affordable housing component that is described in greater detail in Section 3.1 herein.
 - 1.1.2 Height. The mixed-use development of the Property shall be included in a three (3) story building with a maximum height of thirty-six (36') feet fronting along Sherman Avenue and a three (3) story building with the appearance of a 2½ story building, at a maximum height of thirty-six (36') feet fronting along Springfield Avenue, in compliance with the applicable Township Zoning Ordinances, which shall be incorporated into the redevelopment plan for the Property. Included in the attached Exhibit B is an architectural sketch of the project.
 - 1.1.3 Setbacks – The mixed-use development of the Property shall comply with all applicable building setbacks set forth in the Township Zoning Ordinances, which shall be incorporated into the redevelopment plan for the Property.
 - 1.1.4 Retail Space – The mixed-use development of the Property shall include a minimum of 4,000 square feet of retail space on the lower level, which can be divided into two (2) 2,000 square foot retail spaces, all fronting on Sherman Avenue, with an outdoor seating area to be included in the front of said retail space as illustrated on the attached **Exhibit B**.
 - 1.1.5 Amenities. In addition to the retail space on the first floor as set forth in Section 1(e) above, Lockhern shall include various amenities designed to support the apartment uses, including, without limitation, a lobby, gym, and laundry facilities to be located on the second floor, which is the ground level fronting Springfield Avenue. In addition, an outdoor rooftop patio area along that portion of the building fronting on Sherman Avenue may be permitted subject to Township Council approval. Trash and recycling facilities shall be located indoors on the ground floor level.

- 1.1.6 Parking.** Lockhern hereby agrees to provide at least fifty-three (53) parking spaces to services the mixed-use development, or a minimum of two (2) parking spaces per residential unit plus one parking space per 300 square feet of gross retail space.
- 1.1.7 Streetscape.** Lockhern shall provide its pro rata share of streetscape improvements along both sides of Sherman Avenue, or otherwise contribute its pro rata share to such improvements in conjunction with the other redevelopment project (by Berkeley Heights Developers, LLC) providing streetscape improvements along both sides of Sherman Avenue from Summit Avenue to Lone Pine Drive, including, but not limited to, ornamental street lights, street trees, brick paver sidewalks, brick paver crosswalks, bicycle racks, trash receptacles, and benches per the Township's Downtown development standards.
- 1.1.8 Architectural Design.** Lockhern shall construct the mixed-use development in substantial compliance with the floor plans and building elevations as shown on the attached **Exhibit B**, with the final architectural plans to be reviewed and approved by the Township. The mixed-use development shall comply with the Township's Design Standards (Part 19 of the Land Development Ordinance).

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 shall 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 shall 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 from 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 – LOCKHERN OBLIGATIONS

3.1 Affordable Housing Set-Aside. Lockhern shall have an obligation to deed-restrict fifteen percent (15%) of the residential units in the Inclusionary Development as very low, low and moderate income affordable units. Any such affordable units 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 from the date of their initial occupancy (“Deed-Restriction Period”) so that the Township may count the units against its obligations to provide family rental housing. This obligation includes, but is not limited to, Lockhern’s obligation to comply with the bedroom distribution requirements, very low (1 unit) / low (1 unit) / moderate (1 unit) income split requirements, pricing requirements, affirmative marketing requirements, candidate qualification and screening requirements, and deed restriction requirements. Nothing in this Agreement shall obligate Lockhern to provide more than 3 affordable units within the Inclusionary Development.
- 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 Lockhern 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. Lockhern 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 units. At the end of the Deed-Restriction Period, the Township shall cooperate with Lockhern to facilitate Lockhern’s exercise of its right to terminate the deed restriction.
- 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.
- 3.1.6 Upon written notice, Lockhern shall provide detailed information requested by the Township, or the Township’s Administrative Agent, within 30 days concerning Lockhern’s 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, Lockhern shall not directly or indirectly oppose or undertake any action to interfere with the Court’s adjudication of the Township’s affordable housing obligations and compliance standards. Lockhern 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 Lockhern of any rights created hereunder, or unless any other defendants or interested parties undertake any action to obstruct or impeded Lockhern 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, Lockhern shall no longer continue to participate in the Compliance Action, except for the limited circumstances described provided in Section 3.2 of this Agreement; and shall formally be dismissed from the Township's Compliance Action.

ARTICLE IV - OBLIGATIONS OF THE TOWNSHIP

4.1 Obligation To Effect Redevelopment Approvals. At the time of execution of this Agreement, the Township has 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. The Township shall request that the Planning Board undertake its preliminary investigation and make a recommendation as to whether the Property should be designated as a non-condemnation redevelopment area within sixty (60) days of the full execution of this Agreement. 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 days (90) of the date of the Redevelopment Area Designation, 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 the adoption of the Redevelopment Plan, or (b) forty-five (45) days from the date of the Township's introduction of the Ordinance adopting the Redevelopment Plan and referring the Redevelopment Plan to the Planning Board, the Township shall adopt the Redevelopment Plan by ordinance on second reading ("Ordinance"). Within thirty (30) days of the date of the adoption of the Ordinance, the Township shall negotiate a redevelopment agreement with Lockhern or an urban renewal entity to which Lockhern may assign its interest in the Property ("Redevelopment Agreement") and adopt resolutions approving the Redevelopment Agreement and designating Lockhern (or its successor) as the exclusive redeveloper of the Property. The Redevelopment Agreement shall be reasonably satisfactory to both the Township and Lockhern (or its successor) and upon final adoption of the redevelopment plan and in connection with the entering of the redevelopment agreement, the Inclusionary Development shall be subject to a Payment in Lieu of Taxes (PILOT) agreement between the Township and Lockhern or an urban renewal entity to which Lockhern may assign its interest in the Property, the specific terms of which shall be further negotiated between the parties. The Township and Lockhern (or its successor) 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. The time period for the preparation of the Redevelopment Plan shall not begin until the Township has agreed to all Exhibits listed under Exhibit B.

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

4.3 Representation regarding Sufficiency of Water and Sewer: The Township represents that to the best of its knowledge, sufficient potable water and sewer capacity currently exist to serve the Inclusionary Development. The Township agrees to reasonably comply with Lockhern's investigation and inquiry into the sufficiency of such potable water and sewer capacity. Any water, sewer, or any other utility infrastructure or improvements, whether on-site, off-site or off-tract, required for the development of the proposed Inclusionary Development shall be at the sole cost and expense of Lockhern. Lockhern may provide a pro rata contribution in accordance with N.J.S.A. 40:55D-42 and Sections 4.5 and 5.3 of this Agreement, as applicable, for any such improvements which are located off site or off tract.

4.4 Obligation To Cooperate: The Township acknowledges that in order for Lockhern to construct its Inclusionary Development, Lockhern 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 approval (the "Required Approvals") and the Redevelopment Plan. The Township agrees to use all reasonable efforts to assist Lockhern 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 and this Agreement all contemplate the development of an "inclusionary development" within the meaning of the Mount Laurel doctrine, and Lockhern shall be entitled to any benefits, protections, and obligations afforded to developers of inclusionary developments, in addition to what Lockhern agreed to in the Memorandum of Understanding and this Agreement. Therefore, the Township will not impose development standards and/or requirements that have not been agreed to by the parties, and would otherwise be considered to be "cost generative."

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. Within sixty (60) days of the full execution of this Agreement, the Planning Board shall complete its 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. Such preliminary investigation includes, but is not limited to, the preparation of a preliminary investigation report and map, the holding of a preliminary investigation hearing on the Property, and the Planning Board’s formal recommendation regarding the redevelopment area designation of the Property. The Planning shall also expedite its review of the Redevelopment Plan in accordance with N.J.S.A. 40A:12A-7. In connection with the above actions, the Planning Board 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. The costs of the preparation of this preliminary investigation study and the preparation of the redevelopment plan and related work shall be borne by Lockhern through an escrow agreement with the Township.

5.2 Obligation to Process Lockhern’s Development Applications with Reasonable Diligence. The Planning Board shall expedite the processing of Lockhern’s 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, or Court approval of this Agreement, the Board shall process and take action on any development application by Lockhern 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 Lockhern shall be entitled to any benefits, protections, and obligations afforded to developers of inclusionary developments in addition to what Lockhern agreed to in the Memorandum of Understanding and this Agreement. Nothing shall prevent Lockhern 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 Lockhern is entitled to this relief or to 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 the Planning Board are under no 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 Lockhern 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, planning services and construction inspection, 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.

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; Alternative Rezoning Ordinance Option. If the Township fails to effect the Redevelopment Approvals within the time frames set forth in Section 4.1, then, at the option of Lockhern, 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 Lockhern 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 obtaining 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, Lockhern agrees to supply the Township and the Township's Administrative Agent, within 30 days, all documents 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 Lockhern paying and maintaining current real estate taxes, subject to any Exemption for the Inclusionary Development.

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 Lockhern 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 Inclusionary Development shall be substantially consistent with the concept plan, floor plans and elevations attached hereto and made a part hereof as **Exhibit B**, which has been reviewed and approved by the Township and the Township's professionals, and shall be further subject to the following requirements:
- 1.1.1 Density. The mixed-use development of the Property shall be developed with a density of 20 residential units, inclusive of an affordable housing component that is described in greater detail in Section 3.1 herein.
- 1.1.2 Height. The mixed-use development of the Property shall be included in a three (3) story building with a maximum height of thirty-six (36') feet fronting along Sherman Avenue and a three (3) story building with the appearance of a 2½ story building, at a maximum height of thirty-six (36') feet fronting along Springfield Avenue, in compliance with the applicable Township Zoning Ordinances, which shall be incorporated into the redevelopment plan for the Property. Included in the attached Exhibit B is an architectural sketch of the project.
- 1.1.3 Setbacks – The mixed-use development of the Property shall comply with all applicable building setbacks set forth in the Township Zoning Ordinances, which shall be incorporated into the redevelopment plan for the Property.
- 1.1.4 Retail Space – The mixed-use development of the Property shall include a minimum of 4,000 square feet of retail space on the lower level, which can be divided into two (2) 2,000 square foot retail spaces, all fronting on Sherman Avenue, with an outdoor seating area to be included in the front of said retail space as illustrated on the attached **Exhibit B**.
- 1.1.5 Amenities. In addition to the retail space on the first floor as set forth in Section 1(e) above, Lockhern shall include various amenities designed to support the apartment uses, including, without limitation, a lobby, gym, and laundry facilities to be located on the second floor, which is the ground level fronting Springfield Avenue. In addition, an outdoor rooftop patio area along that portion of the building fronting on Sherman Avenue may be permitted subject to Township Council approval. Trash and recycling facilities shall be located indoors on the ground floor level.

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 LOCKHERN: **Lockhern Property, LLC**
Attention: Foun-Chung Fan, Managing Member
P.O. Box 39 Livingston, NJ 07039
Fax: (973) 551-1833

WITH COPIES TO: **Connell Foley, LLP**
Attention: Meghan Barrett Burke Esq.
85 Livingston Avenue
Roseland, NJ 07068
Fax: (973) 535-9217

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: Jeffrey R. Surenian, 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 possesses 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 Lockhern 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 modified 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:

LOCKHERN PROPERTY, LLC

Allyson M Kasetta
Name: Allyson M Kasetta
Title: Attorney at Law

By: Fou-Chung Fan
Name: Foun-Chung Fan
Title: Managing Member
10/7/16

Dated: 10/7/16

Witness/Attest:

TOWNSHIP OF BERKELEY HEIGHTS
By: ROBERT WOODRUFF
as its MAYOR

Ame Markopie

By: Robert Woodruff
Robert Woodruff, Mayor

Dated: 10/13/16

EXHIBIT A

MEMORANDUM OF UNDERSTANDING



MEMORANDUM OF UNDERSTANDING

BY AND BETWEEN

TOWNSHIP OF BERKELEY HEIGHTS

AND

LOCKHERN PROPERTY, LLC

REGARDING

**DEVELOPMENT OF A MIXED-USE PROJECT INCLUDING A RESIDENTIAL,
RENTAL DEVELOPMENT COMPONENT
WITH INCLUSIONARY AFFORDABLE HOUSING
IN
THE TOWNSHIP OF BERKELEY HEIGHTS
COUNTY OF UNION, STATE OF NEW JERSEY**

WHEREAS, on March 24, 2015, the Township Council of the Township of Berkeley Heights adopted a resolution in which the Township reaffirmed its voluntary commitment to satisfy its affordable housing obligations, however they may ultimately be defined by COAH or a court; and

WHEREAS, in compliance with the New Jersey Supreme Court decision in In re Adoption of N.J.A.C. 5:96 & 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, 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 Fair Share Plan, in addition to related reliefs (the "Compliance Action"); and

WHEREAS, on or about September 8, 2015, Lockhern Property, LLC ("Lockhern") filed a Motion to Intervene in the Compliance Action seeking to construct a multi-family, mixed-use development, with an inclusionary component of fifteen (15%) of such units being set aside for affordable housing units pursuant to Section 1(a) below on the property identified as Block 702, Lot 13, commonly known as 450 Springfield Avenue (the "Property"), which intervention was granted by the Court on October 15, 2015; and

WHEREAS, after ongoing discussions, negotiations and mediations between the Township and Lockhern, the parties have agreed upon the general terms of a mixed-use, residential rental development of the Property, with an inclusionary affordable housing component; and

WHEREAS, the Township and Lockhern wish to enter into this Memorandum of Understanding to memorialize the agreed upon terms of the inclusionary, residential rental, mixed-use development of the Property, with the additional and more specific terms and conditions of said development to be further negotiated and agreed to in additional agreements, including a formal settlement agreement to be filed with the Court in connection with the Compliance Action.

NOW, THEREFORE, for and in good and valuable consideration in hand paid, receipt of which is hereby acknowledged, and in consideration of the mutual covenants and obligations hereinafter set forth, the Township and Lockhern hereby set forth in this Memorandum of Understanding that the following general terms shall apply to the future development of the Property:

1. Lockhern agrees to develop, construct, or otherwise build an inclusionary, residential rental, mixed-use development at the Property subject to the following conditions:
 - a. Affordable Housing Component – The mixed-use development shall have an on-site inclusionary affordable housing component of 15% of the total units being developed as very low, low and moderate income affordable housing units to qualify as such pursuant to the terms of the applicable affordable housing regulations, Court Order, Court Special Master requirements, and the Uniform Housing Affordability Controls (“UHAC”) regulations, N.J.A.C. 5:80-26.1, *et seq.* The parties agree that the distribution of the affordable housing units shall be in compliance with the Council on Affordable Housing’s (“COAH”) Round Two substantive regulations, which the parties believe will govern this issue, or as approved by the Court Special Master and the Court. The parties agree that the affordability controls shall expire at the end of thirty (30) years after the date of the initial occupancy of the affordable unit. The Parties agree that the affordable housing units are to be included in the Township’s Fair Share Plan to be approved and credited by the Court in the Compliance Action.
 - b. Density of Development – The mixed-use development of the Property shall be developed with a permitted density of twenty (20) residential housing units, which will include three (3) affordable housing units pursuant to Section 1(a) above.
 - c. Height of Development – The mixed-use development of the Property shall be included in a three (3) story building with a maximum height of thirty-six (36’) feet fronting along Sherman Avenue and a three (3) story building with the appearance of a 2½ story building, at a maximum height of thirty-six (36’) feet fronting along Springfield Avenue, in compliance with the applicable Township Zoning Ordinances, which shall be incorporated into the redevelopment plan for the Property.

- d. Setbacks – The mixed-use development of the Property shall comply with all applicable building setbacks set forth in the Township Zoning Ordinances, which shall be incorporated into the redevelopment plan for the Property.
- e. Retail Space – The mixed-use development of the Property shall include a minimum of 4,000 square feet of retail space on the lower level, which can be divided into two (2) 2,000 square foot retail spaces, all fronting on Sherman Avenue, with an outdoor seating area to be included in the front of said retail space as illustrated on the attached **Exhibit A**.
- f. Amenities – In addition to the retail space on the first floor as set forth in Section 1(e) above, Lockhern shall include various amenities designed to support the apartment uses, including, without limitation, a lobby, gym, and laundry facilities to be located on the second floor, which is the ground level fronting Springfield Avenue. In addition, an outdoor rooftop patio area along that portion of the building fronting on Sherman Avenue may be permitted subject to Township Council approval. Trash and recycling facilities shall be located indoors on the ground floor level.
- g. Streetscape – Lockhern shall provide its pro rata share of streetscape improvements along Sherman Avenue, or otherwise contribute its pro rata share to such improvements in conjunction with the other redevelopment projects (by Berkeley Heights Developers, LLC) providing streetscape improvements along Sherman Avenue from Summit Avenue to Lone Pine Drive, including, but not limited to, ornamental street lights, street trees, brick paver sidewalks, brick paver crosswalks, bicycle racks, trash receptacles, and benches per the Township’s Downtown development standards.
- h. Parking – Lockhern hereby agrees to provide at least fifty-three (53) parking spaces to services the mixed-use development, or a minimum of two (2) parking spaces per residential unit plus one parking space per 300 square feet of gross retail space.
- i. Architectural Design – Lockhern shall construct the mixed-use development in substantial compliance with the floor plans and building elevations as shown on the attached **Exhibit A**, with the final architectural plans to be reviewed and approved by the Township. The mixed-use development shall comply with the Township’s Design Standards (Part 19 of the Land Development Ordinance).
- j. Redevelopment – The Township and Lockhern agree that the mixed-use development of the Property will likely proceed under the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, *et seq.* (the “Redevelopment Law”), provided the Property meets the criteria for the Township to declare it an area in need of redevelopment without the right to exercise eminent domain for the Property. If the Property is deemed an area

in need of redevelopment, upon final approval of the redevelopment plan and in connection with the entering of the redevelopment agreement, the residential component of the mixed-use development shall be subject to a Payment in Lieu of Taxes ("PILOT") agreement between the Township and Lockhern, the specific terms of which shall be further negotiated between the parties. The Township shall not commence the redevelopment process until the final terms of the development have been negotiated and agreed upon, and approved by the Court and the Court Special Master. Should the Property be found to satisfy the requirements of the Redevelopment Law, and the Township enters into a redevelopment agreement with Lockhern, the Township agrees to appoint Lockhern as the redeveloper.

2. The Township must review and approve the final concept plan, building setbacks, lot and impervious coverages, building elevations, architectural floor plans, design standards, building materials, streetscape improvements, amenities, retaining walls and like zoning and development information, which shall be agreed upon and included in the final settlement agreement to be filed with the Court. All such terms shall be included in the redevelopment plan to be adopted by the Township pursuant to the Redevelopment Law assuming said criteria are met.

3. The parties understand and agree that this Memorandum of Understanding sets forth the general agreed upon terms for the development of the inclusionary, residential, rental development of the Property. Nothing herein shall bind or otherwise restrict the parties from negotiating and agreeing to additional and more specific terms of development. Final approval of the proposed mixed-use development is subject to the Township and Lockhern coming to an agreement on the final terms of the development, including that set forth in paragraph 2 herein; which shall be set forth in a settlement agreement to be filed with the Court, and be subject to the Court's and the Court Special Master's approval.

4. Upon approval of the final plans included in the settlement agreement filed with the Court, Lockhern agrees to enter into an escrow agreement with the Township 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, being provided in conjunction with the review of the mixed-use development of the Property, along with redevelopment process under the Redevelopment Law.

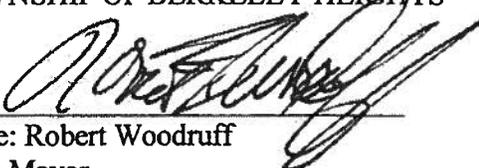
5. The Township and Lockhern hereby agree to act in good faith in the negotiation of the final terms of the development, along with the preparation of a more formal agreement to set forth all of the agreed upon terms of the inclusionary, residential, rental development at the Property, which final agreement shall be filed with the Court, and be subject to the Court's and the Court Special Master's approval. The parties further agreed to proceed in good faith in proceeding through the redevelopment process and developing the site in compliance with the agreed upon timeline to be attached to the settlement agreement.

6. Miscellaneous. This Memorandum of Understanding shall be governed by, and construed and enforced in accordance with, the laws of the State of New Jersey. This

Memorandum of Understanding may be modified or amended only by a written instrument signed by both parties. This is a negotiated agreement wherein both parties were represented by legal counsel. This Memorandum of Understanding shall not be construed against any party by virtue of its counsel having prepared same or part thereof. This Memorandum of Understanding may be executed in counterparts, with facsimile signatures shall be deemed original signatures.

IN WITNESS WHEREOF, the Borough and Lockhern have executed this Memorandum of Understanding as of the dates set forth below.

TOWNSHIP OF BERKELEY HEIGHTS

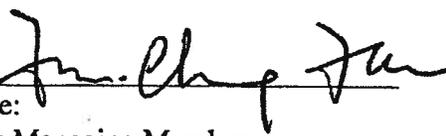
By: 

Name: Robert Woodruff

Title: Mayor

Dated: 8/23/16, 2016

LOCKHERN PROPERTY, LLC

By: 

Name:

Title: Managing Member

Dated: 8/23/, 2016