



---

**IN THE MATTER OF** an application submitted by Burlington Coat Factory of Texas, Inc., pursuant to Sections 197-c and 201 of the New York City Charter for the grant of a special permit pursuant to Section 74-711 of the Zoning Resolution to modify the use regulations of Section 32-652 (Permitted projection in all other Commercial Districts) to allow one illuminated blade sign and 13 double-sided non-illuminated flag signs to project more than the permitted 18” across a street line, and Section 32-655 (Height of signs in all other Commercial Districts) to allow the illuminated blade sign to exceed the maximum permitted height of 40’ above curb level, on property located at 116 W 23rd Street (Block 798, Lot 41), in C6-2A, C6-3A, and C6-3X districts, within the Ladies’ Mile Historic District, Borough of Manhattan, Community District 4.

---

This application was filed by Burlington Coat Factory of Texas, Inc. on February 26, 2018. The applicant is seeking a special permit pursuant to Section 74-711 of the Zoning Resolution (ZR) to modify the signage regulations of Section 32-652 and Section 32-655 to permit non-conforming accessory signage, including one double-sided bracket sign (the “blade sign”) and 13 double-sided flag signs on three facades of a landmarked five-story building located at 116 West 23<sup>rd</sup> Street in the Ladies’ Mile Historic District, Manhattan Community District 4.

## **BACKGROUND**

The building at 116 West 23<sup>rd</sup> Street (Block 798, Lot 41) is located on the west side of Sixth Avenue, occupying the entire street frontage between West 22<sup>nd</sup> Street and West 23<sup>rd</sup> Street. The 33,780-square-foot site is improved with a five-story building containing approximately 169,500 square feet of commercial floor area. Multiple retail businesses (Use Groups 6 and 10) occupy the ground floor of the building, including the Burlington Coat Factory, which occupies the northern portion of the building. The building is listed in Landmarks Preservation Commission’s (LPC) Ladies Mile Historic District Designation Report (1989) as being constructed between 1889 and 1911 for use as a department store, with the large show windows and Italian Renaissance ornamentation typical of the era’s commercial palace design.

Sixth Avenue is a heavily-trafficked thoroughfare, which developed as a retail destination in the early 1900s with mid- to high-rise department stores and office buildings. Today it is developed with commercial, mixed commercial and residential, and light manufacturing buildings, but many of the former department store buildings along the Avenue have been converted to other commercial and residential uses.

On June 30, 1995, LPC granted the owner of the building a Certificate of Appropriateness (COFA #95-0166) for the blade sign, which was installed that year at the northwest corner of West 22<sup>nd</sup> Street and Sixth Avenue. The blade sign is an illuminated, vertical, dual-faceted accessory sign that reads “Burlington Coat Factory.” It has dimensions of approximately 31 feet and 4 inches by 3 feet and 6 inches and is attached to the façade of the building starting at 30 feet above grade. The owner was unaware at the time that other bulk approvals were required prior to installing the sign.

On December 7, 2012, LPC issued a Certificate of No Effect (# 13-8752) for 13 flag signs, three along West 22<sup>nd</sup> Street, seven along Sixth Avenue, and three along West 23<sup>rd</sup> Street. The flag signs are double-sided and located on historic flagpole anchors attached to the façade of the building at approximately 13 feet above grade. The flag signs are 6 feet and 3 inches by 3 feet. Nine of the 13 flag signs (seven along the Sixth Avenue frontage, two along West 22<sup>nd</sup> Street) were installed in 2014.

116 West 23<sup>rd</sup> Street is located between the Flatiron and Chelsea neighborhoods and straddles three zoning districts: C6-2A, C6-3A, and C6-3X. The blade sign and the 13 flag signs (existing and proposed) are located in either the C6-2A or C6-3X portions of the lot. The applicant requests a special permit pursuant to ZR Section 74-711 to modify Section 32-652 (Permitted projection in all other Commercial Districts) and Section 32-655 (Height of signs in all other Commercial Districts) to legalize the existing blade sign and 13 flag signs (nine existing with four proposed). Pursuant to Section 32-652, the maximum projection from the building front for a dual-faceted sign is 18”: the blade sign projects out 6’-2 ¾” and the flag signs projects 4’-6 ½”. Pursuant to Section ZR 32-655, permitted signs shall not extend more than 40’ above curb level. The blade sign begins approximately 30’ above curb level and continues to a height of 61’-4”.

## **ENVIRONMENTAL REVIEW**

This application (C 180273 ZSM) was reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA), and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et seq. and the City Environmental Quality Review (CEQR) Rules of Procedure of 1991 and Executive Order No. 91 of 1977. The lead agency is the Department of City Planning. The designated CEQR number is 16DCP024M. The lead is the City Planning Commission.

After a study of the potential environmental impact of the proposed action, as described in the Environmental Assessment Statement, a negative declaration was issued on April 20, 2018.

## **UNIFORM LAND USE REVIEW**

This application (C 180273 ZSM) was certified as complete by the Department of City Planning on April 23, 2018 and duly referred to Manhattan Community Board 4 and the Manhattan Borough President in accordance with Title 62 of the Rules of the City of New York, Section 2-02(b).

### **Community Board Public Hearing**

Community Board 4 held a public hearing on this application on May 21, 2018, and on June 6, 2018, by a vote of 36 in favor, none opposed, and no abstentions, adopted a resolution recommending approval of the application.

### **Borough President Recommendation**

The application was considered by the Borough President, who issued a recommendation to approve the application on July 13, 2018.

### **City Planning Commission Public Hearing**

On July 11, 2018 (Calendar No. 4), the City Planning Commission scheduled July 25, 2018, for a public hearing on this application (C 180273 ZSM). The hearing was duly held on July 25, 2018 (Calendar No. 28). One person spoke in favor of the application.

The applicant's land use counsel described the proposed project and the requested action. He stated that the signs are contextual to the surrounding commercial district and complementary to the historic character of the building. The signs have been approved by LPC and the owners have already undertaken restoration work on the facades where the signs are located. There were no other speakers and the hearing was closed.

### **CONSIDERATION**

The Commission believes that the grant of this special permit (C 180273 ZSM) is appropriate.

The applicant seeks a Special Permit pursuant to Section 74-711 to modify Section 32-652 (Permitted projection in all other Commercial Districts) and Section 32-655 (Height of signs in all other Commercial Districts) to allow the blade sign and 13 flag Signs. The blade sign was installed in 1995 and nine of the 13 flag signs were installed in 2014 without the appropriate use waivers from the City Planning Commission.

On September 24, 2014, LPC issued a Modification of Use/Bulk 16-2959 report (LPC 16-1461), which states their support for the requested waivers for the blade sign. The report notes that a continuing maintenance program has been established that will result restoration work contributing to the preservation of the building. On July 5, 2017, LPC issued Miscellaneous/Amendments 19-12252, to modify the language in the September 24, 2014 report to include the 13 flag signs. This amendment was necessary as the nonconformance status of the Flag Signs was unknown at the time of the initial report.

116 West 23<sup>rd</sup> Street is located at the intersection of the Chelsea and Flatiron neighborhoods, an area that consists primarily of commercial and mixed commercial and manufacturing uses. The proposed signage will not adversely affect the character of the historic building or the surrounding neighborhood. The illuminated blade sign is adjacent to retail and large department store uses and has been in operation for over twenty years without any complaints from the surrounding community or building tenants. The flag signs are non-illuminated and are to be installed in historic flagpole anchors on the façade. The Commission agrees with LPC that the proposed signage is proportionate to the building, and notes that the total surface area of all signs is well below the total maximum surface area permitted per commercial establishment pursuant to the underlying commercial zoning.

The Commission recognizes that this is a unique building and that the proposed signage is suitable in scale and character to the historic building. Therefore, the Commission believes that the requested special permit for one blade sign and 13 flag signs at 116 West 23<sup>rd</sup> Street, is appropriate.

## **FINDINGS**

The City Planning Commission hereby makes the following findings pursuant to Section 74-711 (Landmark preservation in all districts) of the Zoning Resolution:

- (1) [This finding is not applicable; no bulk modification is being requested]
- (2) Such use modifications shall have minimal adverse effects on the conforming uses within the building and in the surrounding area.

## **RESOLUTION**

**RESOLVED**, that the City Planning Commission finds that the actions described herein will have no significant impact on the environment; and be it further

**RESOLVED**, by the City Planning Commission, pursuant to Sections 197-c and 200 of the New York City Charter, that based on the environmental determination, and the consideration and

findings described in this report, the application (C 180273 ZSM) submitted by Burlington Coat Factory of Texas, Inc., for the grant of a special permit pursuant to Section 74-711 of the Zoning Resolution to modify the use regulations of Section 32-652 (Permitted projection in all other Commercial Districts) to allow one illuminated blade sign and 13 double-sided non-illuminated flag signs to project more than the permitted 18” across a street line, and Section 32-655 (Height of signs in all other Commercial Districts) to allow the illuminated blade sign to exceed the maximum permitted height of 40’ above curb level, on property located at 116 W 23<sup>rd</sup> Street (Block 798, Lot 41), in C6-2A, C6-3A, and C6-3X Districts, within the Ladies’ Mile Historic District, Borough of Manhattan, Community District 4, is approved, subject to the following terms and conditions:

1. The property that is the subject of this application (C 180273 ZSM) shall be developed in size and arrangement substantially in accordance with the dimensions, specifications and zoning computations indicated on the following plans, prepared by SBLM Architects filed with this application and incorporated in this resolution:

<u>Dwg. No.</u>	<u>Title</u>	<u>Last Date Revised</u>
T-001.00	Title Sheet	02/13/2018
Z-001.00	Site Plan	02/13/2018
A-001.00	Building Elevation – Ave of Americas - Signage	02/13/2018
A-002.00	Building Elevation – West 22 <sup>nd</sup> Street - Signage	02/13/2018
A-003.00	Building Elevation – West 23 <sup>rd</sup> Street - Photographs	02/13/2018

2. Such development shall conform to all applicable provisions of the Zoning Resolution, except for the modifications specifically granted in this resolution and shown on the plans listed above which have been filed with this application. All zoning computations are subject to verification and approval by the New York City Department of Buildings.
3. Such development shall conform to all applicable laws and regulations relating to its construction, operation and maintenance.

4. In the event the property that is the subject of the application is developed as, sold as, or converted to condominium units, a homeowners' association, or cooperative ownership, a copy of this resolution and the restrictive declaration described below and any subsequent modifications to either document shall be provided to the Attorney General of the State of New York at the time of application for any such condominium, homeowners' or cooperative offering plan and, if the Attorney General so directs, shall be incorporated in full in any offering documents relating to the property.
5. All leases, subleases, or other agreements for use or occupancy of space at the subject property shall give actual notice of this special permit to the lessee, sublessee or occupant.
6. Development pursuant to this resolution shall be allowed only after the restrictive declaration attached hereto as Exhibit A, with such administrative changes as are acceptable to Counsel to the Department of City Planning, has been executed and recorded in the Office of the Register of the City of New York, County of New York. Such restrictive declaration shall be deemed incorporated herein as a condition of this resolution.
7. Upon the failure of any party having any right, title or interest in the property that is the subject of this application, or the failure of any heir, successor, assign, or legal representative of such party, to observe any of the covenants, restrictions, agreements, terms or conditions of this resolution whose provisions shall constitute conditions of the special permit hereby granted, the City Planning Commission may, without the consent of any other party, revoke any portion of or all of said special permit. Such power of revocation shall be in addition to and not limited to any other powers of the City Planning Commission, or of any other agency of government, or any private person or entity. Any such failure as stated above, or any alteration in the development that is the subject of this application that departs from any of the conditions listed above, is grounds for the City Planning Commission or the City Council, as applicable, to disapprove any application for modification, cancellation or amendment of the special permit hereby granted.

8. Neither the City of New York nor its employees or agents shall have any liability for money damages by reason of the city's or such employee's or agent's failure to act in accordance with the provisions of this special permit.

The above resolution (C 180273 ZSM), duly adopted by the City Planning Commission on August 22, 2018 (Calendar No. 15), is filed with the Office of the Speaker, City Council, and the Borough President together with a copy of the plans of the development, in accordance with the requirements of Section 197-d of the New York City Charter.

**MARISA LAGO**, *Chair*  
**KENNETH J. KNUCKLES, ESQ.**, *Vice Chairman*  
**ALFRED C. CERULLO, III, MICHELLE R. DE LA UZ,**  
**JOSEPH DOUEK, CHERYL COHEN EFFRON,**  
**HOPE KNIGHT, ANNA HAYES LEVIN,**  
**ORLANDO MARIN, LARISA ORTIZ**, *Commissioners*



CITY OF NEW YORK

**MANHATTAN COMMUNITY BOARD FOUR**

330 West 42<sup>nd</sup> Street, 26<sup>th</sup> floor New York, NY 10036  
tel: 212-736-4536 fax: 212-947-9512  
[www.nyc.gov/mcb4](http://www.nyc.gov/mcb4)

**BURT LAZARIN**  
Chair

**JESSE R. BODINE**  
District Manager

June 18, 2018

Mariso Lago  
Chair  
Department of City Planning  
120 Broadway, 31st Fl. New York, NY 10271

RE: Application 180 273 ZSM – 116 West 23rd Street (AKA 695-709 Sixth Avenue)  
Burlington Coat Factory Signage

Dear Chairwoman Lago:

At its regularly scheduled Board meeting on June 6, 2018, Manhattan Community Board 4 voted to recommend approval of an application to the Department of City Planning for a special permit under ZR 74-711 for the referenced signage by a vote of 36 in favor, 0 in opposition, 0 abstentions, and 0 voting Present Not Eligible. This reflects the recommendation of the Chelsea Land Use Committee which voted to approve the request at its May 21, 2018 meeting.

The applicant, Burlington Coat Factory of Texas, Inc., is a lessee with operations at 116 West 23rd Street (AKA 695-709 Sixth Avenue). The Premises are located within the Ladies' Mile Historic District and are under the jurisdiction of the Landmarks Preservation Commission (LPC). Pursuant to ZR 74-711, the Applicant is requesting a special permit to modify ZR 32-655 and ZR 32-652 to allow for the legalization of an existing accessory double-sided illuminated sign and modification of ZR 32-652 to allow for the legalization of nine existing accessory double-sided non-illuminated flag signs as well as the installation of four proposed non-illuminated flag signs at the Premises.

On June 30, 1995, LPC granted the owner of the Premises a Certificate of Appropriateness that permitted the installation of a projecting vertical Blade Sign. Soon thereafter, the blade sign was installed on the northwest corner of West 22nd Street and Sixth Avenue. On December 7, 2012, LPC approved thirteen Flag Signs. Although LPC approved the Blade Sign and Flag Signs, sign permits were never issued by the Department of Buildings. In June 2013, the Applicant advised the Department of Buildings of the Applicant's intent to legalize signage by pursuing the current application.

On September 24, 2014, LPC issued a report stating that a continuing maintenance program had been established that will result in the preservation of the building and that the restorative work under that program contributes to a preservation purpose, meeting the first condition under ZR 74-711. On July 5, 2017, LPC amended the report to include signs hanging from 13 historic flagpoles. Under this program the Applicant has restored a portion of the ground floor terra cotta retail façade, restored a major portion of both the Sixth Avenue and West 22nd Street facades, and agreed to execute a

restrictive declaration, pursuant to which it will maintain the restoration work and the building's features in first class condition.

CB4 commends Burlington Coat Factory for pursuing the appropriate legalization of the existing signage. We also appreciate the work they do to continue to maintain a strong presence in our community with respect for the historic nature of the buildings in our commercial areas.

Sincerely,



Burt Lazarin  
Chair  
Manhattan Community Board 4



John Lee Compton, Co-Chair  
Chelsea Land Use Committee



Betty Mackintosh, Co-Chair  
Chelsea Land Use Committee

cc: Hon. Corey Johnson, City Council  
Hon. Gale A. Brewer, Manhattan Borough President



OFFICE OF THE PRESIDENT  
BOROUGH OF MANHATTAN  
THE CITY OF NEW YORK

1 Centre Street, 19th floor, New York, NY 10007  
(212) 669-8300 p (212) 669-4306 f  
431 West 125th Street, New York, NY 10027  
(212) 531-1609 p (212) 531-4615 f  
[www.manhattanbp.nyc.gov](http://www.manhattanbp.nyc.gov)

Gale A. Brewer, Borough President

July 13, 2018

**Recommendation on  
ULURP Application No. C 180273 ZSM – Burlington Coat Factory Sign  
by Burlington Coat Factory of Texas, Inc.**

**PROPOSED ACTION**

Burlington Coat Factory of Texas, Inc. (the “applicant”) seeks a special permit to modify Zoning Resolution (“ZR”) Sections 32-655 (Height of signs in all other Commercial Districts) and 32-652 (Permitted projection in all other Commercial Districts) to allow for the legalization of an existing accessory double-sided illuminated sign, and another modification of ZR 32-652 to allow for the legalization of nine existing accessory double-sided non-illuminated flag signs as well as the installation of four proposed non-illuminated flag signs at the building located at 116 West 23<sup>rd</sup> Street (Block 798, Lot 41) in Manhattan Community District 4. This building is located within the Ladies’ Mile Historic District and is under the jurisdiction of the Landmarks Preservation Commission (“LPC”) pursuant to ZR 74-711.

In order to obtain a special permit pursuant to ZR 74-711, the following conditions must be met:

- (1) any application pursuant to this Section shall include a report from the Landmarks Preservation Commission stating that a program has been established for continuing maintenance that will result in the preservation of the subject *building* or *buildings*, and that such *use* or *bulk* modifications, or restorative work required under the continuing maintenance program, contributes to a preservation purpose;
- (2) any application pursuant to this Section shall include a Certificate of Appropriateness, other permit, or report from the Landmarks Preservation Commission stating that such *bulk* modifications relate harmoniously to the subject landmark *building* or *buildings* in the Historic District, as applicable; and
- (3) the maximum number of *dwelling units* shall be set forth in Section 15-111 (Number of permitted dwelling units).

In order to grant a special permit, the City Planning Commission (CPC) shall find that:

- (1) such *bulk* modifications shall have minimal adverse effects on the structures or *open space* in the vicinity in terms of scale, location and access to light and air; and
- (2) such *use* modifications shall have minimal adverse effects on the conforming *uses* within the *building* and in the surrounding area.

## **BACKGROUND**

In 1995, LPC granted the owner of the building at 116 West 23<sup>rd</sup> Street a Certificate of Appropriateness permitting the installation of a projecting vertical sign (COFA# 95-1066). Shortly after, the existing accessory double-sided illuminated sign was installed at its current location at the northwest corner of West 22<sup>nd</sup> Street and Sixth Avenue. In 2012, LPC approved thirteen flag signs in Certificate of No Effect 12-8752 (LPC 13-5636). However, despite these approvals, the Department of Buildings never issued permits for the illuminated sign or the flag signs.

In 2014, LPC issued a Modification of Use/Bulk 16-2959 (LPC 16-1461) report to CPC in support of an application for a special permit pursuant to ZR 74-711 seeking waivers necessary to maintain the existing illuminated sign. LPC advised the applicant that it is unlikely LPC would approve an application for the existing sign as-of-right, as it would be disproportionate to the building. In 2017, LPC issued Miscellaneous Amendments 19-12252 to modify the language in the 2014 report to include signs hanging from thirteen historic flagpoles.

In 2013, the applicant's attorneys advised the Department of Buildings that the applicant intends to legalize signage by pursuing this application. There have not been any sign violations issued to this location.

### **Site Description**

The building at 116 West 23<sup>rd</sup> Street is located on a 29,021 square foot corner lot on the easterly end of Block 798 bounded by Sixth Avenue, Seventh Avenue, West 23<sup>rd</sup> Street and West 22<sup>nd</sup> Street. The building was referenced in LPC's 1989 Designation Report for the Ladies' Mile Historic District and its design follows in the tradition of commercial palace design through its use of large show windows and Italian Renaissance ornament.

The building is located within C6-3X, C6-2A and C6-3A zoning districts. It is five stories tall with approximately 169,500 zoning square feet of Use Group 6 and Use Group 10 floor area. The illuminated sign is located at the southeast corner on the Sixth Avenue frontage at the corner of West 22<sup>nd</sup> Street within the C6-2A portion of the zoning lot, and the thirteen flag signs are located in the C6-2A and C6-3X portions of the zoning lot.

The Burlington Coat Factory occupies approximately 82,480 square feet of floor area on the first through third floors, as well as approximately 9,700 square feet in the cellar. The existing illuminated dual-faceted accessory sign reads "Burlington Coat Factory" and begins approximately 25 feet above curb level and continues to a height of 56 feet and 4 inches above curb level. In addition, there are seven non-illuminated double-sided flag signs measuring 14 square feet located at the ground level of the Sixth Avenue façade, and two more flag signs at the ground level of the West 22<sup>nd</sup> Street façade.

### **Area Context**

The building is located in the Flatiron District of Manhattan Community Board 4, within the Ladies' Mile Historic District. The Historic District encompasses many buildings built in the early 1900s, and the area was historically a major retail destination, particularly between the

Gilded Age and World War I. Several former department stores have converted to various commercial and residential uses while maintaining their original facades. The area today is characterized primarily by commercial, light manufacturing, and mixed commercial and residential uses.

The building is very well-served by public transit; 23<sup>rd</sup> Street is a major corridor with multiple subway stations, including the 23<sup>rd</sup> Street Station for the F and M subway lines directly at the corner of 23<sup>rd</sup> Street and Sixth Avenue. The 1 subway line is one block west, the C and E subway lines are two blocks west, the N and R subway lines are one block east, and the 6 subway line is two blocks east. There is also a PATH train station one block south of the building, and multiple bus lines serve the immediate area.

## **PROJECT DESCRIPTION**

The applicant is seeking a special permit pursuant to ZR 74-711 to authorize the existing illuminated sign by waiving the requirements of ZR 32-362 (Permitted projection in all other Commercial Districts) and ZR 32-655 (Height of signs in all other Commercial Districts) and to authorize thirteen flag signs (nine of which are existing) by waiving the requirements of ZR 32-652.

## **COMMUNITY BOARD RECOMMENDATION**

At its regularly scheduled Full Board meeting on June 6th, 2018, Manhattan Community Board 4 (CB4) voted to adopt a resolution recommending approval of the application by a vote of 36 in favor, 0 in opposition, 0 abstentions, and 0 voting Present Not Eligible.

CB4 commended the applicant for pursuing the appropriate legalization of the existing signage, and expressed appreciation for their commitment to maintain the historic nature of the neighborhood.

## **BOROUGH PRESIDENT'S COMMENTS**

The application meets all the findings necessary for a special permit pursuant to ZR 74-711. In September 2014, LPC issued a report stating that a continuing maintenance program had been established that will result in the preservation of the building and that the restorative work under the program contributes to a preservation purpose. Under this program, the applicant has restored a portion of the ground floor façade and major portions of the Sixth Avenue façade and the 22<sup>nd</sup> Street façade, and agreed to execute a restrictive declaration to maintain the restoration work.

The Borough President joins CB4 in commending the applicant for doing the right thing and contributing to the preservation of the historic character of the neighborhood.

**BOROUGH PRESIDENT'S RECOMMENDATION**

Therefore, the Manhattan Borough President recommends **approval** of ULURP Application No. C 180273 ZSM.

A handwritten signature in black ink that reads "Gale A. Brewer". The signature is written in a cursive style with a large initial "G" and "A".

Gale A. Brewer  
Manhattan Borough President

116 West 23rd Street (a/k/a 695 – 709 Sixth Avenue), Manhattan

RESTRICTIVE DECLARATION

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

Location: Block 798, Lot 41  
New York County, New York

Record & Return to:

Howard A. Zipser  
Akerman LLP  
666 Fifth Avenue, 20<sup>th</sup> Floor  
New York, NY 10103

## TABLE OF CONTENTS

### DECLARATION

#### ARTICLE I.

##### DEFINITIONS

1.1	Application	4
1.2	Blade Sign	4
1.3	Buildings Department	4
1.4	Chairperson of the CPC	4
1.5	Chairperson of the LPC	4
1.6	City	4
1.7	City Council	4
1.8	CPC	4
1.9	Declarant	4
1.10	DCP	4
1.11	Designated Structure	5
1.12	Flag Sign	5
1.13	Force Majeure	5
1.14	Landlord	6
1.15	Landmark Work	6
1.16	Lease	6
1.17	LPC	6
1.18	Mortgagee	6
1.19	Party(ies) in Interest	6
1.20	Special Permit	6
1.21	Special Permit Use	6
1.22	Zoning Resolution	6

#### ARTICLE II.

##### DEVELOPMENT, PRESERVATION, REPAIR AND MAINTENANCE OF THE SUBJECT PREMISES

2.1	Sign Permit(s)	7
2.2	Preservation, Repair and Maintenance	7
2.3	Continuing Maintenance Program	11

#### ARTICLE III.

##### CONDOMINIUMS

3.1	General	17
3.2	Board	17
3.3	Condominium Declaration	17

#### ARTICLE IV.

##### EFFECT AND ENFORCEMENT

4.1	Effective Date	18
4.2	Filing and Recording	19
4.3	Additional Remedies	19
4.4	Notice and Cure	20
4.5	Acknowledgment of Covenants	21
4.6	No Other Enforceable Restrictions	21
4.7	Governance	22

4.8	Severability	22
4.9	Applicability to Other City Agencies	22
4.10	Limitation of Liability	23
4.11	Subordination	24
4.12	Right to Convey	25
ARTICLE V.		
	AMENDMENTS, MODIFICATIONS AND CANCELLATIONS	25
5.1	Amendment or Cancellation	25
5.2	Minor Modification	25
5.3	Recording and Filing	25
5.4	Landmark Work Modification	26
5.5	Surrender or Nullification	26
ARTICLE VI.		
	MISCELLANEOUS	27
6.1	Exhibits	27
6.2	Notices	27
6.3	Indemnification	28
6.4	Effect on Lease	28

DECLARATION made as of the \_\_\_\_ day of \_\_\_\_\_, 2018 by Burlington Coat Factory of Texas, Inc. a Delaware Corporation, having an address at 1830 Route 130 North, Burlington, NJ 08016 (the "Declarant"):

WITNESSETH:

WHEREAS, pursuant to that certain Lease Agreement, dated May 6 1994, as amended from time to time including by that certain Eighth Lease Modification Agreement, dated January 15, 2014 (the "Lease"), by and between Majestic Rayon Corporation and Cudge Realty, LLC as landlord ("Landlord") and Burlington Coat Factory of New York, LLC (Declarant is the surviving entity of a merger with Burlington Coat Factory of New York, LLC), Declarant is the long-term lessee of certain demised premises located in a 5-story and cellar building (the "Designated Structure") having the street address 116 West 23rd Street (a/k/a 695-709 Sixth Avenue), designated on the Tax Map of the City of New York as Block 798, Lot 41 in the Borough of Manhattan, City, County and State of New York, and more particularly described on Exhibit A attached hereto (the "Subject Property"); and

WHEREAS, Declarant has renovated portions of the Designated Structure and proposes to legalize an existing blade sign that is affixed to the Designated Structure at the northwest corner of West 22<sup>nd</sup> Street and Sixth Avenue (the "Blade Sign"), seven double-sided flag signs affixed to the Designated Structure on the Avenue of the Americas, three double-sided flag signs affixed to the Designated Structure on West 22<sup>nd</sup> Street and three double-sided flag signs to be affixed to the Designated Structure on West 23<sup>rd</sup> Street (collectively, the "Flag Signs"); and

WHEREAS, the Subject Property together with the Designated Structure constitute the Subject Premises (the "Subject Premises"); and

WHEREAS, \_\_\_\_\_ Title Insurance Company, a title company ("Title Company") has certified as of \_\_\_\_\_, that Declarant and Landlord are the sole

Parties in Interest in the Subject Premises, a copy of which certification is attached hereto as Exhibit B; and

WHEREAS, all Parties in Interest to the Subject Premises have executed this Declaration or waived their rights to execute this Declaration by written instrument annexed hereto as Exhibit C and made a part hereof, which instrument is intended to be recorded simultaneously with this Declaration; and

WHEREAS, Title Company has determined that as of the date hereof there has been no change in the certification attached as Exhibit B, and Declarants represent and warrant that they are the only known Parties in Interest in the Subject Premises as of the date hereof; and

WHEREAS, pursuant to the provisions of Section 3020 of the New York City Charter and Title 25, Chapter 3 of the Administrative Code of the City of New York (the "Landmark Preservation Law"), the Landmarks Preservation Commission (the "LPC") has designated an area which includes the Designated Structure as the Ladies' Mile Historic District because of its special character or historical or aesthetic interest or value; and

WHEREAS, Declarant submitted an application, designated ULURP 180273ZSM and dated February 21, 2018 (the "Application"), to the City Planning Commission of the City of New York (the "CPC") for a Special Permit pursuant to New York City Zoning Resolution ("ZR") Section 74-711 to modify ZR Sections 32-655 and 32-652 to allow the height of the Blade Sign to be 56'-4" above street level, the projection of the Blade Sign to be 7', and the projection of the Flag Signs to 4'-6"; and

WHEREAS, on June 30, 1995, LPC granted the owner of the Premises a Certificate of Appropriateness that permitted the installation of a projecting vertical sign (COFA# 95-0166); and

WHEREAS, on December 7, 2012, LPC approved thirteen Flag Signs in Certificate of No Effect 13-8752 (LPC 13-5636); and

WHEREAS, on September 24, 2014, LPC issued a Modification of Use/Bulk 16-2959 (LPC 16-1461) report to the CPC in support of an application for a special permit pursuant to ZR § 74-711 seeking waivers necessary to maintain the Blade Sign; and

WHEREAS, on July 5, 2017, LPC issued another report, Miscellaneous/Amendments 19-12252, to modify the language in the September 24, 2014 report to include the Flag Signs; and

WHEREAS, Copies of C of A 95-0166, CNE 13-8752 (LPC 13-5636), MOU 16-2959 (LPC 16-1461) and Misc 19-12252 are annexed hereto as Exhibit D; and

WHEREAS, Section 74-711 requires, inter alia, that a program has been established, in concert with the New York City Department of Buildings (the "Buildings Department") and the LPC, for continuing preservation and maintenance (the "Continuing Maintenance Program") that will result in preservation of portions of the Designated Structure by Declarant; and

WHEREAS, Declarant has agreed to certain obligations and restrictions contained in this Declaration for the protection, preservation, repair and maintenance of portions of the Designated Structure; and

WHEREAS, Declarant desires to restrict the manner in which the Subject Premises may be developed, restored, and operated in order to assure the protection, preservation, repair and maintenance of portions of the Designated Structure; and

WHEREAS, Declarant represents and warrants that there are no restrictions, liens, obligations, covenants, easements, limitations or encumbrances of any kind, the requirements of which have not been waived or subordinated, which would prevent or preclude, presently or potentially, the imposition of the restrictions, covenants, obligations, easements and agreements of this Declaration;

NOW, THEREFORE, Declarant does hereby declare and agree that the Subject Premises shall be held, sold, transferred, conveyed and occupied subject to the following

restrictions, covenants, obligations, easements, and agreements, all of which are for the purpose of protecting the Subject Premises, which shall inure to the benefit of the City of New York, and which shall run with the Subject Premises and bind Declarant and its heirs, successors and assigns so long as they have a right, title or interest in the Subject Premises or any part thereof.

## **ARTICLE I DEFINITIONS**

The following words, when used in this Declaration, shall have the following meanings:

1.1 "Application" shall mean the application to the City Planning Commission for the Special Permit.

1.2 "Blade Sign" shall have the meaning set forth in the Recitals to this Declaration.

1.3 "Buildings Department" shall mean the New York City Department of Buildings, or any successor to the jurisdiction thereof.

1.4 "Chairperson of the CPC" shall mean the Chairperson of the City Planning Commission of the City of New York or any successor to the jurisdiction thereof.

1.5 "Chairperson of the LPC" shall mean the Chairperson of the Landmarks Preservation Commission of the City of New York or any successor to the jurisdiction thereof.

1.6 "City" shall mean the City of New York.

1.7 "City Council" shall mean the New York City Council or any successor to the jurisdiction thereof.

1.8 "CPC" shall mean the New York City Planning Commission, or any successor to the jurisdiction thereof.

1.9 "Declarant" shall mean the named Declarant and the heirs, successors and assigns of the named Declarant including, without limitation, any owner of a condominium unit within the Designated Structure, except that Declarant shall not be deemed to include (i) a mortgagee of all or any portion of the Subject Premises until it succeeds to the interest

or obligation of Declarant by purchase, assignment, foreclosure or otherwise, or (ii) a tenant of the Subject Premises, unless such tenant holds a ground lease to all or substantially all of the Subject Premises pursuant to which such tenant is obligated to maintain the exterior of the Subject Premises.

1.10 "DCP" shall mean the New York City Department of City Planning or any successor to the jurisdiction thereof.

1.11 "Designated Structure" shall mean the structure located on Tax Block 798, Lot 41, in Manhattan, which is located in the Ladies' Mile Historic District.

1.12 "Flag Sign" shall have the meaning set forth in the Recitals to this Declaration.

1.13 "Force Majeure" shall mean: strike, lockout or labor dispute(s); inability to obtain materials or reasonable substitutes therefor unless due to any act or failure to act by Declarant; acts of God; unforeseen governmental restrictions, regulations, omissions or controls; enemy or hostile government actions; civil commotion, insurrection, revolution or sabotage; fire or other casualty; inclement weather of such a nature as to make performance or completion of the Landmark Work not feasible unless due to any act or failure to act by Declarant; any damage to the Subject Premises of such a nature as to make completion of the Landmark Work not feasible; a taking of the Subject Premises, or a portion thereof, by condemnation or eminent domain; failure of a public utility to provide power, heat or light; unusual delay in transportation; material delays by the City, State or United States Government, or any agency or instrumentality thereof, in the performance of any work or processing or approval of any applications required in order to permit Declarant to carry out its obligations pursuant to this Declaration unless due to any act or failure to act by Declarant; denial to Declarant by any owner of an enforceable interest in adjoining real property, including any private fee owner or ground lessee of adjoining real property, or any agency of the City or State having an enforceable interest in adjoining real property, including sidewalk or streets, of a right to access to such adjoining real property, if such access is required to accomplish the obligations of the

Declarant pursuant to this Declaration; the pendency of a litigation not initiated by Declarant or similar proceeding which suspends or materially and adversely affects the ability of the Declarant to accomplish the obligations of the Declarant pursuant to this Declaration; or other conditions similar in character to the foregoing which are beyond the control of Declarant. No event shall constitute a Force Majeure unless Declarant complies with the procedures set forth in Sections 2.1 and 6.2 hereof.

1.14 "Landlord" shall mean Majestic Rayon Corporation and Cudge Realty, LLC, and their respective heirs, successors and assigns under the Lease.

1.15 "Landmark Work" shall refer to the restoration work on the Designated Structure identified in Section 2.1(a) below and undertaken in conformity with the C of A which is attached hereto as Exhibit D.

1.16 "Lease" shall have the meaning set forth in the Recitals to this Declaration.

1.17 "LPC" shall mean the Landmarks Preservation Commission of New York City or any successor to the jurisdiction thereof.

1.18 "Mortgagee" shall mean (a) the leasehold mortgagee of all or substantially all of the Subject Premises listed in Exhibit B; (b) the institutional first mortgagee of all or substantially all of the Subject Premises listed in Exhibit B; or (c) the first mortgagee of a condominium unit within the Designated Structure.

1.19 "Party(ies) in Interest" shall mean any party-in-interest listed in Exhibit B and any other party-in-interest to the Subject Premises who has given written notice of its name and address to the CPC and the LPC.

1.20 "Special Permit" shall mean the special permit described in the Recitals to this Declaration.

1.20 "Special Permit Use" shall mean use of the Blade Sign and Flag Signs upon the Designated Structure. Notwithstanding the foregoing, no use shall be deemed a Special Permit Use if it is permitted as-of-right within the Subject Premises by the terms of the Zoning Resolution then in effect.

1.21 "Zoning Resolution" shall mean the Zoning Resolution of the City of New York, effective as of December 15, 1961, as amended from time to time.

## **ARTICLE II DEVELOPMENT, PRESERVATION, REPAIR AND MAINTENANCE OF THE SUBJECT PREMISES**

### 2.1 Sign Permit(s)

(a) The issuance of the Special Permit is premised on, inter alia, the performance of the following restoration work along the Sixth Avenue façade and the c. 1911 portion of the West 22<sup>nd</sup> Street façade within 65.6 feet of Sixth Avenue (collectively, the "Restored Facades", as more particularly shown on the diagram attached as Exhibit E hereto) on the Designated Structure in conformity with the C of A and the requirements thereof (which restoration work shall be referred to as the "Landmark Work") as shown in drawings labeled A9, dated revised September 7, 2012; A4 dated revised October 5, 2012; A2, A3, A5, A6, A14 and A19 dated revised November 9, 2012; A13, A15, A17, A20 and A21 dated revised November 27, 2012; and A7 and A18 dated revised December 6, 2012, prepared by Sawicki Tarella Architecture + Design PC (the "Approved Drawings"); drawings labeled A-001.00 through A-300.00, A-500.00 through A-800.00 and A-805.00 through A-809.00 dated March 25, 2013; A-301.00 and A-804.00 dated revised April 10, 2013, prepared by Joseph S. Tarella, R.A.; DM-100.00, DM 200.00, SP-100.00, SP-200.00, P-100 through P-400.00, EN-100.00, M-100.0 through M-500.00 and FA-100.00 dated March 25, 2013, prepared by Ramez Afify, P.E.; and S-101.00 through S-113.00 dated March 25, 2013, prepared by Anthony T. Volpe, P.E.; and an annotated site plan and unlabeled drawings dated revised September 8, 2014 prepared by Blair Sign Programs:

- cleaning and repairing the stone plinths at the piers at the base of the Designated Structure along the Restored Facades;
- installation of new metal and glass storefront infill featuring cast-metal molding

- profiles to match the historic profiles, pairs of glazed metal-framed doors at each retail entry, and multi-light paneled transoms along the Restored Facades;
- restoration of the c. 1911 decorative storefront piers featuring mosaic tile and cast-metal escutcheons with integral awning armature housing and flagpole anchors along the Restored Facades;
  - installation of new flagpoles at the location of historic flagpole anchors;
  - painting of all new metal storefront framing and decorative elements with a copper-finished paint (Scuffmaster SM 8109) along the Restored Facades;
  - continuation of the new copper-finished paint color at the first story cornice on the c. 1911 West 22<sup>nd</sup> Street façade;
  - painting of the cast-iron and masonry piers a terra-cotta color (Benjamin Moore "Mayflower Red" HC-49) and the masonry bulkheads a tan color on the c. 1911 West 22<sup>nd</sup> Street façade;
  - performance of probes at the polished stone fascia on all Restored Facades and restoration of historic fascia material and details contingent upon findings of probe;
  - at the West 22<sup>nd</sup> Street façade, installation of a pair of metal doors within existing door openings at the seventh bay (reading west to east) and installation of louvers within existing transoms at the seventh bay (reading west to east), with the louvers painted copper to match the new storefront finish;
  - painting of the upper floors at all Restored Facades with all cast-iron columns and fascia to be painted Benjamin Moore "Shaker Beige" HC-45, all window spandrels to be painted Benjamin Moore "Lenox Tan" HC-44 and all window sashes and frames to be painted Benjamin Moore "Texas Leather" AC-3;
  - replication of cast-metal storefront elements in fiberglass; and
  - replacement of louvers above the retail entries on the Sixth Avenue façade.

Notwithstanding anything herein to the contrary, all of Landmark Work set forth in this

Section 2.1(a) has been completed and signed off as complete by the LPC as of the date of this Declaration.

(b) Written notice that the Declarant is seeking a permit or other approval of the Blade Sign and Flag Signs by the Buildings Department ("Sign Permit") shall be provided to the LPC seven days prior to the Declarant applying for such Sign Permit. No Sign Permit which permits a Special Permit Use shall be granted by the Buildings Department or accepted by Declarant until the Chairperson of the LPC shall have given written notice to the Buildings Department that the Landmark Work has been satisfactorily completed by Declarant or the Chairperson of the LPC has certified in writing, as provided in Section 2.2 hereof, that (a) a Force Majeure has occurred and (b) the Chairperson of the LPC has no objection to the issuance of the Sign Permit for, as appropriate, all or part of the Subject Premises. The Chairperson of the LPC shall issue said notice reasonably promptly after Declarant has made written request to the Chairperson of the LPC and has provided documentation to support such request, and the Chairperson of the LPC shall in all events endeavor to issue such written notice to the Buildings Department, or inform Declarant in writing of the reason for not issuing said notice, within twenty-one (21) calendar days after Declarant has requested such written notice. Upon receipt of the written notice from the Chairperson of the LPC that (i) the Landmark Work has been satisfactorily completed or (ii) the Chairperson of the LPC has certified that a Force Majeure has occurred and that the Chairperson of the LPC has no objection to the issuance of the Sign Permit, the Buildings Department may grant, and Declarant may accept, the Sign Permit for the Designated Structure.

(c) Declarant shall permit inspection of the Designated Structure by the Chairperson of the LPC and representatives designated by the Chairperson of the LPC in connection with the notice described in Section 2.1(b) hereof.

(d) (i) Upon application by Declarant, notwithstanding anything contained in any other provision of this Declaration, the Chairperson of the LPC, in the

exercise of his or her reasonable judgment, may certify that the performance or completion of the Landmark Work is delayed due to a Force Majeure as provided in paragraph (ii) below.

(ii) In the event that Declarant reasonably believes that full performance of its obligations to complete the Landmark Work has been delayed as a result of a Force Majeure, Declarant shall so notify the Chairperson of the LPC (with a copy to Landlord) as soon as Declarant learns of such circumstances. Declarant's written notice shall include a description of the condition or event, its cause (if known to Declarant), its probable duration, and in Declarant's reasonable judgment, the impact it is reasonably anticipated to have on the completion of the Landmark Work. The Chairperson of the LPC shall, within twenty-one (21) calendar days of its receipt of Declarant's written notice, (A) certify in writing that a Force Majeure has occurred, including a determination of the expected duration of such delay (the "Delay Notice"), and grant Declarant appropriate relief for such delay, including certifying in writing to the Buildings Department that the Chairperson of the LPC has no objection to the issuance of a Sign Permit, or (B) notify Declarant that it does not reasonably believe a Force Majeure has occurred. With respect to any claim that a Force Majeure has delayed the Declarant's performance or completion of the Landmark Work, the LPC may require that Declarant post a bond or other security in a form and amount acceptable to the Chairperson of the LPC in order to ensure that the Landmark Work is completed. Such alternative security could include, without limitation, alternative or additional conditions on the issuance of any Sign Permit. Any delay caused as the result of a Force Majeure shall be deemed to continue only as long as the Declarant shall be using reasonable efforts to minimize the effects thereof. Upon cessation of the events causing such delay, the Declarant shall promptly recommence or cause to be recommenced the Landmark Work.

(e) Notwithstanding anything else to the contrary contained herein, this

Declaration shall not be deemed to prohibit or restrict Declarant or Landlord from (i) applying for or receiving a temporary certificate of occupancy ("TCO") or a permanent certificate of occupancy ("PCO") for any floor area in the Designated Structure or the remainder of the building which is not to be used for a Special Permit Use; or (ii) obtaining permits or building notices from the Buildings Department to perform work, including tenant work, in the Designated Structure or the remainder of the building prior to the completion of the Landmark Work; or entering into agreements affecting all or any portions of the space in the Designated Structure prior to completion of the Landmark Work.

## 2.2 Preservation, Repair and Maintenance

Declarant hereby covenants and agrees to preserve, repair and maintain, or cause to be preserved, repaired, and maintained, the Restored Facades in sound first-class condition, in accordance with this Declaration, the C of A and the Landmarks Preservation Law. It is understood that certain obligations and duties set forth in this Declaration are above and beyond the requirements of the Landmarks Preservation Law and do not in any way diminish Declarant's obligation and responsibility to comply with all provisions of the Landmarks Preservation Law.

## 2.3. Continuing Maintenance Program

Declarant shall comply with the obligations and restrictions of the continuing maintenance program (the "Continuing Maintenance Program") as set forth below:

(a) Periodic Inspections. Declarant shall establish and carry out a cyclical inspection and maintenance program for the Restored Facades which shall include, without limitation, the following:

(i) At Declarant's expense, an inspection (the "Periodic Inspection") shall be made every five years, on or within two weeks of the anniversary of the issuance

by the LPC of the Notice of Compliance pursuant to the C of A, and thereafter, shall be made on or within every five years from the date of such initial inspection. The Periodic Inspection shall be done by a preservation architect, engineer or other qualified person knowledgeable about the preservation of historic structures (the "Preservation Architect") selected by Declarant from a list prepared by Declarant and approved by the Chairperson of the LPC as to their credentials, which approval shall not be unreasonably withheld or delayed. Declarant shall update such listing upon the request of the Chairperson of the LPC. In addition, Declarant may periodically supplement the list of Preservation Architects, subject to the approval of the Chairperson of the LPC as to their credentials. The Preservation Architect shall make a thorough inspection of the exterior of the Restored Facades and those portions of the interior, as well as those portions to the mechanical systems that are accessible to and under the control of building management, which, if not properly maintained, could affect the condition of the exterior of the Restored Facades. The Periodic Inspection shall include (but not be limited to) the following portions of the Restored Facades: primary and secondary façades.

(ii) The Preservation Architect shall, at the expense of Declarant, submit a report on each Periodic Inspection (the "Periodic Report") to Declarant (with a copy to Landlord) and the LPC within 45 days after each Periodic Inspection. The Periodic Report shall outline the existing conditions of the Restored Facades and detail the work which should be performed in order to maintain the Restored Facades, including all architectural features and elements, in a sound first-class condition, including but not limited to caulking, painting, cleaning, repair of architectural features and elements, checking for rust and repointing of masonry.

(iii) Submission of Local Law 10 & 11 Façade Inspection Report. If the Restored Facades are subject to the Façade Inspection Report requirements of Title 1 RCNY §32-03 et seq., a copy of any such Façade Inspection Report which is submitted to the Buildings Department, shall also be provided at the same time to the LPC. In the

event that the building is found to be unsafe pursuant to such inspection, the Declarant shall notify the LPC simultaneously with Landlord and the Buildings Department, pursuant to Title 1 RCNY §32-03(b)(2)(vii).

(iv) Except as set forth below, Declarant shall perform or cause to be performed all work which a Periodic Report, Facade Inspection Report or Emergency Incident Report (as defined below) identifies as necessary to maintain the Restored Facades, including architectural features and elements, in sound first-class condition. No work shall be performed except pursuant to a permit from the LPC if a permit is required under the Landmarks Preservation Law. If the LPC determines that a specific item of work or method of work as set forth in a Periodic Report, Facade Inspection Report or Emergency Incident Report would be inappropriate or inadequate, the determination of the LPC shall control and Declarant need not and shall not have such specific item performed. Declarant shall have the right to contest in a hearing before the LPC any work called for in a Periodic Report or Emergency Incident Report. Declarant's obligation to perform such contested work or to perform it by a method acceptable to the LPC shall be stayed pending a decision in any such proceeding at the LPC. Declarant shall proceed with, or cause to be proceeded with, all work which is uncontested during the stay pursuant to a permit.

(v) Unless Declarant has notified the LPC in writing that it contests any work as set forth in the preceding paragraph, Declarant shall apply for all necessary permits or certificates from the LPC within 45 days of receiving the completed report from the Preservation Architect. Declarant shall use its best efforts to assure that all repairs, rehabilitation, repointing and restoration work detailed in the Periodic Report or Emergency Incident Report shall be completed at the earliest possible date, but no later than within nine months of the date of issue of the certificate or permit from the LPC, or, if no such certificate or permit is required, within nine months of the date of the Periodic Report or Emergency Incident Report. If for reasons beyond Declarant's control, as

determined by the Chairperson of the LPC, such work cannot be completed within nine months, Declarant shall apply to the LPC for an extension of time within which to complete such work. Such extensions shall be for a stated additional period of time to be related to the period of delay and shall not be unreasonably withheld.

(b) Emergency Protection Program. Declarant in consultation with Landlord shall establish and be prepared to carry out an emergency protection program for the Restored Facades which shall include at the minimum, the following:

(i) If a fire, the elements or any other cause whatsoever damages or destroys the Restored Facades or any part thereof (the "Emergency Incident"), Declarant shall use all reasonable means to save, protect and preserve the Restored Facades at the time of and following the Emergency Incident, including, but not limited to, acting with an approval from the Chairperson of the LPC or his or her designated representatives to stabilize and prevent further damage to or deterioration of the structure, and to secure the Subject Premises from unauthorized access. Declarant shall not remove from the Subject Premises any debris consisting of exterior features of the Restored Facades without an approval from the Chairperson of the LPC or his or her designated representative. Unless necessitated as a safety precaution as ordered by the New York City Departments of Buildings, Health, Fire or Police, or as an action taken in response to a life-threatening situation, the Declarant shall not remove any other debris or otherwise clear the Subject Premises without the approval of the LPC or its Chairperson.

(ii) Declarant shall give immediate written notice of such Emergency Incident to the LPC. Declarant shall also give timely notice to the LPC of the time or times when the New York City Departments of Buildings, Health and Fire will inspect the Subject Premises following the Emergency Incident, in order that the LPC may have a representative present during such inspections.

(iii) Within sixty days of such Emergency Incident, a Preservation Architect shall, at the expense of Declarant, make a thorough inspection of the Restored

Facades and submit a report (an "Emergency Incident Report") to Declarant, Landlord and to the LPC outlining the condition of the structure, assessing the extent of damage, and recommending (A) work, if any, which must be undertaken immediately, upon receipt of proper permits, in order to stabilize and prevent further damage to the Restored Facades, and (B) work that should be performed to repair and restore the Restored Facades to a sound, first-class condition or, alternatively to (A) and (B), that Declarant and Landlord make an application to the LPC for permission to demolish the remaining portions of the Restored Facades.

(iv) With regard to the work to be performed pursuant to subparagraph (iii)(A), Declarant, in consultation with Landlord, shall immediately upon receipt of the Emergency Incident Report request and vigorously pursue all necessary permits and upon their issuance, shall undertake all such work with alacrity. If no permits are required, work shall be undertaken as soon as possible after receipt of the Emergency Incident Report.

(v) With regard to the work to be performed pursuant to subparagraph (iii)(B), within ninety days of receiving the report of the Preservation Architect, Declarant, in consultation with Landlord, shall apply for all necessary permits and certificates from the LPC to repair and restore or to demolish. No work on the exterior of the Restored Facades, and no work on the interior of the Designated Structure adjacent to the Restored Facades which would affect the exterior or which would require the issuance of a permit from the Buildings Department shall be performed except pursuant to a permit from the LPC. If the LPC determines that a recommendation to demolish or to perform a specific item of work or method of work set forth in the report would be inappropriate, using the criteria set forth in the Landmarks Preservation Law, the determination of the LPC shall control and the Declarant shall not have such specific work performed or be entitled to have the Restored Facades demolished unless Declarant or Landlord is obligated to perform such work or demolish the structure in accordance

with an "Unsafe Building Notice" issued by the Buildings Department. All repair, restoration, rehabilitation, repointing, and other work provided for in a certificate or permit shall be completed within nine months of the date of issue of such certificate or permit by the LPC. If such work cannot be completed within nine months for reasons beyond Declarant's control, as determined by the Chairperson of the LPC, Declarant shall apply in writing to the LPC for an extension of time within which to complete such work. Such extensions shall be for a stated additional period of time which is related to the period of the delay and shall not be unreasonably withheld.

(c) Access to Designated Structure. Declarant agrees to provide access to the Designated Structure to the LPC and its designated representatives at reasonable times and upon reasonable written notice, except in cases of emergency, in which event the LPC or its representatives shall have access, if feasible, immediately and without notice, in order to insure that the preservation, repair and maintenance of the Restored Facades is carried out in accordance with this Declaration.

(d) Failure to Perform. In the event that the preservation, repair, or maintenance of the Restored Facades is not performed in accordance with the provisions of this Article, the LPC shall give written notice of such failure to perform to the Declarant with a copy to Landlord. In the event that Declarant, its successors or assigns, fails after sixty days from receipt of written notice from the LPC to perform or shall commence to perform but fail diligently to prosecute to completion, any such repair and/or maintenance, or any obligations of Declarant set forth in this Declaration, the City of New York may perform, subject to notice and cure rights set forth in Section 4.4 below, all of the necessary work at the sole cost and expense of the Declarant and shall have the right to enter onto the Subject Premises and to charge said Declarant for all the actual cost of such work, together with actual administrative and legal fees incurred in the collection thereof. Such actual costs shall include, but not be limited to, payments by the City of New York to any lawyers, consultants, contractors, painters, engineers, architects

and skilled artisans required to be hired to perform or supervise such work. To the extent such actual costs are expended by the City of New York, the LPC shall have a lien on the Subject Premises as if a lien had been filed, perfected and enforced for materials and labor under Article 2 of the Lien Law of the State of New York. Notwithstanding the foregoing, in the event that the Designated Structure is converted to a condominium, Declarant's right to notice and cure provided in this subsection shall apply only to the condominium board and to any owner of space occupied by retail uses in the Designated Structure; provided that the LPC has received notice by said parties in accordance with Section 6.2.

### **ARTICLE III CONDOMINIUMS**

#### **3.1 General**

In the event that the Designated Structure is converted to a condominium in accordance with Article 9B of the New York State Real Property Law ("RPL"), the condominium board ("Board") shall have the responsibility to carry out all of Declarant's obligations and the authority to exercise all of Declarant's rights under this Declaration and upon such assumption, Burlington Coat Factory of Texas, Inc., a Delaware Corporation, shall be released from its liability thereunder. The following provisions of this Article 3 shall be operative only in the event that the Board is formed as described in this Section 3.1.

#### **3.2 Board**

The Board shall require that each owner of a condominium unit (the "Unit Owner") appoint the Board as his Attorney-in-Fact with respect to modification, amendment, or cancellation of the Declaration.

### 3.3 Condominium Declaration

Every deed conveying title to, or a partial interest in, the Subject Premises and every lease of all or substantially all of the Subject Premises shall contain a recital that the grantee is bound by the terms of the Condominium Declaration and By-laws which shall incorporate an obligation by the Board to comply with the provisions of Article 3 of this Declaration. In addition, every deed, lease, the offering plan, and by-laws shall include the following language: Portions of this building are obligated by a restrictive declaration to be maintained in a sound, first-class condition in perpetuity. This obligation includes a thorough inspection of portions of this building every five years and the preparation of an existing conditions report that shall be submitted to the Landmarks Preservation Commission. All work identified in the existing conditions report as necessary to maintain this building in a sound, first-class condition must be expeditiously undertaken.

## **ARTICLE IV EFFECT AND ENFORCEMENT**

### 4.1 Effective Date

(a) This Declaration shall have no force and effect unless and until the occurrence of one of the following, to be referred to as the "Effective Date": (a) the expiration of 21 days after the Special Permit has been approved if no review is undertaken by the City Council pursuant to Section 197-d of the New York City Charter or (b) final approval of the Special Permit pursuant to Section 197-d of the New York City Charter. The Declaration shall become immediately effective upon the Effective Date. If, before the Effective Date, Declarant requests or causes the application for the Special Permit to be withdrawn or abandoned, or if final action has been taken having the effect of denying the Special Permit, then, upon notice to CPC and LPC, this Declaration shall not become effective, shall be automatically canceled and shall be of no force and

effect.

(b) If the Special Permit is at any time declared invalid or is otherwise voided by final judgment of any court of competent jurisdiction from which no appeal can be taken or for which no appeal has been taken within the applicable statutory period provided for such appeal, then, upon entry of said judgment or the expiration of the applicable statutory period for such entry, as the case may be, this Declaration shall be automatically canceled without further action by Declarant and shall be of no further force or effect and the CPC shall, if requested by Declarant, provide Declarant and Landlord with a letter in recordable form stating that the Declaration has been so canceled and is of no further force and effect. In such event, if Declarant has obtained a Sign Permit allowing any Special Permit Use on the Designated Structure, Declarant shall promptly, after receipt of such letter, apply to the LPC and Buildings Department for approval to remove the Blade Sign and Flag Signs as set forth in Section 5.5 below.

#### 4.2 Filing and Recording

Declarant shall file and record at its sole cost and expense this Declaration in the Register's Office, indexing it against the Subject Property, immediately upon the Effective Date. Declarant shall promptly deliver to the CPC and the LPC duplicate executed originals, promptly following the Effective Date and, following recordation, a true copy of this Declaration as recorded, as certified by the Register. If Declarant fails to so record this Declaration, the City may record this Declaration, at the sole cost and expense of Declarant, who shall promptly pay to the City such costs together with fees for purchase of a reasonable number of certified copies of the recorded Declaration.

#### 4.3 Additional Remedies

Declarant acknowledges that the City is an interested party to this Declaration, and consents to enforcement by the City, administratively or at law or equity, of the

restrictions, covenants, easements, obligations and agreements contained herein. Declarant also acknowledges that the remedies set forth in this Declaration are not exclusive, and that the City and any agency thereof may pursue other remedies not specifically set forth herein including, but not limited to, the seeking of a mandatory injunction compelling Declarant, its heirs, successors or assigns, to comply with any provision, whether major or minor, of this Declaration.

#### 4.4 Notice and Cure

(a) Before any agency, department, commission or other subdivision of the City of New York institutes any proceeding or proceedings to enforce the terms or conditions of this Declaration because of any violation hereof, it shall give Declarant sixty (60) days' written notice of such alleged violation (with a copy to Landlord), during which period Declarant shall have the opportunity to effect a cure of such alleged violation. If Declarant commences to effect a cure during such sixty (60) day period and proceeds diligently towards the effectuation of such cure, the aforesaid sixty (60) day period shall be extended for so long as Declarant continues to proceed diligently with the effectuation of such cure. In the event that title to the Subject Premises, or any part thereof, shall become vested in more than one party, the right to notice and cure provided in this subsection shall apply equally to all parties with a fee interest in the Subject Property, or any part thereof, including ground lessees; provided the LPC has received notice by said parties in accordance with Section 6.2. Notwithstanding the foregoing, in the event that the Designated Structure is converted to a condominium, the right to notice and cure provided in this subsection shall apply only to the condominium board and to any owner of space occupied by retail uses in the Designated Structure; provided that the LPC has received notice by said parties in accordance with Section 6.2.

(b) If Declarant fails to observe any of the terms or conditions of this Declaration, and the Declarant fails to cure such violation within the applicable grace

period provided in paragraph 4.4(a) of this Declaration, then prior to the institution by any agency or Department of the City of any action, proceeding, or proceedings against Declarant in connection with such failure, Landlord, and/or a Mortgagee who has given written notice of its name and address to the CPC and the LPC, shall be given thirty (30) days written notice of such alleged violation, during which period Landlord and/or such Mortgagee shall have the opportunity to effect a cure of such alleged violation. If Landlord and/or such Mortgagee commences to effect a cure during such thirty (30) day period and proceeds diligently towards the effectuation of such cure, the aforesaid thirty (30) day period shall be extended for so long as Landlord and/or such Mortgagee continues to proceed diligently with the effectuation of such cure.

(c) If after due notice as set forth in this Section 4.4, Declarant, Landlord and/or the Mortgagee fail to cure such alleged violations, the City may exercise any and all of its rights, including those delineated in this Section and may disapprove any amendment, modification, or cancellation of this Declaration on the sole grounds that Declarant is in default of any material obligation under this Declaration.

#### 4.5 Acknowledgment of Covenants

Declarant acknowledges that the restrictions, covenants, easements, obligations and agreements in this Declaration, which are an integral part of the Special Permit, will protect the value and desirability of the Subject Premises as well as benefit the City of New York and all property owners within a one-half mile radius of the Subject Premises. Those restrictions, covenants, easements, obligations and agreements shall be covenants running with the land, and shall bind Declarant and its successors, legal representatives, and assigns.

#### 4.6 No Other Enforceable Restrictions

Declarant represents and warrants that there are no enforceable restrictions of

record on the use of the Subject Premises, nor any present or presently existing future estate or interests in the Subject Premises, nor any lien, obligation, enforceable covenant, limitation or encumbrance of any kind which precludes, directly or indirectly, imposition on the Subject Premises of the restrictions, covenants, easements and obligations of this Declaration.

#### 4.7 Governance

This Declaration shall be governed by and construed in accordance with the laws of the State of New York.

#### 4.8 Severability

In the event that any provision of this Declaration shall be deemed, decreed, adjudged or determined to be invalid or unlawful by a court of competent jurisdiction and the judgment of such court shall be upheld on final appeal, or the time for further review of such judgment on appeal or by other proceeding has lapsed, such provision shall be severable, and the remainder of this Declaration shall continue to be of full force and effect.

#### 4.9 Applicability to Other City Agencies

Declarant covenants to include a copy of this Declaration as part of any application submitted to the LPC, CPC, Buildings Department, Board of Standards and Appeals ("BSA"), New York State Attorney General (in the event of a proposed conversion of the Designated Structure to condominium ownership) or any agency succeeding to their respective jurisdictions. The restrictions and obligations contained herein are a condition of any permit or Sign Permit to be issued by the Buildings Department and Declarant will take all reasonable steps to ensure that they are so listed. Failure to carry out such

obligation beyond any applicable grace period shall constitute sufficient cause for the Commissioner of the Buildings Department to revoke any building permit issued pursuant to the Special Permit or to apply to the BSA or to a court of competent jurisdiction for revocation of the Sign Permit or any permit issued by the Buildings Department.

#### 4.10 Limitation of Liability

(a) Declarant shall be liable in the performance of any term, provision or covenant in this Declaration, subject to the following sentences and subject to Section 4.12 below. Notwithstanding anything to the contrary contained in this Declaration, the City and any other party or person relying on the Declaration will look solely to the leasehold estate and interest of Declarant in the Subject Premises, on an in rem basis only, for the collection of any money judgment recovered against Declarant, and no other property of Declarant shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies of the City or any other person or entity with respect to this Declaration, and Declarant shall have no personal liability under this Declaration. The liability of any Unit Owner under this Declaration shall be limited to the amount of such Unit Owner's prorated share, based on such Unit Owner's interest in the common elements of the Condominium, of the costs of compliance with this Declaration. For the purposes of this Section 4.10, "Declarant" shall mean "Declarant" as defined in Article I hereof, as well as any principals, disclosed or undisclosed, partners, affiliates, officers, employees, shareholders or directors of Declarant.

(b) The restrictions, covenants and agreements set forth in this Declaration shall be binding upon the Declarant and any successor-in-interest only for the period during which Declarant and any successor-in-interest is the holder of a leasehold interest in or is a party-in-interest of the Subject Premises and only to the extent of such leasehold

interest or the interest rendering Declarant a party-in-interest. At such time as the named Declarant has no further leasehold interest in the Subject Premises and is no longer a party-in-interest of the Subject Premises, Declarant's obligations and liability with respect to this Declaration shall wholly cease and terminate from and after the conveyance of Declarant's interest and Declarant's successors-in-interest in the Subject Premises by acceptance of such conveyance automatically shall be deemed to assume Declarant's obligations and liabilities hereunder to the extent of such successor-in-interest's interest.

(c) Following the expiration, earlier termination or extension of the term of the Lease, Landlord, in its sole discretion, shall have the right (but not the obligation) to assume, or to cause a subsequent tenant of the demised premises and/or other portion of the Designated Structure (a "New Tenant") to assume, Declarant's obligations under this Declaration by written notice delivered to the LPC, in which event the Blade Sign and Flag Signs may remain affixed to the Designated Structure and Landlord or such New Tenant, as applicable, may apply to the LPC for all necessary permits and certificates to modify the Blade Sign and Flag Signs to reflect such New Tenant's occupancy. In the event that Landlord elects not to assume, or to permit a New Tenant to assume, Declarant's obligations under this Declaration, Landlord shall promptly apply to the LPC and the Buildings Department for approval to remove the Blade Sign and Flag Signs and restore and repair the portion of the façade of the Designated Structure to which the Blade Sign and Flag Signs are affixed, and upon receipt of such approval, promptly remove the Blade Sign and Flag Signs, as set forth in Section 5.5 below.

#### 4.11 Subordination

Declarant shall cause every individual, business organization or other entity that between the date hereof and the date of recordation of this Declaration becomes a party-in-interest to the Subject Premises, to execute this Declaration or to subordinate such

interest to the Declaration and waive its right to execution. Any mortgage or other lien encumbering the Subject Premises after the recording date of this Declaration shall be subject and subordinate hereto.

4.12 Right to Convey

Nothing contained herein shall be construed as requiring the consent of the CPC, the LPC, the City, any agency thereof or any other person or entity to any sale, transfer, conveyance, mortgage, lease or assignment of any interest in the Subject Property or the Designated Structure.

**ARTICLE V AMENDMENTS, MODIFICATIONS  
AND CANCELLATIONS**

5.1 Amendment or Cancellation

Except as provided in paragraph 4.1 above, this Declaration may be amended or canceled only upon application by LPC on behalf of Declarant and only with the express written approval of the CPC and of the City Council, but only in the event that the City Council reviewed the Special Permit pursuant to Section 197-d, and no other approval or consent shall be required from any public body, private person or legal entity of any kind; provided, however, that no such approval shall be required in the case of any cancellation pursuant to paragraph 5.5.

5.2 Minor Modification

The Chairperson of the LPC and the Chairperson of the CPC may, by express written consent, administratively approve modifications to the Declaration that the CPC has determined to be minor. Such minor modifications shall not be deemed amendments requiring the approval of the CPC, the LPC, the City Council or any other agency or department of the City of New York.

### 5.3 Recording and Filing

Any modification, amendment or cancellation of this Declaration, except pursuant to paragraph 5.4, shall be executed and recorded in the same manner as this Declaration. Following any modification, amendment or cancellation, Declarant shall immediately record it and provide one executed and certified true copy thereof to each of the CPC and the LPC and upon failure to so record, permit its recording by the CPC or the LPC at the cost and expense of Declarant.

### 5.4 Landmark Work Modification

In the event that the Landmark Work is modified, pursuant to a future approval by the LPC, a notice indicating such modification, subject to approval by the LPC, may, in lieu of a modification of the Declaration pursuant to section 5.1, be recorded in the City Register's Office. Such recordation of such notice shall be in accordance with Section 5.3 of the Declaration, and proof of recordation shall be provided to CPC and LPC.

### 5.5 Surrender or Nullification

In the event that Declarant elects not to use the Blade Sign and Flag Signs pursuant to the Special Permit and Landlord does not elect to assume, or to cause a New Tenant to assume, Declarant's obligations under this Declaration, or in the event that the Special Permit has lapsed under Section 11-42 of the Zoning Resolution, Declarant may surrender the Special Permit to CPC and proceed with any use permitted by the Zoning Resolution and in accordance with the Landmarks Preservation Law as if such Special Permit had not been granted. Declarant shall provide Landlord with written notice of Declarant's intent to surrender the Special Permit at least 45 days prior to such surrender of the Special Permit, so as to allow Landlord to have an opportunity to assume the Declarant's obligations under this Declaration. As a condition to the surrender of the

Special Permit, Declarant shall file applications with the LPC and the Buildings Department to remove the Blade Sign and Flag Signs and to repair and restore the portion of the façade of the Designated Structure to which the Blade Sign and Flag Signs was affixed and upon receipt of such approval of the LPC and the Buildings Department, Declarant shall promptly remove the Blade Sign and Flag Signs and undertake such repairs and restoration of the façade. This Declaration shall be rendered null and void upon recordation of an instrument filed by Declarant discharging it of record, with copies to LPC and CPC, the recordation of which instrument shall constitute a waiver of the right to use the Subject Property pursuant to the Special Permit.

## ARTICLE VI MISCELLANEOUS

### 6.1 Exhibits

Any and all exhibits, appendices, or attachments referred to herein are hereby incorporated fully and made an integral part of this Declaration by reference.

### 6.2 Notices

All notices, demands, requests, consents, waivers, approvals and other communications which may be or are permitted, desirable or required to be given, served or deemed to have been given or sent hereunder shall be in writing and shall be sent: (a) if intended for Declarant to Scott Ciocco, Burlington Coat Factory of Texas, Inc., a Delaware Corporation, 1830 Route 130 North, Burlington, NJ 08016, with copies sent to Howard A. Zipser, Akerman LLP, 666 Fifth Avenue, 20<sup>th</sup> Floor, New York, NY 10103 and to Richard Aibel c/o Cudge Realty, LLC, 116 West 23<sup>rd</sup> Street, 4<sup>th</sup> Floor, New York, NY 10011 and S. Nicholas Hockens, Greenberg Traurig, LLP, 200 Park Avenue, New York, NY 10016; (b) if intended for the CPC, to 120 Broadway, 31<sup>st</sup> Floor, New York, NY 10271 (or then-official address), Attn: Chairperson; (c) if intended for the LPC, to One Centre Street, 9 North, New York, NY 10007 (or then-official address), Attn:

Chairperson; and (d) if intended for the City Council, to the Office of the Speaker, City Council, City Hall, New York, New York 10007. Declarant, or its representatives, by notice given as provided in this paragraph 6.2, may change any address for the purposes of this Declaration. Each notice, demand, request, consent, approval or other communication shall be either sent by registered or certified mail, postage prepaid, or delivered by hand, and shall be deemed sufficiently given, served or sent for all purposes hereunder five (5) business days after it shall be mailed, or, if delivered by hand, when actually received. Declarant shall provide Landlord with copies of all notices, demands, requests, consents, waivers, approvals and other communications sent to the CPC, LPC or City Council pursuant to the terms of this Declaration.

#### 6.3 Indemnification

Provided that Declarant is found by a court of competent jurisdiction to have been in default in the performance of its obligations under this Declaration after having received written notice of such default and opportunity to cure as provided above, and such finding is upheld on final appeal, or the time for further review of such finding on appeal or by other proceeding has lapsed, Declarant shall indemnify and hold harmless the City from and against all of its reasonable legal and administrative expenses arising out of or in connection with the City's enforcement of Declarant's obligations under this Declaration.

#### 6.4 Effect on Lease

Nothing herein shall be deemed to modify, amend, cancel or abrogate Declarant's or Landlord's rights or obligations under the Lease.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, Declarant has executed this Declaration as of the day and year first above written.

BURLINGTON COAT FACTORY  
OF TEXAS, INC., A DELAWARE CORPORATION

\_\_\_\_\_  
By: Robert LaPenta  
Vice President

STATE OF NEW YORK )  
 )  
COUNTY OF NEW YORK )

On the \_\_\_\_ day of \_\_\_\_\_, 2018, before me, the undersigned, a Notary Public in and for said State, personally appeared Robert LaPenta, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or the person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:



SCHEDULE OF EXHIBITS

- Exhibit A - Metes and Bounds of Subject Premises
- Exhibit B - Certificate as to Parties in Interest
- Exhibit C - Waiver and Subordination
- Exhibit D - LPC Reports
- Exhibit E - Diagram "Location of Restored Facades"

**Exhibit A**

**Metes and Bounds of Subject Premises**

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City and State of New York, bounded and described as follows:

BEGINNING at a point made by the westerly line of Avenue of the Americas (formerly known as 6<sup>th</sup> Avenue) with the northerly line of 22<sup>nd</sup> Street;

RUNNING THENCE northeasterly along the westerly line of Avenue of the Americas, 170 feet 9 inches;

THENCE northwesterly parallel with 23<sup>rd</sup> Street 60 feet;

THENCE again northeasterly parallel with Avenue of the Americas, 26 feet 9 inches to the southwesterly side of 23<sup>rd</sup> Street;

THENCE northwesterly along the southwesterly side of 23<sup>rd</sup> Street, 90 feet;

THENCE southwesterly and parallel with Avenue of the Americas 98 feet 9 inches to the center line of the block;

THENCE northwesterly and parallel with West 23<sup>rd</sup> Street, 58 feet 4 inches;

THENCE southwesterly parallel with Avenue of the Americas, 98 feet 9 inches to the northeasterly side of 22<sup>nd</sup> Street;

THENCE along the northeasterly side of 22<sup>nd</sup> Street, 208 feet 4 inches to the point of place of BEGINNING.

**Exhibit B**

**Certificate as to Parties in Interest**

[SEE ATTACHED]

**Exhibit C**

**Waiver and Subordination**

[SEE ATTACHED]

**Exhibit D**

**LPC Reports**

[SEE ATTACHED]

**Exhibit E**

**Location of Restored Facades**

