



CITY PLANNING COMMISSION

December 6, 2006 | Calendar No. 2

C 060310 ZSM

IN THE MATTER OF an application submitted by 23rd Street Development LLC 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:

1. the use regulations of Section 42-10 to allow residential use (Use Group 2 uses); and
2. the height and setback regulations of Section 43-43 (Maximum Height of Front Wall and Required Front Setbacks), and the rear yard regulations of Section 43-26 (Minimum Required Rear Yards) and 43-28 (Special Provisions for Through Lots);

to facilitate the construction of a 21-story and 3-story mixed use development on property located at 35-41 West 23rd Street (Block 825, Lots 20 and 1001-1005), in an M1-6 District, within the Ladies' Mile Historic District, Community District 5, Borough of Manhattan.

The application (C 060310 ZSM) was filed by 23rd Street Development LLC on January 31, 2006, for a special permit pursuant to Section 74-711 of the Zoning Resolution to modify the use provisions of Section 42-10 to allow residential use and to modify the height and setback regulations of Section 43-43, and the rear yard regulations of Section 43-26, and the provisions for through lots of Section 43-28. This application would facilitate the construction of a 21-story residential development on a through-block site between West 23rd and 24th Streets, located in the midblock between Fifth and Sixth Avenues, in the Ladies' Mile Historic District.

BACKGROUND

The site of the proposed new development is an irregularly-shaped through-block parking lot with 41 feet and six inches of frontage on West 23rd Street and 19 feet of frontage along West 24th Street. The lot has a depth of 197 feet and six inches and is located roughly halfway between Fifth and Sixth avenues. The zoning lot also includes a five-story, 44-foot wide historic store building east of the parking lot along 23rd Street. Today, this building contains ground floor retail with residential units above as permitted by a variance granted by the Board of

Standards of Appeals. Adjacent to the development site, to the west, along West 23rd Street, is a through-block eight-story commercial loft building. Along West 24th Street, to the east of the site is a six-story commercial loft building, and to the west is a five-story commercial structure.

The area surrounding the site is dominated by loft buildings constructed during the late nineteenth and early twentieth centuries. Most of the light manufacturing businesses that once populated these structures have since left the area, which is now largely commercial in nature. In all directions but to the north, the surrounding blocks are experiencing an influx of residential units through new construction and conversions permitted by rezonings of Sixth Avenue (C950318 ZMM, 1995), the Ladies' Mile Rezoning encompassing the Fifth to Sixth Avenue midblocks south of the project site (C040331 ZMM, 2004) and the Toy Center buildings between West 23rd and 25th Streets along Broadway, on the eastern end of the block (C060210 ZMM, 2006). In the early 1980s, many residential units were also grandfathered by the City in manufacturing districts in this area. The project site is located in the southern portion of an M1-6 (10.0 FAR) district that extends from West 23rd to 31st Streets, between Fifth and Sixth Avenues. M1-6 districts are high-density districts that allow a range of manufacturing and commercial uses, but do not allow new residential construction or conversions to residential use. The site is also included within the Ladies' Mile Historic District.

Buildings in the neighborhood vary in form and height. The area's loft buildings rise from the streetline without setback to heights ranging from 60 to 200 feet. Some smaller structures remain interspersed in midblock locations, and a number of much taller buildings exist in the area, especially along the avenues. The 292-foot Masonic Temple stands at the western end of the block at Sixth Avenue, the 296-foot tall Flatiron Building and 345-foot Madison Green building are one block east of the site. Many taller high-rise buildings stand along Sixth Avenue to the west and around Madison Square Park to the east. The area also contains several parking lots on sites once occupied by buildings that have been demolished.

The proposed development would be a 90,670 square foot residential development on the parking lot site, including approximately 24,600 square feet of floor area obtained from and

cantilevered over the adjacent merged lot. The proposed development would include a 21-story tower fronting on West 23rd Street and a three-story townhouse fronting on West 24th Street. The development would include 63 residential units with a lobby and retail uses on the ground floor fronting on West 23rd Street. The ground floor of the structure would cover the entire lot. The proposed development presents a faceted glass design that would reach a height of 278 feet on the West 23rd Street side of the lot. Indoor recreation space at the sixth story would include a swimming pool with glass walls cantilevered 22 inches over the sidewalk as a cornice. The proposed tower would cantilever approximately 10 feet over the five-story building on the zoning lot.

The proposed residential building is not permitted in the M1-6 zoning district. In addition, it does not comply with certain height and setback and yard regulations as further described below. The applicant has applied for the subject special permit subject to Section 74-711 which allows the City Planning Commission to modify use and bulk, except floor area, regulations on zoning lots with existing buildings in historic districts.

The base of the West 23rd Street portion of the proposed building is 41 feet and 5 inches wide for the first five stories. At this point, the building would begin cantilevering over the adjacent five-story building on the merged zoning lot to the east. In the next eight stories, it would continue to widen to a maximum cantilever of twelve feet before beginning to recede over the remaining eight stories. This cantilever does not require a modification of bulk regulations because the proposed building would tilt over a building on the same zoning lot.

In addition to the cantilever over the adjacent building, the proposed 21-story tower also curves in a northward direction above the sixth floor as it rises. This curve is evident in both the West 23rd Street façade and its rear façade facing the rear yard. Though the building would tilt away from West 23rd Street, it would penetrate the mandatory initial front setback of 10 feet which is required above the sixth floor. Above the 18th floor, the building angles away from West 23rd Street to a degree where the initial front setback is no longer breached. The sky exposure plane is also penetrated between the 6th and 21st floors. Because of the faceted design of the proposed

building, the depth of the penetration into the initial front setback and sky exposure plane also varies at different east-west points along the façade.

As the proposed building cantilevers to the north, it extends into the required rear yard to varying degrees at different heights and different east-west points. Where the rear yard coincides with the proposed townhouse structure on West 24th Street, a 40-foot rear yard equivalent is required between the West 23rd and 24th Streets structures. The encroachment into the 40-foot rear yard equivalent begins at the third story and reaches a point of maximum encroachment of 31 feet at the 21st story, 180 feet above the roof of the townhouse.

A 20-foot rear yard is required where the rear lot line of the proposed development abuts that of 14-18 West 24th Street, the six-story commercial loft structure east of the location of the proposed townhouse. A rear yard of greater than 20 feet is provided here until the 16th story, where the proposed tower begins to encroach into the 20-foot required rear yard. At a height of 256 feet, the tower would encroach 20 feet into the required 20-foot rear yard. 14-18 West 24th Street rises to a height of 88 feet, eight inches and provides only a 3-foot, eight-inch rear yard.

A 20-foot rear yard is also required where the lot line of the proposed development abuts the rear lot line of 22 West 24th Street, the five-story commercial structure west of the location of the proposed townhouse. The 20-foot rear yard is provided until the twelfth story where the proposed tower begins to encroach into the required rear yard. The maximum encroachment of 15 feet is at the 21st story. The building at 22 West 24th Street would provide a rear yard of approximately nine feet.

As part of the special permit, the applicant would restore and maintain in perpetuity, the adjacent building at 37 West 23rd Street, according to specifications agreed upon by the Landmarks Preservation Commission. This neo-Greco/Queen Anne style store building was designed by D. and J. Jardine and built in 1880.

In order to grant the special permit, Section 74-711 requires a report from the LPC establishing a

continuing maintenance program and a permit from the LPC stating that any bulk modifications are appropriate. The Landmarks Preservation Commission issued a report on July 19, 2005, stating that a program for continuing maintenance has been established for the adjacent five-story building at 37 West 23rd Street. The report also states that bulk and use modifications and restorative work contributes to a preservation purpose. On May 8, 2006, the Landmarks Preservation Commission issued a Certificate of Appropriateness stating the bulk modifications proposed for the new building relate harmoniously to the buildings in the Ladies Mile Historic District.

ENVIRONMENTAL REVIEW

This application (C 060310 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 designated CEQR number is 06DCP004M. The lead is the City Planning Commission.

After a study of the potential environmental impact of the proposed action, a revised Negative Declaration was issued on August 7, 2006.

UNIFORM LAND USE REVIEW

The application (C 060310 ZSM) was certified as complete by the Department of City Planning on August 7, 2006, and was duly referred to Community Board 5 and the Borough President, in accordance with Article 3 of the Uniform Land Use Review Procedure (ULURP) rules.

Community Board Public Hearing

Community Board 5 held a public hearing on the original application (C 060310 ZSM) on September 14, 2006, and on that day, by a vote of 22 in favor, 8 opposed, 2 abstentions, adopted a resolution recommending disapproval of the application. The resolution of the Community

Board included the following statements:

The bulk of the proposed new building significantly destroys the continuity of the elegant decorative historic street wall and despoils the special aesthetic character of the Ladies' Mile Historic District streetscape;

The sizable and numerous spatial encroachments of the bulk of the new building negatively impact the open space in the vicinity;

This oversized 21-story midblock building is uncharacteristic for the district and its height will cast deep new shadows across the neighborhood;

The negative impact on the surrounding buildings in the immediate vicinity of the site by the substantial encroachment will result in diminished access to light and air;

Even if this building were located on the end of the block where the average is 12 to 15 stories, it would still far be incongruous to the neighborhood; and

The nonconforming residential use is not consistent with the existing use patterns, since all other adjacent residential units provide for live/work uses, and the only emerging residential uses in the vicinity are the buildings surrounding Madison Square Park (per zoning changes in 1960) and the recently rezoned residential corridor which runs up both side of 6th Avenue, where 7 new residential end of block towers have been built or are currently under construction.

Borough President Recommendation

The application (C 060310 ZSM) was considered by the Borough President, who issued a recommendation for approval of the application on October 20, 2006, subject to the following condition:

The Manhattan Borough President recommends conditional approval of ULURP Application No. C 060310 ZSM, if the application is amended to modify the proposed waivers of the rear yard requirements.

City Planning Commission Public Hearing

On October 11, 2006 (Calendar No. 6), the City Planning Commission scheduled October 25, 2006, for a public hearing on the application (C 060310 ZSM). The hearing was duly held on October 25, 2006, (Calendar No. 8). There were six speakers in favor of the application and two speakers in opposition.

Speakers in support of the application included the applicant's representatives, an attorney, a

historian, and the project architect; two residents of the existing five-story building on the zoning lot; and the Director of Land Use for the Manhattan Borough President. The historian described the surrounding context. The attorney described the necessary zoning actions and the involvement of the Landmarks Preservation Commission and aspects of its review and approval of a Certificate of Appropriateness. The project architect described the design of the architecture in detail focusing on the requested encroachment into the rear yard. The Director of Land Use for the Manhattan Borough President discussed the Borough President's concerns about the intrusion of the upper levels of the proposed building into the required rear yard. Tenants of the existing building on the zoning lot stated that that building's condominium board supported the proposed project.

Speakers opposing the project included the Chair of the Community Board 5 who reiterated concerns stated in the Board's resolution regarding use, height, and encroachment into the rear yard of the proposed development. The second speaker in opposition was a member of the public who expressed a general concern about air rights from merged zoning lots.

There were no other speakers and the hearing was closed.

CONSIDERATION

The Commission believes the application for a special permit (C 060310 ZSM) is appropriate.

In order to grant the special permit, the Commission must find that the such bulk modifications 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 that such use modification have minimal adverse effects on the conforming uses within the building and in the surrounding area.

The Commission believes that the proposed building is compatible with other buildings in the vicinity in scale and massing. The Commission notes that the area has many existing large buildings including the 292-foot tall Masonic Temple building located on the western end of the block and the 180-foot tall former Toy Center building located on the eastern end of the block.

Other taller buildings located nearby include the 300-foot tall Flatiron building, the 345-foot tall Madison Green Building to the north, and the Met Life Tower located on the east side of Madison Square Park. The proposed building, at 278 feet, is slightly lower in height than the Masonic Temple building. Unlike older existing buildings in the area, the proposed building has a unique design that gently arcs back from West 23rd Street, giving it a sense of lightness and airiness. The Commission notes also that the proposed building is located in an M1-6 district, a high density, non-contextual zoning district, and along a heavily trafficked wide street with excellent access to public transit.

The Commission believes that the requested intrusions by the proposed 21-story tower into the required front setback, sky exposure plane, and rear yard are appropriate. The south side of the tower fronting on West 23rd Street encroaches into the initial setback distance and the sky exposure plane. The encroachment begins at the sixth story, at 85 feet, and is at its maximum degree of encroachment between the sixth and ninth stories. From the ninth story upwards, the encroachment is progressively reduced as the front of the tower curves and recedes from the street line.

The Commission believes that the proposed bulk modifications has minimal impact on the open space and structures nearby. The Commission notes that while the north side of the tower encroaches into the required rear yard at several points, due to the multi-faceted and angled design of the rear façade the building basically does not intrude into the rear yard until tower has “cleared” the heights of building that abut onto the shared rear yard line. Further, the Commission notes that a large area of sky and a great deal of ambient light reaches the rear yard below, even with the encroachment from the tower. The proposed building’s obstruction of sky is modest at any point where two buildings are directly opposite one another, and that the points of greatest encroachment occurs at an elevation where the proposed building is much taller than the other building abutting the rear yard. The rear windows of the tower look out into an open area partly above the rear yard and partly above the abutting West 24th Street buildings. The townhouse portion of the development site has a maximum height of 90 feet, the building located at 14-18 West 24th street is approximately 111-feet tall, and the building at 22 West 24th Street is

65-feet tall. The great majority of apartments in the tower building with windows facing West 24th Street would have an effective rear yard and viewing distance that exceeds what is required by zoning. The Commission notes the high likelihood of this open area remaining above the buildings fronting West 24th Street.

The Commission notes that the only residential windows that will face onto the rear yard are those of the buildings on the subject zoning lots, and the building located at 22 West 24th Street. In the rear yard equivalent portion of the zoning lot, at the east side of the townhouse, the encroachment of the tower into the rear yard begins at the sixth floor and rises to the tenth floor, and intrudes into the rear yard only above the height of the townhouse which has a maximum height of 90 feet. The Commission notes that the point of maximum encroachment occurs at a point 180 feet higher than the top of the townhouse. At the eastern end, at the rear yard line shared with 14-18 West 24th Street, a rear yard of a minimum of 30 feet is provided up until the 12th story of the tower. Above that height, the building begins to reach over the yard, but does not begin to encroach into the required 20 foot rear yard until the 16th story. The Commission notes that the 14-16 West 24th Street is a commercial building with a rear yard of its own of less than three feet. At the western portion of the rear yard, where the tower building faces 22 West 24th Street, the rear yard encroachment occurs at approximately twice the height of the 65-foot tall 22 West 24th Street building.

The Commission believes that while there is still some presence of manufacturing in the M1-6 in which the proposed building is located, there is virtually none on West 23rd Street. The proposed residential use is consistent with the land uses south of the site, along West 23rd Street, and north along Sixth Avenue, which was rezoned from an M1-6 to a C6-4X in the mid 1990s to allow for as-of-right residential use. Additionally, the residential use proposed for this site would be consistent with a more recent rezoning adopted earlier this year which extended an existing C5-2 along the Fifth Avenue end of the block and additional 175 feet westward into the block, and within 150 feet of the development site. The one residential unit proposed for the townhouse on West 24th Street will have negligible effect on the character of that street.

FINDINGS

The City Planning Commission hereby makes the required findings pursuant to Section 74-711 of the Zoning Resolution:

- 1) That the bulk modifications shall have minimal impact on structures or open space in the vicinity in terms of scale, location and access to light and air, and
- 2) That the 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 action 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 Charter, that based on the environmental determination, and the consideration and findings described in this report, the application submitted by 23rd Street Development LLC pursuant to Sections 197-c and 201 of the New York City Charter and proposed for modification pursuant to Section 2-06(c)(1) of the Uniform Land Use Review Procedure for the grant of a special permit pursuant to Section 74-711 of the Zoning Resolution to modify:

1. the use regulations of Section 42-10 to allow residential use (Use Group 2 uses); and
2. the height and setback regulations of Section 43-43 (Maximum Height if Front Wall and Required Front Setbacks), and the rear yard regulations of Section 43-26 (Minimum Required Rear Yards) and 43-28 (Special Provisions for Through Lots);

to facilitate the construction of a 21-story and 3-story mixed use development on property located at 35-41 West 23rd Street (Block 825, Lots 20 and 1001-1005), in an M1-6 District, within the Ladies Mile Historic District, Community District 5, Borough of Manhattan, is approved pursuant to Section 74-711, subject to the following conditions:

- 1) The property that is the subject of this application (C 060310 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 Gruzen Samton LL, filed with this application and incorporated in this resolution:

<u>Drawing No.</u>	<u>Title</u>	<u>Last Date Revised</u>
Z-1	Zoning Analysis	11/11/05
Z-2	Lot Plan	11/11/05
Z-3	Site Plan	11/11/05
Z-37	Site Sections	11/11/05
Z-38	Site Sections	11/11/05
Z-39	Site Sections	11/11/05

- 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) Development pursuant to this resolution shall be allowed only after the attached Restrictive Declaration marked as Exhibit 1 hereto, together with any necessary administrative and technical changes acceptable to counsel to the Landmarks Preservation Commission and the City Planning Commission, is executed by 23rd Street

Development LLC and the Board of Managers of the 35 West 23rd Street Condominium.

- 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) 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 report and resolution and any subsequent modifications 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.
- 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 and the attached restrictive declaration 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 or of the attached restrictive declaration.
- 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 060310 ZSM), duly adopted by the City Planning Commission on December 6, 2006, (Calendar No. 2), is filed with the Office of the Speaker, City Council, and the Borough President in accordance with the requirements of Section 197-d of the New York City Charter.

AMANDA M. BURDEN, AICP, Chair

KENNETH J. KNUCKLES, Esq., Vice Chair

**ANGELA M. BATTAGLIA, P.E., ALFRED C. CERULLO, III, RICHARD W. EADDY,
JANE D. GOL, LISA A. GOMEZ, CHRISTOPHER KUI, JOHN MEROLO,**
Commissioners

**IRWIN G. CANTOR, ANGELA R. CAVALUZZI, R.A., KAREN PHILLIPS,
DOLLY WILLIAMS, Commissioners Voting No**

Exhibit 1

23RD STREET DEVELOPMENT LLC

RESTRICTIVE DECLARATION

Dated: December _____, 2006

Location: Block 825, Lots 20 and 1001-1005
New York County, New York

Record & Return to:

DeCampo, Diamond, and Ash
747 Third Avenue, Suite 37C
New York, New York 10017
Attention: Francis R. Angelino, Esq.

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DECLARATION made as of the ____ day of December, 2006, by 23rd Street Development LLC ("23rd Street Development"), a New York limited liability company, having offices c/o Horizen Global LLC, 9 East 19th Street, 6th floor, New York, NY 10003, Attn: Mr. Michael Yanko and the Board of Managers of the 35 West 23rd Street Condominium [the "Board"], having an address at 35-37 West 23rd Street, New York, NY 10010 (hereinafter collectively referred to as the "Declarant"):

W I T N E S S E T H:

WHEREAS, 23rd Street Development is the owner in fee simple of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 825, Lot 20 on the Tax Map of the City of New York and by the street address 39-41 West 23rd Street, a/k/a 20 West 24th Street (the "Subject Property"). 23rd Street Development also has obtained development rights from the adjacent lot at 35-37 West 23rd Street, which property is designated as Block 825, Lots 1001-1005 (the "Development Rights Property"). The Subject Property and the Development Rights Property merged into one zoning lot pursuant to a Declaration of Zoning Lot Restrictions, dated September 19, 2005, and are collectively referred to as the "Subject Premises;" and

WHEREAS, the Subject Premises is improved by a public parking lot (the "Parking Lot") and a five story mixed commercial and residential building at 35-37 West 23rd Street on the Development Rights Property, which together have approximately

10,968 square feet of zoning lot area (as such term is defined by Section 12-10 of the New York City Zoning Resolution (the "Zoning Resolution"); and

WHEREAS, the Subject Premises is located within an M1-6 zoning district and is part of the Ladies' Mile Historic District. The Subject Premises is more particularly described on Exhibit A attached hereto; 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 Subject Premises as the Ladies' Mile Historic District; and

WHEREAS, First American Title Insurance Company ("TITLE CO."), a title company, has certified in the certification ("Certification") attached hereto as Exhibit B as of October 30, 2006, and acknowledged as of December 1, 2006, that Declarant, as fee owner, and CIF 23rd Street Lender, LLC, as mortgagee ("BANK"), are parties in interest ("Parties in Interest"), as that term is defined in the zoning lot definition in Section 12-10 of the Zoning Resolution, to the Subject Premises; and

WHEREAS, the Board has been granted power of attorney, pursuant to a declaration establishing a plan for condominium ownership for 35 West 23rd Street, dated March 25, 1983, to execute this Declaration on behalf of the unit holders of 35-37 West 23rd Street and recorded with the City Registrar of the City of New York on April 28, 1983 at Reel 682, Page 1181; and

WHEREAS, BANK has waived its right to execute this Declaration, a copy of which waiver is attached hereto as Exhibit C; and

WHEREAS, all Parties in Interest to the Subject Property have executed this Declaration or waived their rights to execute this Declaration; and

WHEREAS, pursuant to Application No. 060310 ZSM, dated January 31, 2006 (the "Application"), Declarant applied to the CPC for a special use permit pursuant to Section 74-711 of the Zoning Resolution (the "Special Permit") to allow the development of new residential units on the Subject Premises with an accessory spa and approximately 7,653 feet of ground floor retail space (the "Residential Structure"); and

WHEREAS, Declarant at the public hearing on May 24, 2005, requested the LPC issue a report to the CPC for the Application; and

WHEREAS, at the public meeting on July 19, 2005, following a public meeting on June 7, 2005 and said public hearing, the LPC voted to issue the Report to the CPC as requested for the Application, and subsequently issued report MOU 06-4549, dated December 16, 2005 (the "Report"), annexed hereto as Exhibit D; and

WHEREAS, at the public meeting of July 19, 2005, the LPC decided to grant a Certificate of Appropriateness for the alterations required in connection with the Special Permit, and subsequently issued Certificate of Appropriateness 06-6577, dated May 8, 2006 (the "CofA") annexed hereto as Exhibit E; and

WHEREAS, on December 12, 2005, the LPC issued a Certificate of No Effect (the "CNE") No. 06-4546 for restoration work on the Development Rights Property annexed hereto as Exhibit F; and

WHEREAS, Declarant has agreed to certain obligations and restrictions for the protection, preservation, repair and maintenance of the Development Rights Property in accordance with the Preservation Program as set forth in Article II of this Declaration; and

WHEREAS, Declarant has agreed to restrict the manner in which the Subject Premises may be developed, restored and operated and shall inure to the benefit of all the land, including City-owned land, lying within one-half (½) mile of the Subject Premises; and

WHEREAS, Declarant has agreed to restrict the manner in which the Subject Premises may be developed, restored, and operated in order to assure the protection, repair and maintenance of the Development Rights Property; and

WHEREAS, Declarant represents and warrants that there are no restrictions of record on the use of the Subject Premises, nor any presently existing future estate or interest in the Subject Premises, nor any liens, obligations, covenants, easements, limitations or encumbrances of any kind, the requirements of which have not been waived or subordinated or made subject to this Declaration, which would prevent or

preclude, directly or indirectly, 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, which are for the purpose of protecting value and desirability of the Subject Premises and which shall run with the Subject Premises and be binding upon and inure to the benefit of any party having any right, title or interest in the Subject Premises and their successors, heirs, legal representatives and assigns.

ARTICLE I
DEFINITIONS

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

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

1.2 "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.

1.3 "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.

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

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

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

1.7 "Declarant" shall mean the named Declarant and the heirs, successors and assigns of the named Declarant, except that Declarant shall not be deemed to include (i) a mortgagee of all or any portion of the Subject Property 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 lease to all or substantially all of the Subject Premises.

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

1.9 "Development Rights Property" shall mean the five-story structure located on Tax Block 825, Lots 1001-1005, which is a contributing structure in the Ladies' Mile Historic District.

1.10 "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; acts of terrorism; 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 Restoration 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 Restoration 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 4.21 hereof.

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

1.12 "Mortgagee" shall mean (a) the institutional first mortgagee of all or substantially all of the Subject Property listed in Exhibit B or (b) the first mortgagee of a condominium unit within the Designated Structures.

1.13 "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.

1.14 "Special Permit" shall mean the special permit described on pages 4 and 5 hereof.

1.15 "Special Permit Use" shall mean residential use. 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.

1.15 "Zoning Resolution" shall mean the Zoning Resolution of the City of New York.

ARTICLE II
PRESERVATION, REPAIR AND MAINTENANCE

2.0 Plans. 23rd Street Development covenants and agrees to develop the Subject Property in accordance with the following plans: Z-1, Z-2, Z-3, Z-37, Z-38 and Z-39, dated 11/11/05, prepared by Gruzen Samton LLP and Zapata and Associates, and attached hereto as Exhibit G (the "Plans").

2.1 Restoration Work and Certificate of Occupancy. (a) The issuance of the Special Permit is premised on, inter alia, the performance of the following restoration work on the Development Rights Property in conformity with the CNE and the requirements thereof (which restoration work shall be referred to as the "Restoration Work"):

West 23rd Street Elevation:

Brick Masonry

1. Undertake tests to determine feasibility of removing the paint and coating from the brick masonry. If the coating is a cementitious material, it should be left on the brick surface and a polychrome scheme should be considered for the upper floors that distinguishes the materials and reflects the historic configuration based on photographs.
2. Clean all brick masonry based on tests.
3. Rake and repoint all (100%) of the open joints. Finish joints to match the surrounding joints in color, size, and texture.
4. Remove all metal embeds and patch resulting voids with restoration patching mortar to match the color, texture, and strength of the existing coating, or the brick surface below if the coating is cleaned to from the facade.
5. Patch all cracked brick masonry with restoration patching mortar to match the color, texture, and strength of the existing coating, or the brick surface below if the coating is cleaned to from the facade.

Stone Masonry

1. Undertake tests to determine feasibility of removing the paint and coating from the stone masonry. If the coating is a cementitious

material, it should be left on the masonry surface and a polychrome scheme based on historic photographs should be considered.

2. Rake and repoint all (100%) of the open stone joints. Finish the joints to match the surrounding joints in color and texture.

Cast Iron

1. Remove the existing paint and coating from the cast-iron surface with methods based on tests.
2. Undertake tests to determine the original and subsequent paint colors and composition.
3. Prepare and paint all cast iron to match the historic color.

Second Story Storefront

1. Return to the historic second-floor storefront condition. Remove all non-original plywood and replace with a higher quality wood, color to be based on historic photographs.
2. Undertake tests to determine the original and subsequent paint color and composition of the sheet metal colonnettes and cornice.
3. Prepare paint all sheet metal elements based on tests and historic photographs.
4. Repair damaged or missing elements of the sheet metal cornice in kind.

Storefront

1. Provide new storefront, which recalls the dimensions and proportions of the historic storefront using contemporary materials (such as wood) and details.

Sheet Metal Cornice

1. Undertake tests to provide the original and subsequent paint colors and paint composition of the cornice.
2. Prepare and paint the cornice based on tests.
3. Replace in-kind the missing and damaged "1879" ornament.
4. Repair and replace the missing and damaged sections of the cornice to match the historic condition.
5. Replicate and replace the pediment based on historic photographs.

Windows

1. Remove all non-original windows (third through fifth floor).
2. Provide new wood windows; new windows to match the historic

windows in configuration, dimension, profile, detail and color. Color to be based on historic photographs.

(b) Written notice that 23rd Street Development is seeking a temporary certificate of occupancy ("TCO") or permanent certificate of occupancy ("PCO") shall be provided to the LPC seven days prior to 23rd Street Development applying for a TCO or PCO. No TCO or PCO which permits a Special Permit Use shall be granted by the Buildings Department or accepted by 23rd Street Development until the Chairperson of the LPC shall have given written notice to the Buildings Department that the Restoration Work required by the latest inspection report of the Development Rights Property has been satisfactorily completed by 23rd Street Development or the Chairperson of the LPC has certified in writing, as provided in Section 2.1(d) hereof, that (i) a Force Majeure has occurred and (ii) the Chairperson of the LPC has no objection to the issuance of a TCO or PCO for, as appropriate, all or part of the Subject Property. The Chairperson of the LPC shall issue said notice reasonably promptly after 23rd Street Development 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 23rd Street Development in writing of the reason for not issuing said notice, within twenty-one (21) calendar days after 23rd Street Development has requested such written notice. Upon receipt of the written notice from the Chairperson of the LPC that (A) the Restoration Work has been satisfactorily completed or (B) 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 a TCO or PCO, the Buildings Department may grant, and 23rd Street Development may accept, a TCO or PCO for the Development Rights Property.

(c) Declarant shall permit inspection of the Development Rights Property 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) 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 Restoration Work is delayed due to a Force Majeure as provided in paragraph (e) below.

(e) In the event that Declarant reasonably believes that full performance of its obligations to complete the Restoration Work has been delayed as a result of a Force Majeure, Declarant shall so notify the Chairperson of the LPC 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 Restoration 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 TCO or PCO for, as appropriate, all or part of the Subject Property, 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 Restoration 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 Restoration Work is completed. Such alternative security could include, without limitation, alternative or additional conditions on the issuance of any PCO or TCO. 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 the Restoration Work.

(e) Notwithstanding anything else to the contrary contained herein, this Declaration shall not be deemed to prohibit or restrict Declarant from (i) applying for or receiving a TCO or a PCO for any floor area in the Development Rights Property which is not to be used for a Special Permit Use; or (ii) obtaining permits or building notices

from the Building's Department to perform work in the Development Rights Property prior to the completion of the Restoration Work; or entering into agreements affecting all or any portions of the space in the Development Rights Property prior to completion of the Restoration Work.

2.2 Declarant hereby covenants and agrees to preserve, repair and maintain the Development Rights Property, in accordance with this Declaration and the Landmarks Preservation Law and not to alter the Development Rights Property except in accord with all the terms and conditions of this Declaration 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 obligations and responsibility to comply with all provisions of the Landmarks Preservation Law.

2.3 The Development Rights Property shall be kept in sound, first-class condition. It is recognized that certain elements of this structure may require work and therefore may be in less than sound first class condition during the time allowed for the work designated to be carried out as provided in Paragraph 2.4.

2.4 Declarant shall establish and carry out a cyclical preservation and maintenance program for the Development Rights Property (the "Continuing Maintenance Program"). Such Continuing Maintenance Program shall include at the minimum the following:

A. Yearly inspections shall be made by the building management to see that the building is kept in sound first class condition with regard to the exterior portions of the Development Rights Property and those portions of the interior of the Development Rights Property which, if not properly maintained, would cause or tend to cause the Development Rights Property to deteriorate, decay, become dangerous or otherwise fall into a state of disrepair.

B. Declarant shall cause a first cyclical maintenance report (the "Maintenance Report") to be prepared and submitted to LPC, if there is no satisfactory Maintenance Report on file with the LPC, within three (_3_) months subsequent to the date of issuance of the Special Permit. At Declarant's expense, an inspection (the

"Periodic Inspection") shall be made every five (5) years, on or within two weeks of the anniversary date of the filing of the first cyclical maintenance report, by a preservation architect, or architect specializing in preservation or other qualified person (hereinafter referred to as "Preservation Architect") selected by Declarant from a list prepared by the Declarant and whose credentials have been approved by the LPC, who shall make a thorough inspection of the exterior and those portions of the interior of the Development Rights Property which, if not properly maintained, would cause or tend to cause the Development Rights Property to deteriorate, decay, become dangerous or otherwise fall into a state of disrepair, which inspection shall include but not be limited to:

- 1) All masonry portions of the building, including but not limited to:
 - a) All Walls;
 - b) Foundations;
 - c) All brick, and mortar joints;
 - d) Stone sills;
 - e) Paved areas, sidewalks, entrance areaway;
 - f) Parapet, coping and corbelling;
 - g) All chimneys and flues;
 - h) Stonework (existing and new);
 - i) Caulking where necessary, with particular reference to joints between terra cotta and ironwork;
- 2) All metal work;
- 3) All areas of the roof, flashing, drainage and rainwater systems;
- 4) All skylights;
- 5) All mechanical systems and equipment, including but not limited to:
 - a) Plumbing;
 - b) Electrical and lighting fixtures;
 - c) Heating and air conditioning;
 - d) Sprinkler system;
 - e) Elevators.

C. The Preservation Architect shall, at the expense of Declarant, submit the Maintenance Report to the Declarant and the LPC within 60 days after the Commission has approved the list of preservation architects, outlining the existing conditions of the Development Rights Property and detailing the work which should be performed on the Development Rights Property in order to maintain the structure, including all of its architectural features and elements, in sound first-class condition and shall address all types of work including but not limited to:

1. Painting;

2. Cleaning;
3. Repair of architectural features and elements;
4. Resurfacing of walls, repointing of masonry and waterproofing.

D. Submission of Local Law 10 & 11 Facade Inspection Report. If the

Development Rights Property is subject to the Facade Inspection Report requirements of Title 1 RCNY § 32-03 et seq., a copy of any such Facade Inspection Report which is submitted to the New York City Department of Buildings, 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 the owner and the Department of Buildings, pursuant to Title 1 RCNY § 32-03(b)(2)(vii).

E. Except as set forth below, Declarant shall perform all work which a Maintenance Report, Facade Inspection Report or Emergency Incident Report (as defined below) identifies as necessary to maintain the Development Rights Property, 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 Maintenance 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 items performed. Declarant shall have the right to contest in a hearing before the LPC any work called for in a Maintenance 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 all work which is uncontested during the stay pursuant to a permit.

F. 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, repainting and Restoration Work detailed in a Maintenance 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 Maintenance 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; however, Declarant shall use all best efforts to complete such work as quickly as possible.

2.5 Emergency Protection Program. Declarant shall establish and be prepared to carry out an emergency protection program for the Development Rights Property which shall include at the minimum, the following:

1. If a fire, the elements or any other cause whatsoever damages or destroys the Development Rights Property or any part thereof (the "Emergency Incident"), Declarant shall use all reasonable means to save, protect and preserve the Development Rights Property 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 Development Rights Property, 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 Development Rights Property 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 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.

2. 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.

3. Within 60 days of such Emergency Incident, a Preservation

Architect shall, at the expense of Declarant, make a thorough inspection of the Development Rights Property and submit a report (an "Emergency Incident Report") to Declarant and to the LPC outlining the condition of the Development Rights Property, 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 Development Rights Property, and (B) work that should be performed to repair and restore the Development Rights Property to a sound, first-class condition or, alternatively to (A) and (B), that Declarant make an application to the LPC for permission to demolish the remaining portions of the Development Rights Property.

4. With regard to the work to be performed pursuant to subparagraph 3(A), Declarant 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.

5. With regard to the work to be performed pursuant to subparagraph 3(B), within 90 days of receiving the report of the Preservation Architect, Declarant shall apply for all necessary permits and certificates from the LPC to repair and restore or to demolish the Development Rights Property. No work on the exterior of the Development Rights Property, and no work on the interior of the Development Rights Property which would affect the exterior or which would require the issuance of a permit from the Department of Buildings 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 Development Rights Property demolished unless Declarant is obligated to perform such work or demolish the structure in accordance with an "Unsafe Building Notice" issued by the Department of Buildings. 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; however, Declarant shall use all best efforts to complete such work as quickly as possible.

2.6 Failure to Perform. In the event that the preservation, repair, or maintenance of the Development Rights Property 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. 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 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 Development Rights Property 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 Development Rights Property; provided that the LPC has received notice by said parties in accordance with Section 4.21.

2.7 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.

2.8 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 heirs, successors, legal representatives, and assigns. Reference in this Declaration to Declarant shall be deemed to include such heirs, successors, legal representatives, mortgagees and assigns to the extent of their interest in the Development Rights Property.

2.9 Access to Development Rights Property. Declarant agrees to provide access to the Development Rights Property 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 Development Rights Property is carried out in accordance with this Declaration.

ARTICLE III
CONDOMINIUM BOARD

3.1 In the event that the Residential Structure is converted to a condominium in accordance with Article 9B of the New York State Real Property Law ("RPL"), the condominium board of the Residential Structure (the "Board of the Residential Structure") shall have the responsibility to carry out all of 23rd Street Development's obligations and the authority to exercise all of 23rd Street Development's rights under this Declaration and upon such assumption, 23rd Street Development shall be released from its liability thereunder. The following provisions of this Article 3 shall be operative only in the event that the Board of the Residential Structure is formed as described in this Section 3.1.

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

3.3 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 of the Residential Structure to comply with the provisions of Article 3 of this Declaration.

ARTICLE IV
MISCELLANEOUS

4.1 This Declaration shall have no force and effect unless and until the occurrence of the following, to be referred to as the "Effective Date": final approval of the Special Permit by the CPC. 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.

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 with a letter in recordable form stating that the Declaration has been so canceled and is of no further force and effect. In the event that Declarant has obtained a certificate of occupancy allowing any Special Permit Use in the Subject Premises, Declarant shall promptly, after receipt of such letter, obtain a revised certificate of occupancy from the Buildings Department reflecting the cessation of any such Special Permit Use in the Subject Premises.

4.2 Declarant shall file and record at its sole cost and expense this Declaration in the City's Register's Office, indexing it against the Subject Premises, 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 Those restrictions, covenants, obligations, easements and liens contained in this Declaration that pertain to or affect the Subject Premises or portions thereof shall be considered covenants running with the Subject Premises, and shall inure to the benefit of the City of New York and be binding upon Declarant and all of its heirs, successors, legal representatives, mortgagees in possession, and assigns.

4.4 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 Subject Premises to condominium ownership) or any agency succeeding to their respective jurisdictions.

4.5 The restrictions and obligations contained herein are a condition of any permit or Certificate of Occupancy to be issued by the Building 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 Certificate of Occupancy or any permit issued by the Buildings Department.

4.6 Declarant shall cause every individual, business organization or other entity (including another mortgagee) 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.

4.7 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.

4.8 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.

4.9 Declarant acknowledges that this Declaration is neither a contract nor an agreement with the City, the CPC or the Chairperson, and that neither the City nor any City agency or official has any affirmative obligations under this Declaration.

4.10 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 forty-five (45) days written notice of such alleged violation, 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 forty-five (45) day period and proceeds diligently towards the effectuation of such cure, the aforesaid forty-five (45) 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 Premises, or any part thereof, including ground lessees; provided the LPC has received notice by said parties in accordance with Section 4.21. Notwithstanding the foregoing, in the event that the Subject Premises is converted to a condominium, the right to notice and cure provided in this subsection shall apply only to the Board and to any owner of space occupied by retail uses in the Subject Premises; provided that the LPC has received notice by said parties in accordance with Section 4.21.

4.11 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 Section 4.10 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, 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 such Mortgagee shall have the opportunity to effect a cure of such alleged violation. If 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 such Mortgagee continues to proceed diligently with the effectuation of such cure.

4.12 If after due notice as set forth in Sections 4.10 and 4.11, Declarant and 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.

4.13 Declarant represents and warrants that there are no enforceable restrictions of record on the use of the Subject Property, the Development Rights Property or the Subject Premises, nor any present or presently existing future estate or interests in the Subject Property, the Development Rights Property or 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.

4.14 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 4.15 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 fee 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, "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.

4.15 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 fee interest in or is a Party in Interest of the Subject Premises and only to the extent of such fee interest or the interest rendering Declarant a Party in Interest. At such time as the named Declarant has no further fee 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.

4.16 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, the Development Rights Property or the Subject Premises.

4.17 Except as provided in paragraph 4.1 above, this Declaration may be amended or canceled only upon application by LPC on behalf of Declarant.

4.18 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.

4.19 Any modification, amendment or cancellation of this Declaration 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.

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

4.21 All notices, demands, requests, consents, waivers, approvals and other communications (each of which shall hereafter be referred to as a “notice”) 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, if intended for Declarant, to 39 West 23, LLC, having offices c/o Horizen Global LLC, 9 East 19th Street, 6th floor, New York, NY 10003, Attn: Mr. Michael Yanko, with a copy to Francis R. Angelino, Esq., c/o DeCampo, Diamond & Ash, 747 Third Avenue, Suite 37C, New York, New York 10017, and to President, Board of Managers, 35 West 23rd Street Condominium, 35 West 23rd Street, New York, NY 10010; if intended for the CPC, to the CPC at 22 Reade Street, New York, NY 10007-1216 (or its then-official address), Attn: Chairperson; if intended for the LPC, to the LPC at One Centre Street, 9th floor, New York, NY 10007 (or its then-official address), Attn: Chairperson; and, if intended for the City Council, to the City Council at the Office of the Speaker, City Council, City Hall, New York, New York 10007 (or its then-official address). Declarant, or its representatives, by notice given as provided in this paragraph 4.21, may change any address for the purposes of this Declaration. Each notice, demand, request, consent, approval or other communication shall be sent either 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.

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

4.23 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.

4.24 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.

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

23RD STREET DEVELOPMENT LLC

By: _____

Name: _____

Title: _____

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ____ day of _____, 2006, before me personally came Michael Yanko, to me known or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, who being by me duly sworn, did depose and say that (s)he resides at _____; that (s)he is the _____ of 23RD Street Development LLC described in and which executed the foregoing instrument; that (s)he had authority to sign same; and (s)he acknowledged to me that (s)he executed the same as the act and deed of said corporation for the use and purposes herein mentioned.

Notary Public

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

Board of Managers of 35 West 23rd Street Condominium

By: _____

Name: _____

Title: _____

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ____ day of _____, 2006, before me personally came _____, to me known or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, who being by me duly sworn, did depose and say that (s)he resides at _____; that (s)he is the _____ of the Board of Managers of 35 West 23rd Street Condominium described in and which executed the foregoing instrument; that (s)he had authority to sign same; and (s)he acknowledged to me that (s)he executed the same as the act and deed of said corporation for the use and purposes herein mentioned.

Notary Public

SCHEDULE OF EXHIBITS

- Exhibit A - Metes and Bounds of Subject Premises
- Exhibit B - Certification pursuant to Zoning Lot Subdivision C of Section 12-10 of the Zoning Resolution of the City of New York
- Exhibit C - Waiver of Execution of Restrictive Declaration and Subordination of Mortgage
- Exhibit D - Report of the Landmarks Preservation Commission to the City Planning Commission, dated December 16, 2005
- Exhibit E - Certificate of Appropriateness, dated May 8, 2006
- Exhibit F - Certificate of No Effect, dated December 12, 2005
- Exhibit G - Plans

