

DECLARATION OF COVENANTS AND RECIPROCAL EASEMENTS

6205722

THIS DECLARATION OF COVENANTS AND RECIPROCAL EASEMENTS (this "Declaration") is made this 27th day of October, 1995, by FACTORY STORES OF AMERICA, INC., a Delaware corporation ("Declarant").

WITNESSETH:

WHEREAS, Declarant is the owner of that tract or parcel of land located in Draper City, Salt Lake County, Utah, being more particularly described as Lot 2 on that certain Factory Stores of America Subdivision (the "Subdivision Plat") recorded as Entry Number 6168179 in Book 95-9P, Page 235 of the real estate records of the Office of the Recorder of Salt Lake County, Utah (said tract or parcel of land, together with all improvements and personal property located thereon, including any future development of said tract or parcel of land, being hereinafter referred to as "Parcel 1"); and

WHEREAS, Declarant is also the owner of that tract or parcel of land located in Draper City, Salt Lake County, Utah, being more particularly described as Lot 1 on the Subdivision Plat (said tract or parcel of land, together with all improvements and personal property located thereon, including any future development of said tract or parcel of land, being hereinafter referred to as "Parcel 2"); and

WHEREAS, Declarant has entered into a contract to transfer Parcel 2 to D & T Investments, L.L.C., a Utah limited liability company ("Purchaser"); and

WHEREAS, Parcel 2 is contiguous with Parcel 1 (Parcel 1 and Parcel 2 hereinafter being collectively referred to as the "Parcel's" and individually being referred to as a "Parcel"); and

WHEREAS, Declarant desires to dedicate, create, grant and establish certain easements over each Parcel in favor of the other Parcel and to otherwise create certain rights and obligations benefitting and burdening each Parcel (the owners, occupants, successors and assigns of any Parcel, or any portion thereof, as well as any lessee of any Parcel or portion thereof who has assumed all of the obligations of the owning party, are hereinafter individually called the "Owner", and collectively the "Owners");

NOW, THEREFORE, for and in consideration of the premises and other benefits to be derived by Declarant and each and every subsequent Owner and its successors and assigns of each of the Parcels, Declarant hereby declares that each of the Parcels shall be held, sold, and conveyed subject and subordinate to the easements and other rights and obligations granted, created, established, declared or otherwise set forth herein for the use, benefit and enjoyment of the applicable Parcel.

11/03/98 6205722 1118 PM 54-00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
SECURITY TITLE INS AGENCY
REC BY: B GRAY DEPUTY - WI

BK 7263P62549

1. Easements.

(a) Access and Parking.

(1) Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, Parcel 1 and the Owner thereof, its officers, agents, employees, customers, guests, invitees, licensees, tenants, subtenants and the successors and assigns of each of them, the right, privilege and easement of a perpetual, non-exclusive easement to go upon and use the roadways and drives on Parcel 2 for the purposes of access, ingress, egress, and regress by pedestrian and vehicular traffic to and from Parcel 2.

(2) Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of Parcel 2 and the Owner thereof, its officers, agents, employees, customers, guests, invitees, licensees, tenants, subtenants and the successors and assigns of each of them, the right, privilege and easement of a perpetual, non-exclusive easement to go upon and use the roadways and drives on Parcel 1 shown on Exhibit "A" attached hereto and made a part thereof by this reference, for the purpose of access, ingress, egress, and regress by pedestrian and vehicular traffic to and from Parcel 1 and adjacent public roadways.

(3) So long as the traffic flow on the Parcel of the other Owner is not materially and adversely impacted, and there remains direct access between Parcel 1 and Parcel 2, either Owner shall have the right to relocate the roadways and drives on its Parcel and to locate or relocate and configure or reconfigure, on its Parcel, the parking areas and individual parking places located thereon; provided that each Parcel shall at all times comply with the federal, state and local requirements (including, without limitation, the Americans With Disabilities Act and zoning requirements) applicable to such Parcel as if the other Parcel did not exist.

(b) Drainage.

(1) Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, Parcel 1 and the Owner thereof, a perpetual, non-exclusive easement for the drainage and discharge of storm water from Parcel 1 in, to, over, under, across and through Parcel 2 to the extent that the Detention Basin Area located on Parcel 2, as shown on the Survey, has sufficient excess capacity after discharge of storm water on Parcel 2 to retain discharge storm water from Parcel 1 or that alternative facilities for the discharge of storm water have been installed as described below. As used herein, "Survey" means that certain survey dated April 21, 1995, revised May 17, 1995, and prepared by Bingham Engineering, a copy of which Survey is attached hereto as Exhibit "A" and incorporated herein by this reference.

(2) All storm water from Parcel 2 and discharge from Parcel 1 to the extent of excess capacity must be discharged into and retained in the Detention Basin Area as shown on the Survey. At such time as catch basins and underground storm lines have been installed on Parcel 2 in connection with an overall plan for removal and discharge of storm water for the Parcels and any adjoining parcels, storm water drainage shall be implemented by the use of catch basins and underground storm lines on Parcel 2; no open ditches will be permitted. The Owner of Parcel 2 shall be under no obligation to install catch basins and underground storm lines or accept storm water discharge from Parcel 1 in excess of the capacity of the Detention Basin Area shown on the Survey. However, the Owner of Parcel 2 shall cooperate with the Owner of Parcel 1 and any adjoining parcels in implementing a plan for storm water discharge.

(c) **Sewer.** No on-site septic system or sanitary sewer treatment facility will be permitted on either Parcel.

(d) **Utility Easement.** Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, Parcel 1, and the Owner thereof, a perpetual non-exclusive easement in, to, upon, over, under and across Parcel 2 (but not within the areas on or over which buildings are from time to time constructed) for the purpose of the operation, installation, maintenance, repair, replacement and use of and connection with underground water and gas mains, electric power lines and other underground utility lines and related facilities (collectively, the "Utility Line(s)") necessary to serve the improvements from time to time located on Parcel 1. The location of the easement for each such Utility Line shall be as shown on the Survey (subject to relocation as provided below). Notwithstanding anything to the contrary set forth hereinabove, the Owner of Parcel 2 shall have the right, at its sole cost and expense, to relocate elsewhere within Parcel 2 any Utility Line(s) serving Parcel 1, provided that the utility service or capacity for Parcel 1 served by such Utility Line(s) shall not be unreasonably interrupted or materially reduced in connection with such relocation; and provided, further, that any such Utility Line(s) shall be entirely underground. The Owner of Parcel 1 may maintain, repair and replace such Utility Line(s) on Parcel 2 serving Parcel 1, provided that such repair, maintenance and replacement is performed expeditiously, in accordance with all governmental regulations, and in a manner so as not unreasonably to interfere with the conduct or operation of any business on Parcel 2 affected thereby. Promptly after each exercise of any such installation, maintenance, repair, replacement or connection work on Parcel 2, the Owner of Parcel 1 shall, at its sole cost and expense, restore those portions of Parcel 2 affected by such installation, maintenance, repair, replacement or connection to no less than their condition and appearance prior to such installation, maintenance, repair, replacement or connection.

(e) **General Use.** The Owner of each of the Parcels shall be entitled to use its respective Parcel for any purpose not inconsistent with the rights or limitations hereby granted or created. Any reconfiguration of roadways, parking and traffic flow on a Parcel shall not materially and adversely affect the other Parcel. Notwithstanding the foregoing, the Owner of Parcel 1 shall have the right to approve any point of ingress or egress from Parcel 2, such approval not to be unreasonably withheld.

(f) **No Rights to General Public.** Nothing contained herein shall ever be deemed to create any rights for the benefit of the general public, or to constitute any of the affected areas a dedicated public thoroughfare for either vehicles and/or pedestrians or other lawful use. The parties shall do all things necessary to perpetuate the status of the easements created by this Declaration as private easements, including cooperating with each other in the periodic publication of legal notices or physically barring access to the affected areas as may be required by law.

2. **Maintenance Covenant.** The Owner of each Parcel shall maintain, repair and replace, or shall cause to be maintained, repaired and replaced, all buildings and improvements on its respective Parcel, including, without limitation, the exterior facades of all buildings and other structures located on its respective Parcel, so as to keep the same at all times in a safe, attractive, good and functional condition. The Owner of each Parcel shall be responsible for keeping their respective Parcel free from refuse, rubbish, oil spills, garbage and trash and shall cause the same to be removed at its own expense or at the expense of its tenants.

3. **Parcel 2 Operating Covenants.** As partial consideration for the easements set forth in Paragraph 1 above, Parcel 2 shall be held, transferred, sold, conveyed, used, occupied, rented, mortgaged or otherwise encumbered subject to the following covenants and restrictions:

(a) **No Interference with Access.** No improvements shall be erected on Parcel 2 which materially interfere with the access to Parcel 1 or the visibility from the adjoining public roadways, of the signs or improvements on Parcel 1.

(b) **Permitted Use.** Subject to the limitations of subparagraph 1(e), the Owner of Parcel 2 may use Parcel 2 for the purpose of operating a retail store or stores, professional office space, or a bank, and for no other purpose whatsoever.

(c) **Architectural and Design Approval.** Preliminary plans and specifications for buildings, utilities, signs, improvements, and landscaping to be constructed and installed on Parcel 2 are attached hereto as Exhibit B; include, without limitation, (i) site plans and drawings, (ii) elevations, exterior designs and descriptions of proposed exterior materials, (iii) sign plans, (iv) parking plans, (v) exterior lighting plans, (vi) landscaping plans, and (vii) the location and appearance of all exterior trash containers; and are hereby approved by the Owner of Parcel 1. Such plans and specifications do not contain, and the Owner of Parcel 1 shall not permit, any walls, fences or similar barriers (excluding curb cuts) to separate the parcels, other than such walls, fences or similar barriers as the Owner of Parcel 1 reasonably deems necessary or desirable to control vehicular traffic flows without materially impeding pedestrian flow between the Parcels.

Upon the completion of the construction and installation of any such buildings, utilities, signs, improvements or landscaping, the same shall not be materially or substantially changed or altered (any material or substantial change or alteration herein an "Alteration") without the prior written approval of the Owner of Parcel 1; provided, however, that any Alteration (i) as to which no building height is in excess of twenty-eight (28) feet, including false facades, if any, measured from finished floor elevation to the top of the highest building protrusion or appurtenance, including roof-mounted equipments, decorative roof screening, and the like, and (ii) which shall be compatible and in substantial conformity with the general architectural design, aesthetic quality and exterior materials of the improvements erected, or to be erected, on Parcel 2 (the building height limitation and compatibility and conformity provisions in the foregoing clauses (i) and (ii) herein collectively the "Height/Compatibility/Conformity Requirements"), shall not require such approval.

Prior to the commencement of any Alteration, the Owner of Parcel 2 shall deliver for approval to the Owner of Parcel 1 or its successors or assigns with respect to this Paragraph 3(a), or for its information if such approval is not required pursuant to the foregoing sentence, plans and specifications in the same detail as those attached as Exhibit B (which plans and specifications shall, without limiting the generality of the foregoing, reflect the placement of any building and other improvements on Parcel 2 in substantial conformity with said Exhibit "B"). Within thirty (30) days after receipt of such plans and specifications, the Owner of Parcel 1 shall give the Owner of Parcel 2 notice of its approval or disapproval of the same if approval is required; failure by the Owner of Parcel 1 so to give notice shall be deemed approval. Such approval shall not be unreasonably withheld; provided, however, that the Owner of Parcel 1 shall in all events have the right to reject any such plans or specifications if any of the Height/Compatibility/Conformity Requirements are not met. Furthermore, in all events decorative screening and/or landscaping shall be installed in Parcel 2 so as to obscure from public view all trash rooms, trash holding receptacles, loading or service areas, mechanical or electrical equipment, storage facilities or bins, or other unsightly building appurtenances. Appropriate screening shall be provided to obscure all roof-mounted equipment and appurtenances, roof vents, and the like from public view.

All construction on Parcel 2 shall be constructed and installed substantially in accordance with approved plans and specifications as provided in this Paragraph 3(a), in a safe, good and workmanlike manner and in accordance with all governmental requirements. All such construction shall be staged and completed on Parcel 2. Furthermore, all such construction shall be performed expeditiously and in a manner so as to not unreasonably interfere with the conduct of business on Parcel 1. The approval of any plans or specifications hereunder by the Owner of Parcel 1 with respect to this Paragraph 3(a) shall not impose any liability or responsibility whatsoever upon the Owner of Parcel 1 with respect to this Paragraph 3(a) as regards to the compliance or non-compliance of such plans and specifications, or any improvements erected or installed in accordance therewith, or with the applicable zoning ordinances, building codes or other applicable governmental laws, ordinances or regulations.

(d) **Other Prohibited Activities.** No portion of Parcel 2 shall be leased, used or occupied for an activity or business (a "Prohibited Activity") which shall include, without limitation: (1) a noxious or offensive use; (2) for manufacturing (except for such manufacturing use as shall be incidental to a permitted retail use); (3) a theater; (4) a bowling alley; (5) a funeral parlor; (6) a warehouse or office (except for such office or warehouse use as shall be incidental to a permitted retail, professional office or bank use); (7) a nightclub, discotheque, cabaret, bar, or lounge; (8) a restaurant (other than a fast or quick service food store or fast or quick service restaurant, or a one-story family-style restaurant with sit down food service and with no drive-through take-out food service, provided that patrons and employees of any such restaurant may only park on Parcel 2 and shall be prohibited from parking on Parcel 1; a restaurant described in this parenthetical shall be a permitted use hereunder only if (A) the Owner of Parcel 1 is given written notice by the Owner of Parcel 2 of the intention to use some or all of Parcel 2 for such a restaurant, accompanied by such detailed information concerning such restaurant as the Owner of Parcel 1 shall require in its sole discretion in order to evaluate and confirm to its satisfaction strict compliance with the foregoing requirement as to parking only on Parcel 2, at least sixty (60) days prior to commencement of construction of any such restaurant, and (B) the Owner of Parcel 1 shall not object to such use in writing within twenty (20) days after receipt of such notice), or (9) a public transportation parking lot.

(e) **Curb Construction.** Concrete curbs shall be constructed on Parcel 2 in each of the following locations: (a) around the entire perimeter of Parcel 2 at the edge of the pavement to separate the paved area from the adjacent landscaped buffer; (b) on both sides of the landscaped buffer in those areas where the buffer separates Parcel 2 from roadways in Parcel 1 and/or adjacent public roadways; and (c) at all vehicular entrances to Parcel 2 from Parcel 1 roadways and contiguous outparcels. All such curbs shall be full-depth 18" poured in-place concrete type curbs; no bumper blocks, precast, extruded, or asphaltic curbs shall be utilized. However, the Owner of Parcel 1 shall be responsible for all obligations of the Owner of either Parcel under the Improvement Agreement by and between Declarant and the City of Draper, dated September 30, 1994 and recorded as Entry No. 5967779 in Book 7056 at Page 1202 of the Salt Lake County records, even if such obligations would otherwise be the obligation of the Owner of Parcel 2 hereunder.

(f) **Parking.** There shall be maintained on Parcel 2 the greater of: (1) at least four (4) standard-sized automobile parking spaces for each one thousand (1,000) square feet of enclosed building area constructed on Parcel 2; or (2) such number of automobile parking spaces as may be required by applicable law.

(g) **Traffic Flow.** Pavement markings, directional signs and other traffic indicators upon Parcel 2 shall be in accordance with the local code requirements, and shall provide for a traffic scheme compatible with that of Parcel 1.

(h) **Landscaping.** All buffer strips and other undeveloped land areas in Parcel 2 shall be landscaped with trees, shrubs, or suitable ground cover in a uniform manner consistent with the landscaping in Parcel 2. All parking areas in Parcel 2 shall have internal landscaping which shall meet local code requirements. All internal landscaping in Parcel 2 shall be protected from vehicular encroachment by concrete curbing.

4. **Parcel 1 Operating Covenant.** As partial consideration for the easements set forth in Paragraph 1 above, if and for so long as Parcel 2 shall be used for the sale at retail of carpeting, vinyl sheet flooring, floor tiles and other permanently affixed flooring materials (such sale at retail of such affixed materials herein a "Floor Covering Business"), Parcel 1 shall be held, transferred, sold, conveyed, used, occupied, rented, mortgaged or otherwise encumbered subject to the covenant and restriction that no portion of Parcel 1 shall be used for any Floor Covering Business without the consent of the Owner of Parcel 2.

5. **Mutual Operating Covenants.** As partial consideration for the easements set forth in Paragraph 1 above, each Parcel shall be held, transferred, sold, conveyed, used, occupied, rented, mortgaged or otherwise encumbered subject to the covenants and restrictions that no portion of either Parcel shall be leased, used or occupied for a business or use which (i) creates strong, unusual or offensive odors, fumes, dust or vapors, (ii) is a public or private nuisance, (iii) emits noise or sounds which are objectionable, (iv) creates unusual fire, explosive or other hazards, (v) may injure the reputation of the business operated on either Parcel, or (vi) parks, or permits the parking of, trucks and delivery vehicles so as to unreasonably interfere with the use of the easements granted herein. In addition, except for loud-speaker communication devices used for drive-through operations, no flashing lights or signs, strobe lights, search lights, loud speakers, phonographs, radios or video screens shall be permitted on the exterior of any buildings on either Parcel. Furthermore, no portion of either Parcel shall be used for the sale of pornographic or sexually explicit materials.

6. **Subdivision.** Subject only to applicable state and local laws and requirements, the Owner of any Parcel shall be able to sell all or any portion of its respective Parcel and file of record plats reflecting any subdivision of its Parcel at any time and from time to time, provided, however, that any such sale and any such plat of subdivision shall be subject to this Declaration, and all of the provisions contained herein and all of the rights, easements and obligations hereunder, as covenants running with the fee simple estate of the Parcels as more fully provided in Paragraph 12(a).

7. **Sign Criteria.**

(a) **General Requirements and Prohibitions:**

(1) No signs or other advertising devices shall be installed or permitted on Parcel 2 except to the extent specifically permitted hereby. In particular, no signage shall be permitted on Parcel 2 that is not for the sole purpose of identifying the primary business conducted on Parcel 2.

(2) Painted lettering, symbols or identification of any nature may not be utilized, except that professionally prepared banners advertising "sale" or other temporary events shall be permitted.

(3) Flashing, blinking, moving, animated or audible signs will not be permitted.

(4) No exposed wiring, conduits, tubing, lamps, ballast boxes or raceways will be permitted.

(5) All cabinets, conductors, transformers, ballasts, attachment devices, and other equipment shall be concealed.

(b) **Building Mounted Sign(s):**

(1) Any building erected upon Parcel 2 may contain only such signs as strictly comply both with the other requirements of this Paragraph 6, and with the requirements of Exhibit B attached hereto.

(2) No building mounted sign or any portion thereof may project above the parapet wall or top of the exterior wall or building facade upon which it is mounted.

(3) All cabinets, conductors, transformers, ballasts, attachment devices, and other equipment shall be concealed.

(4) Except for standard recognized identification of national tenants or brands and a single logo identifying the business conducted at Parcel 2, the advertising or informative content of all signs shall be limited to letters designating the establishment name and/or type of establishment (which designation will be generally descriptive and shall not include any specification of the merchandise offered for sale therein or the services rendered therein) and shall contain no advertising services, slogans, symbols, or marks.

(c) **Freestanding Signs:**

(1) No more than one (1) permanently affixed freestanding name identification sign may be installed on Parcel 2.

(2) The maximum heights from the bottom of the base to the top of any such freestanding, type sign structure, including the sign panel, shall be the lower of: (i) 22' 0"; or (ii) as allowed by code, and the sign panel shall be the size as allowed by code.

8. **Eminent Domain.** In the event the whole or any part of Parcel 1 or Parcel 2 shall be taken by right of eminent domain or condemnation or any similar authority of law, or is sold in lieu of such condemnation, the entire award for the value of the land and improvements so taken shall belong to the Owner of the Parcel (or portion thereof) so taken or to such Owner's mortgagees or tenants, as their interests may appear, and no other Owner shall have a right to claim any portion of such award by virtue of any interest created by this Declaration. In the event of a total taking of a Parcel, any Owner of a Parcel which is not the subject of a taking may, however, file a collateral claim

with the condemning authority over and above the value of the land and improvements being so taken and related income loss to the extent of any damage suffered by such Owner resulting from the severance of the land or improvements so taken if such claim shall not operate to reduce the award allocable to the Parcel (or portion thereof) taken.

9. **Remedies.**

(a) If the Owner of Parcel 2 (i) fails to commence construction of the initial improvements depicted on Exhibit B within eighteen (18) months after the date of such Owner's acquisition of Parcel 2, or fails to substantially complete construction of such initial improvements and open for business within eighteen (18) months after commencing construction as described above, or (ii) fails or refuses to operate a business as may comply with the provision of this Declaration (e.g., not Prohibited Activity) on Parcel 2 for a period of nine (9) months; and said failure or refusal is not due to (aa) construction, remodeling, or repairs of the said Parcel, (bb) governmental order, (cc) war, (dd) civil insurrection, (ee) fire, flood or acts of God, or (ff) other causes beyond the control of the Owner of Parcel 2, then the Owner of Parcel 1 shall for the defaults specified in Paragraph 8(a)(i) or 8(a)(ii) have the right, exercisable by written notice (the "Exercise Notice") to the Owner of Parcel 2 given within six (6) months of learning of the event of default giving rise to such right (the date on which the Exercise Notice is given being herein the "Exercise Date"), to purchase Parcel 2 for the Repurchase Amount. As used herein, "Repurchase Amount" means an amount equal to the greater of (A) seventy-five percent (75%) of the current fair market value of Parcel 2 and the improvements thereon (such market value being determined as the average of the respective fair market values determined in written appraisals provided to each Owner within thirty (30) days after the Exercise Date by each of two independent MAI appraisers, one selected by the Owner of Parcel 1 and one selected by the Owner of Parcel 2; or, if such appraiser as either Owner shall select shall not provide a written appraisal within such 30-day period, then such market value shall be the amount determined in the only appraisal provided within such 30-day period) or (B) a sum equal to the aggregate of the outstanding balance of principal, accrued and unpaid interest and other amounts due to pay in full all liens for Borrowed Money filed against Parcel 2 or (C) the Purchase Price. Should the Owner of Parcel 1 elect to repurchase Parcel 2 pursuant to the terms of this provision, the amount due under the terms hereof shall be payable in cash at closing, which closing shall be held at the offices of Security Title Insurance Agency of Utah, Inc. in Salt Lake City at a date and time appointed by the Owner of Parcel 1 which date shall be not less than sixty (60) and not more than ninety (90) days after the Exercise Date. Failure of the Owner of Parcel 1 to exercise its right within the period specified above shall be deemed a waiver of its right to purchase Parcel 2. "Borrowed Money" shall be all financing by any bank, savings and loan association, or other independent financial institution secured by Parcel 2 to the extent that the principal amount of such financing does not exceed the fair market value of Parcel 2 and the improvements on Parcel 2 at the time the financing is obtained. (The highest independent MAI appraisal obtained by a lienholder or prospective lienholder and prepared within six (6) months of the date of

the funding of the financing may be relied on by such lienholder or prospective lienholder as the fair market value of Parcel 2 and the improvements on Parcel 2 at the time of the financing.)

(b) If the Owner of either Parcel shall default or fail in the performance or observance of any other covenant, obligation or responsibility imposed on such Owner hereunder (such Owner herein the "Defaulting Owner"), which default or failure affects the other Owner (the "Non-Defaulting Owner"), the latter shall have the following rights and remedies:

(1) The Non-Defaulting Owner shall have the right, upon the expiration of thirty (30) days after written notice to the Defaulting Owner for a non-monetary default, or ten (10) days following notice of a monetary default, to pursue full legal and equitable remedies against the Defaulting Owner, including, without limitation, the payment of reasonable attorneys' fees actually incurred as a result of pursuing said legal and equitable remedies; provided, however, for non-monetary defaults which cannot reasonably be cured within said thirty (30) day period, the Defaulting Owner shall have such additional time as may be required in order to cure the same, provided that the Defaulting Owner diligently pursues such cure to completion, as reasonably required to effect such cure; provided, further, in no event shall the Defaulting Owner have longer than a total of ninety (90) days following said notice to cure any non-monetary default; and

(2) After thirty (30) days' prior written notice to (aa) the Owner of the Parcel in default and (bb) any holder of a first priority trust deed or mortgage to secure debt (the "First Mortgage") then affecting such Parcel, or in the event of an Emergency (as hereinafter defined) after such shorter notice as is practical under the circumstances, the Non-Defaulting Owner shall have the right to go upon such Parcel and perform such obligation on behalf of the Defaulting Owner. In such event, the Non-Defaulting Owner shall send the Defaulting Owner a bill which itemizes the costs and expenses incurred by the Non-Defaulting Owner in curing such default. The Defaulting Owner shall reimburse the Non-Defaulting Owner for said costs and expenses within thirty (30) days of its receipt of said bill for the costs and expenses of such cure, together with interest thereon from the date of payment thereof at a rate equal to the Prime Rate, as announced from time to time by, Bank One, Dayton, NA or its successors, plus three percent (3%) per annum.

Any such claim for reimbursement, together with interest accrued thereon as aforesaid, shall be secured by an equitable charge and lien on the Parcel owned by the Defaulting Owner and improvements thereon owned by the Defaulting Owner, which lien shall be effective upon the recording of a notice thereof in the Office of the Recorder of the County in which such Parcel is located, but which lien may not be filed more than fifteen (15) days prior to the actual commencement of such work. The lien shall be subordinate to any First Mortgage and to the interest of any party who has purchased the

Parcel and leased it back to the preceding Owner, or its subsidiary or affiliate, under an SL Lease (hereafter defined); and any purchaser at any foreclosure sale (as well as any grantee by deed in lieu of foreclosure) under any such First Mortgage or any lessor or assignee of such lessor under any such SL Lease shall take title subject only to liens thereafter accruing pursuant to this Paragraph 8. Furthermore, the right of possession and leasehold interest or tenancy or any tenant or occupant of the Parcel encumbered by any lien accruing pursuant to this Paragraph 8 shall not be terminated, affected or disturbed by such lien or any foreclosure thereof.

As used herein, the term "Emergency" shall mean any condition on either Parcel, which poses an imminent risk of personal injury or serious property damage, and the term "SL Lease" shall mean a lease by which a party that has purchased the Parcel from the previous Owner has leased it back to the Owner, or its subsidiary or affiliate, on a net lease basis assuming all obligations in what is commonly referred to as a "sale-leaseback" transaction.

10. **Hazardous Substances.** Except as in compliance with all applicable Environmental Laws (as hereinafter defined), no pollutants, contaminants, chemicals, hazardous, toxic or dangerous waste, substance or material, or any other substance or material regulated or controlled pursuant to any Environmental Law now or at any time hereafter in effect, including, without limiting the generality of the foregoing, asbestos, PCBs, or other substances defined as "hazardous substances" or "toxic substances" in any Environmental Law (collectively, the foregoing are herein called "Hazardous Substances"), shall be made, stored, used, treated or disposed of on Parcel 2. The Owner of Parcel 2 shall also prevent its officers, employees, agents, customers and invitees from placing, whether or not intentional, trash or Hazardous Substances on Parcel 1.

As used herein the term "Environmental Law" shall mean, any federal, state, local or foreign law, statute, decree, ordinance, code, rule, or regulation, as applicable, including, without limiting the generality of the foregoing, the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, the Hazardous Materials Transportation Act, The Resource Conservation and Recovery Act, the Toxic Substance Control Act of 1976, and any federal, state, or local so-called "Superfund" or "Superlien" law or ordinance relating to the omission, discharge, release or threatened release into the environment (including, without limitation, ambient air, surface water, groundwater or land) of any gasoline, oil or petro-chemicals, or any other pollutant, contaminant, chemical, hazardous, toxic or dangerous waste, substance or material, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of such substances and any and all regulations, codes, plans, orders, decrees, judgments, injunctions, notices or demand letters issued, entered, promulgated or approved thereunder.

11. **Notice.** Any notice, consent, approval or other communication provided for or required by this Declaration shall be in writing and shall be deemed to have been given (i) when delivered in person, or (ii) when deposited in the United States Mail, certified or registered, return receipt requested, postage prepaid, or (iii) when sent by nationally recognized overnight courier service which maintains evidence of receipt, properly addressed to the party to whom such notice is intended to be given.

Until notice of change of address is given to the other party in accordance with the provisions of this paragraph, notices shall be delivered, addressed or directed to the parties hereto at the following addresses; provided, however, that if Declarant does not sell Parcel 2 to Purchaser within thirty (30) days of the recording of this Declaration, notices to the Owner of Parcel 2 shall be addressed to the Owner of Parcel 1:

Owner of Parcel 1: Factory Stores of America, Inc.
230 North Equity Drive
Post Office Box 1395
Smithfield, North Carolina 27577
Attention: Robin W. Mathias, Corporate Counsel

with a copy to: Arnall Golden & Gregory
2800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3400
Attention: Abe J. Sciear, Esq.

Owner of Parcel 2: D&T Investments, L.L.C.
6152 Stratler Street
Murray, Utah 84107
Attention: Drue Kehl

with a copy to: Ballard Spahr Andrews & Ingersoll
201 South Main Street, Suite 1200
Salt Lake City, Utah 84111
Attention: William D. Marsh, Esq.

Notices sent by United States Mail shall be deemed received three (3) Business Days (as hereinafter defined) from the date mailed. Notices sent by personal delivery or nationally recognized overnight courier service shall be deemed received when actually delivered. As used herein, the term "Business Day" shall mean any day except Saturday, Sunday or a legal holiday under the laws of the State of Utah.

12 **Miscellaneous.**

(a) **Grants and Declarations.** The parties hereby agree and declare that this Declaration, and all of the provisions contained herein and all of the rights, easements and obligations hereunder, shall be and constitute covenants running with the fee simple estate of the Parcels. The grants of easements, rights and privileges in this Declaration are independent of any contractual agreements undertaken by the parties in this Declaration and a breach by either party of any such contractual agreements shall not cause or result in a forfeiture or reversion of the easements, rights and privileges granted in this Declaration.

- (b) **Recording and Filing.** A counterpart of this Declaration shall be recorded in the Office of the Recorder of the County of Salt Lake, State of Utah, or in such other office as may at the time be provided by law as the proper place for recordation thereof.
- (c) **Waiver.** No consent or waiver, express or implied, by any party to or of any breach of default by any other party in the performance by such other party of the obligations thereof under this Declaration shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations of such other party under this Declaration. Failure on the part of any party to complain of any act or failure to act of any other party or to declare such other party in default, irrespective of how long such failure continues, shall not constitute a waiver of such party of the rights thereof under this Declaration.
- (d) **Severability.** If any provision of this Declaration or the application thereof to any entity or circumstances shall be invalid or unenforceable to any extent, the remainder of this Declaration and the application of such provisions to any other entity or circumstance shall not be affected thereby and shall be enforced to the greatest extent permitted by law.
- (e) **Status Reports.** Recognizing that any party may find it necessary from time to time to establish to third parties such as accountants, banks, mortgagees or the like, the then current status of performance hereunder, the parties each agree, upon the written request of the other party, made from time to time by notice as provided in Paragraph 10 hereof, to furnish promptly a written statement (in recordable form, if requested) containing any reasonably requested information which pertains to (i) the status of this Declaration, or (ii) whether there are any defaults hereunder qualified to the best of the knowledge and belief of the party making such statement.
- (f) **Terminology.** All personal pronouns used in this Declaration, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural; and the plural shall include the singular. Titles of paragraphs of this Declaration are for convenience only, and neither limit nor amplify the provisions of this Declaration, and all references in this Declaration to paragraphs thereof shall refer to the corresponding paragraphs of this Declaration unless specific reference is made to the paragraphs of another document or instrument.
- (g) **Counterparts.** This Declaration may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall comprise but a single instrument.
- (h) **Binding Declaration.** The provisions of this Declaration shall apply to, inure to the benefit of and bind the parties hereto and their respective heirs, transferees, successors and assigns thereof, including, without limitation, any mortgagee acquiring an interest in any portion of the respective Parcels thereon by reason of foreclosure, deed or assignment in lieu of foreclosure or purchase at

foreclosure sale; but any such mortgagee shall not incur or be required to assume any obligation under this Declaration unless and until such mortgagee has so acquired an interest in any portion of the respective Parcel thereon, and then only such as may arise by operation of law by reason or privity of estate as limited by the provisions of this Declaration. Subject to the above, whenever in this Declaration a reference to any party is made, such reference shall be deemed to include a reference to the heirs, transferees, executors, legal representatives, successors and assigns of such party.

(i) **Interpretation.** No provision of this Declaration shall be construed against or interpreted to the disadvantage of any party by any court or other governmental or judicial authority by reason of such party having or being deemed to have structured or dictated such provision.

(j) **Relationship of Parties.** No express or implied term, provision or condition of this Declaration shall be deemed to constitute the parties as partners or joint venturers nor shall anything herein create the relationship of landlord and tenant.

(k) **Non-Terminable Agreement.** No breach of the provisions of this Declaration shall entitle any Owner of a Parcel or other party to cancel, rescind or otherwise terminate this Declaration, but such limitation shall not affect, in any manner, any other rights or remedies which any party may have hereunder by reason of any breach of the provisions of this Declaration. Subject to the purchase right in Paragraph 8(a), no breach of the provisions of this Declaration shall defeat or render invalid the lien of any mortgage or deed to secure debt made in good faith for value covering any Parcel or any portion thereof or any improvements thereon.

(l) **Term.** This Declaration and the easements, rights, restrictions, obligations and liabilities created hereby shall be perpetual to the extent permitted by law. To the extent applicable law would limit the term of any of the foregoing, the term thereof shall be automatically renewed for a period equal to the lesser of twenty (20) years or the longest period permitted by applicable law unless both Owners agree to the contrary and file a notice to such effect with the Recorder of the county in which the Parcels are located prior to the expiration of the then current term.

(m) **Governing Law.** This Declaration shall be governed by and construed in accordance with the laws of the State of Utah.

(n) **Modifications.** This Declaration may be modified, amended or terminated in whole or in part, only by a written instrument executed and acknowledged by all of the then Owners (and their respective mortgages, if any) of Parcel 1 and Parcel 2.

(o) **Taxes.** The Parcel Owners shall be responsible for paying the real estate taxes assessed on their respective Parcels.

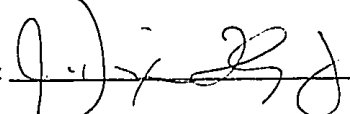
(p) **Non-Merger.** In the event that fee simple title to the Parcels is held by one Owner, the terms, covenants, easements and obligations set forth in this Declaration shall not automatically merge into said fee simple estate.

(q) **Limitation on Liability.** In the event that any Owner sells or otherwise transfers all such Owner's Parcel to an unrelated third party, such Owner shall automatically be relieved of any further obligation or liability hereunder with respect to such Parcel, and the rights and obligations of such Owner with respect to such Parcel shall automatically pass to and be assumed by such Owner's successor-in-title to such Parcel.

(r) **No Third Party Beneficiaries.** The rights and obligations under this Declaration are for the benefit of the Owner of Parcel 1 and the Owner of Parcel 2 and shall not be construed as conferring upon or giving to any person other than the Owners (including, without limitation, their successors and assigns) any rights or benefits under or by reason of this Declaration.

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

FACTORY STORES OF AMERICA, INC.,
a Delaware corporation

By: 

Print Name: J. Dixon Fleming

Title: Chairman & CEO

STATE OF North Carolina
:ss.
COUNTY OF Wake)

On the 27th day of October, 1995, personally appeared before me J. Dixon Fleming who being by me duly sworn did say that he/she is the Chairman/CEO of FACTORY STORES OF AMERICA, INC., and that the within and foregoing instrument was signed in behalf of said corporation by authority of its by-laws or a resolution of its board of directors and said J. Dixon Fleming duly acknowledged to me that said corporation executed the same.

Brenda D. Leonard
Notary Public
Residing at 230 N. Equity Dr.
Shelfield, NC 27577

My Commission Expires:

12.12.98

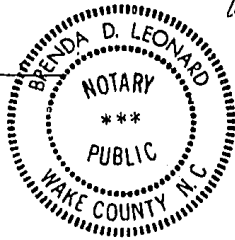


EXHIBIT A

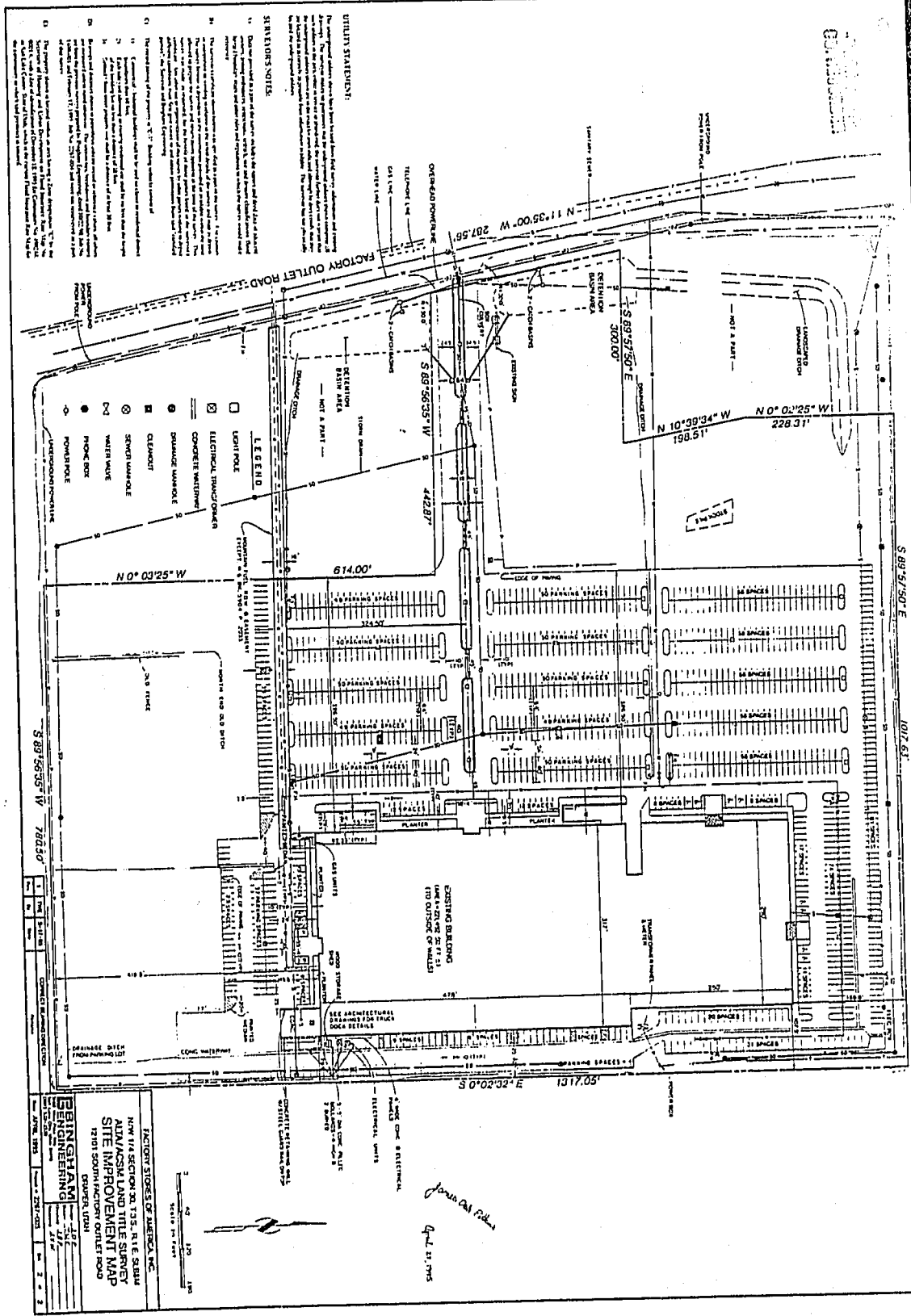
SURVEY

1735\DCRE\102795

17

BK 7263 PG 2565

EXHIBIT A



UTILITY STATEMENT:
 The utility lines shown on this plan are based on field observations and records. The utility lines are shown as they exist and are not intended to be a warranty of the utility lines. The utility lines are shown as they exist and are not intended to be a warranty of the utility lines. The utility lines are shown as they exist and are not intended to be a warranty of the utility lines.

STAKEOUT NOTES:
 1. Stakeout shall be a part of the survey and shall be done in accordance with the standards of the Survey Act and the standards of the Survey Act. The stakeout shall be done in accordance with the standards of the Survey Act and the standards of the Survey Act. The stakeout shall be done in accordance with the standards of the Survey Act and the standards of the Survey Act.

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LEGEND

- LIGHT POLE
- ⊠ ELECTRICAL TRANSFORMER
- ⊞ CONCRETE WALKWAY
- ⊟ DRAINAGE UNWEAVE
- ⊠ CLEANOUT
- ⊞ SEWER MANHOLE
- ⊟ WATER MANHOLE
- ⊠ PHONE BOX
- ⊞ POWER POLE

FACTORY STORES OF ALBERTA INC.
 NOW 1/4 SECTION 04, 13, 15, R1E, S18M
 ALTA/ASLM LAND TITLE SURVEY
 SITE IMPROVEMENT MAP
 12101 SOUTH FACTORY OUTLET ROAD
 DRAPER, UTAH

BENINGHAM ENGINEERING
 1012 S. 1000 E.
 DRAPER, UTAH 84024

DATE: 12/15/15
 SHEET 2 OF 2

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EXHIBIT B

PRELIMINARY PLANS AND SPECIFICATIONS

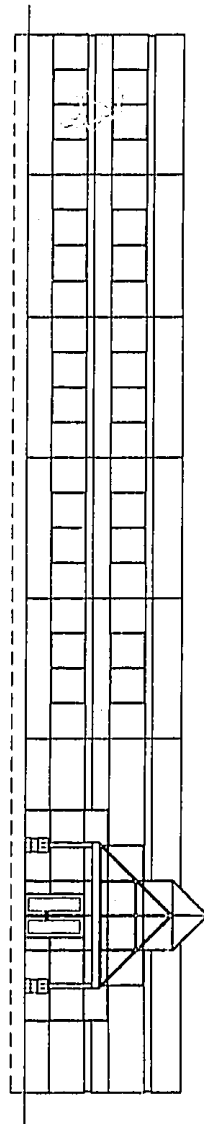
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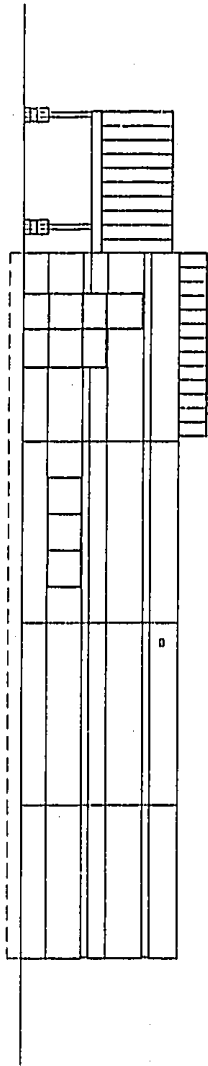
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EXHIBIT B



(A) NORTH ELEVATION

SCALE 1/8" = 1'-0"



(B) WEST ELEVATION

SCALE 1/8" = 1'-0"



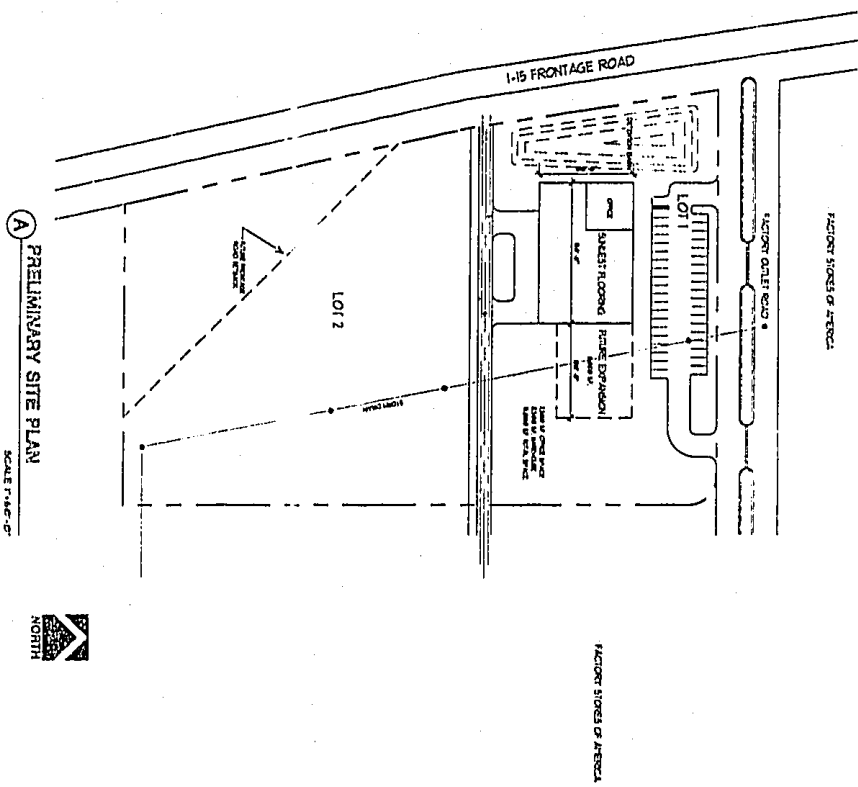
SUNWEST FLOORING

Erus A. Kohl
1210 South Factory Outlet Road

REVISIONS

DATE
BY
CHECKED
SCALE

A2



BK 7263 PG 2570

EXHIBIT B

DATE: 12/11/10
 SHEET NO: A1

SUNWEST FLOORING
 L. Russ A. Kehl
 1216 South Factory Outlet Road

