

BY AUTHORITY

ORDINANCE NO. _____
SERIES OF 2013

COUNCIL BILL NO. CB13-0025
COMMITTEE OF REFERENCE:

BUSINESS, WORKFORCE, & SUSTAINABILITY

A BILL

For an ordinance approving a proposed Non-Disturbance, Attornment and Concession Agreement between the City and County of Denver and Skyport Development Company, LLC for a concession at Denver International Airport.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. The proposed Non-Disturbance, Attornment and Concession Agreement between the City and County of Denver and Skyport Development Company, LLC (201208465) in the words and figures contained and set forth in that form of Agreement available in the office and on the web page of City Council, and to be filed in the office of the Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, under City Clerk's Filing No. 2013-0009, is hereby approved.

COMMITTEE APPROVAL DATE: January 24, 2013

MAYOR-COUNCIL DATE: January 29, 2013

PASSED BY THE COUNCIL: _____, 2013
_____ - PRESIDENT

APPROVED: _____ - MAYOR _____, 2013

ATTEST: _____ - CLERK AND RECORDER,
EX-OFFICIO CLERK OF THE
CITY AND COUNTY OF DENVER

NOTICE PUBLISHED IN THE DAILY JOURNAL: _____, 2013; _____, 2013

PREPARED BY: Skip Gray, III, Assistant City Attorney DATE: January 31, 2013

Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to § 3.2.6 of the Charter.

Douglas J. Friednash, City Attorney for the City and County of Denver

BY: _____, Assistant City Attorney DATE: January 31, 2013

NON-DISTURBANCE, ATTORNMENT AND CONCESSION AGREEMENT

THIS NON-DISTURBANCE, ATTORNMENT AND CONCESSION AGREEMENT, is made and entered into as of the date indicated on the signature pages and is by and among the **CITY AND COUNTY OF DENVER**, a municipal corporation formed under the laws of the State of Colorado ("City"), **SKYPORT DEVELOPMENT COMPANY, LLC**, a Colorado limited liability company ("Tenant") and **FM Wok, LLC**, a Colorado limited liability company ("Subtenant").

RECITALS:

WHEREAS, the City and Tenant have entered into an Amended and Restated Mezzanine Lease Agreement (Sixth Amendment to Agreement), dated June 17, 1997 (the "Lease"), and

WHEREAS, Tenant has the right to develop, sublease, use and permit Subtenants to use portions of the mezzanine area of Concourse B at Denver International Airport (the "Lease Premises") for retail, services and food and beverage purposes consistent with Tenant's Proposal; its Business Plan(s), the needs and requirements of the Airport and subject to all of the terms, conditions, covenants and provisions of the Lease; and

WHEREAS, Tenant and Subtenant have entered into an agreement, dated October 1, 2012 (the "Sublease"), which has been approved by the Manager under which Subtenant will sublease from Tenant certain premises within the Airport as described in the Sublease (the "Subtenant Space"); and

WHEREAS, so that Subtenant will have a reasonable period over which to attempt to recover its investment in improvements to the Subtenant Space, Subtenant is only willing to enter into the Sublease if its right to occupy the Subtenant Space described therein extends until January 31, 2023 (the "Extended Term" and "Expiration Date"); and

WHEREAS, the Tenant's Lease is scheduled to end October 31, 2017 and therefore Tenant has no rights under its Lease to permit the Subtenant to occupy the Subtenant Space after October 31, 2017; and

WHEREAS, having reviewed a request by Subtenant to extend Subtenant's right to occupy the Subtenant Space beyond October 31, 2017, the City is willing to permit the Subtenant to remain in the Subtenant Space through the Extended Term, under certain conditions notwithstanding the earlier termination of the Tenant's Lease; and

WHEREAS, the City desires to grant the Subtenant, as a Concessionaire, subject to the terms and conditions set forth herein, the right to occupy, operate and manage the Subtenant Space on all the terms and conditions set forth in the Sublease, which shall be considered modified to substitute the City for the Tenant therein through the Extended Term; and

WHEREAS, the Sublease requires the consent of the City before the Sublease becomes effective; and

WHEREAS, the parties desire to provide for the non-disturbance and conditional transfer of the Sublease in the event of default by Tenant;

NOW THEREFORE, for and in consideration of the terms and conditions hereinafter set forth, the parties agree as follows:

1. **Quiet Enjoyment.** Except as otherwise provided in the Tenant's Lease or in the Sublease, the City agrees that so long as the Sublease is in full force and effect and not terminated and Subtenant is not in default thereunder (after giving effect to applicable notice and cure periods):

a. The City will not (unless required by law) name or join Subtenant as a party-defendant or otherwise in any suit, action or proceeding brought by the City to enforce the Tenant's Lease. The Sublease and the rights granted to Subtenant thereunder shall not be terminated or canceled or otherwise affected (except as permitted by the provisions of the Sublease) by the City's enforcement of the Tenant's Lease due to a default by the Tenant.

b. The City will not terminate its consent to the Sublease and Subtenant shall be entitled to quietly hold and enjoy the Subtenant Space for the duration of the term of the Sublease.

2. **Right to Cure.** So long as the Sublease remains in effect, if Subtenant gives Tenant any notice of default of Tenant thereunder, Subtenant agrees to give a copy of any such notice of Tenant's default to the City and the City shall have the right, but not the obligation, to cure the default of Tenant within the same period of time, if any, as is afforded to Tenant under the Sublease.

3. **Attornment.** If the City resumes possession of the Subtenant Space as a result of or in connection with a default by Tenant under the Tenant's Lease, with or without terminating the Tenant's Lease, the rights of Tenant under the Sublease shall be considered assigned to the City and the Subtenant shall be bound to the City under all of the terms, covenants and provisions of the Sublease, and in such event, Subtenant hereby agrees to attorn to the City and to recognize the City as the Tenant under the Sublease, such attornment to be self-operative and self-executing. Upon such an assignment to the City, the City shall be bound by the Sublease and the City shall assume and perform the Tenant's obligations thereunder, provided that: (i) the Sublease was approved by the Manager, (ii) at the time of such assignment, Subtenant has paid all amounts payable by it and is not in default under any of the terms and conditions of the Sublease; (iii) the City will be entitled to receive payment of all Sublease fees accruing after the time of such assignment, whether or not Subtenant has prepaid any of such fees to Tenant; (iv) the City shall not be liable for any act or omission of the Tenant; (v) the City shall not be bound by any amendment or modification of the Sublease made without its consent; (vi) the City shall not be subject to any offsets or defenses which Subtenant might have against the Tenant; and (vii) the City shall not be liable for performance of obligations of the Tenant arising prior to such assignment of the Sublease to the City.

4. **Grant of Concession.** Provided that the Sublease has not been terminated (except for termination as a matter of law upon the termination of Tenant's Lease on October 31, 2017), commencing on November 1, 2017 and continuing to the Expiration Date, the City hereby grants Subtenant the right to occupy, improve and use the Subtenant Space as a Concessionaire of the City, subject to all of the terms and conditions of the Sublease, modified: (i) to change all of the obligations and rights of the Tenant thereunder to obligations and rights of the City from and after November 1, 2017, and (ii) to provide for an expiration date of the Expiration Date. The parties to this Agreement understand and agree that from and after November 1, 2017, Tenant will have no rights and obligations with respect to the Sublease or the Subtenant Space under the Sublease, provided, however, that the rights and obligations arising before the effective date of any such termination shall not be affected by the provisions of this Section. As so modified, such terms and conditions are hereby incorporated by this reference as if set forth fully herein.

5. **Sublease Modifications.** After the City is considered to have received an assignment of Tenant's rights under Tenant's Lease, upon no less than thirty (30) days written notice to the Subtenant of its election to do so, at the option of the Manager, the City may require that the Subtenant agree to either or both of the following modifications to the Sublease:

a. Performance Surety. Subtenant shall provide to and the Manager, and maintain in effect at all times throughout the Term plus a period of six (6) months after expiration or earlier termination of the Sublease, an irrevocable letter of credit or such other acceptable surety as first approved in writing by the City, in an amount initially equal to six (6) months of Minimum Annual Guarantee or if greater, an amount equal to the prior six (6) months of total compensation paid to the Tenant. Such letter of credit or other surety shall be payable without condition to the City with surety acceptable to and approved by the City's Manager, which irrevocable letter of credit shall guarantee to the City the full and faithful performance of (i) all of the terms and provisions of this Sublease to be performed by Subtenant, as this Sublease may be amended, substituted, supplemented or extended, and (ii) all obligations and duties of Subtenant under all general rules and regulations adopted by the City or the Manager for the management, operation and control of the Airport as amended or supplemented. All irrevocable letters of credit shall be in a form, and issued by a bank, acceptable to the City. Notwithstanding the foregoing, if at any time during the term hereof, the City deems the amount of the surety insufficient to properly protect the City from loss hereunder because Subtenant is or has been in arrears with respect to such obligations or because Subtenant has, in the opinion of the City, violated other terms of this Sublease, Subtenant agrees that it will, after receipt of notice, increase the surety to an amount required by the City; provided however, the percentage increase in the amount of surety shall not exceed the annual percentage increase that has occurred with respect to Subtenant's Minimum Annual Guarantees in effect under this Sublease. This Performance Surety shall be in lieu of the Security Deposit under the Sublease. Subtenant waives and releases any claims it may have against the City concerning that Security Deposit except to the extent that the City actually receives the amount of the Security Deposit from the Tenant or its successors in interest.

b. Amendment of the Sublease Compensation Provisions. To comply with City Bond Ordinances applicable to the Airport as they may be amended, supplemented or replaced from time to time, the City may elect to modify the compensation provisions of the Sublease to be more consistent with the City's Concessions program by increasing the "Minimum Annual Guarantee" so that it equals Subtenant's prorata share of the rates, fees and charges established by the City for the use of lease premises as may be reestablished from time to time in accordance with the Sublease, and to the extent the City deems it reasonably appropriate to reduce Subtenant's Percentage Compensation so that the total compensation payable by the Subtenant is consistent with the similar types of Concessions within the Airport's concessions program .

6. PVC Participation. The Department of Aviation has created the "Premium Value Concessions Program" ("PVC Program") described in Airport Rule and Regulation 45 (the "PVC Rules") to reward certain categories of subtenants that operate first-class concessions and achieve the high performance standards defined in the PVC Rules. For subtenants that achieve the high performance standards defined in the PVC Rules at the time their existing agreements terminate, the City will offer a new concession agreement that is consistent with the concession policy then in effect for either (i) the same particular merchandise category as the terminating concession, or (ii) if the Manager, in her sole discretion, deems it advisable to change from that particular merchandise category, the City will offer the right to change their concept to one that is consistent with DIA's goals. The Tenant hereby grants Subtenant the right to participate in the PVC Program, subject to the following:

A. For purposes of the PVC Program only, Tenant and Subtenant agree and each gives its consent to the following actions: (i) Tenant shall promptly deliver to the City a copy of any written notice of default or breach of Tenant's Lease or the Subtenant's Sublease issued by Tenant to Subtenant; and (ii) The City shall promptly deliver said notices to the Third Party Administrator for its use in the PVC Program as provided in the PVC Rules.

B. Notwithstanding any provision herein to the contrary, nothing in this Agreement shall effect or alter the rights of the Tenant and Subtenant under the Sublease, including Tenant's rights to cancel, alter or terminate the Sublease pursuant to its terms;

C. Except as provided in this Attornment Agreement, Subtenant understands and agrees that any provision of the Sublease to the contrary notwithstanding, as a matter of law, upon the termination of Tenant's Lease on October 31, 2017, neither Tenant nor Subtenant will have any rights with respect to the Sublease or the Subtenant Space subject to the Sublease, provided, however that any rights and obligations arising before the effective date of any such termination shall not be affected by these PVC Program provisions; and

D. Tenant and Subtenant acknowledge that all of the provisions, terms and conditions of the Sublease remain in full force and effect and are hereby ratified and reaffirmed.

E. Subtenant agrees to participate in the City's "Premium Value Concessions Program" or "PVC Program" as more particularly described in Aviation Rule and Regulation 45 (the "PVC Rules").

G. For Subtenant's participation in the PVC Program, the Parties agree that Subtenant's major and minor categories and square footage shall be as follows: Major Category: Food and Beverage, Minor Category: Quick Serve with alcohol, Square Footage: 1,958.

H. Upon written notice from the Manager, Subtenant agrees that it shall contribute Subtenant's prorated share of the cost of administering the PVC Program as described in section 3 (Third Party Administrator) of the PVC Rules, which shall be payable to the City in advance, without setoff, deduction, prior notice or abatement on the first day of every month following notification.

J. The City shall not be obligated to expend more for the PVC Program than is actually collected from participating concessions pursuant to section 7 (Cost of the Premium Value Concessions Program) of the PVC Rules. All services and personnel related to the PVC Program, including the Third Party Administrator as defined in section 3 (Third Party Administrator) of the PVC Rules, shall be under the exclusive control and supervision of DIA.

K. Subtenant may withdraw from the PVC Program only if its annual obligation in any location to the airport exceeds \$15,000 per concession location. Inflation adjustments shall be calculated using the Consumer Price Index for all Urban Consumers (CPI-U) for the Denver-Boulder-Greeley MSA.

L. The Manager, in her sole and absolute discretion, may terminate the PVC Program if the number of participating concessions falls below 20, or for any other reason, upon 30 days notice to Subtenant. Return to Subtenant of any portion of its Participation Fees shall be in accordance with the procedures stated in the PVC Rules.

M. In the event of a conflict between any provision of the PVC Rules and the Attornment Agreement or the Sublease, the Attornment Agreement and the Sublease shall govern.

7. **Notices.** Any notices required or permitted to be given hereunder shall be in writing and delivered by a nationally recognized courier service or by U. S. certified mail, postage prepaid, return receipt requested, addressed as follows:

If to the City:	Manager of Aviation Denver International Airport 8500 Pena Boulevard Denver, Colorado 80249-6340
If to Tenant	Skyport Development Company, LLC 8231 East Prentice Avenue Greenwood Village, CO 80111 Attn: David Mosteller
If to Subtenant	FM Wok, LLC 8231 East Prentice Avenue Greenwood Village, CO 80111

Any party may change its address for purposes of this paragraph by written notice similarly given.

6. **Agreement made in Colorado.** This Agreement shall be deemed to have been made in and shall be construed in accordance with the laws of the State of Colorado.

7. **Administrative Hearing.** Disputes arising out of this Agreement shall be resolved by administrative hearing before the Manager following the procedures outlined in Denver Revised Municipal Code Section 5-17; provided, that the City shall retain its right to obtain an order of eviction in accordance with applicable state law. It is further agreed that no cause of action shall be brought against the City until there has been full compliance with the terms of this paragraph.

8. **Final Approval.** This Agreement which is expressly subject to and shall not be or become effective or binding on the City until approved by the City Council and fully executed by all signatories of the City and County of Denver, may be executed in two or more counterparts, each of which will be deemed to be an original signature page to this Agreement which may be signed electronically by the Parties in the manner specified by the City.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have caused this Non-Disturbance and Attornment Agreement to be executed and effective as of the the date written on the signature page.

ATTEST:

CITY AND COUNTY OF DENVER

Clerk and Recorder, Ex-officio Clerk of the
City and County of Denver

By _____
Mayor

RECOMMENDED AND APPROVED:

APPROVED AS TO FORM:

By _____
Manager of Aviation

Douglas J. Friednash, City Attorney
for the City and County of Denver

REGISTERED AND COUNTERSIGNED:

By *[Signature]*
Assistant City Attorney

By _____
Auditor

Contract Control No. _____

"CITY"

ATTEST:

SKYPORT DEVELOPMENT COMPANY, LLC

By: *Dennis M. Doby*
Title: *N/A*

By: *[Signature]*
Title: *Member*

"TENANT"

ATTEST:

FM WOK, LLC

By: *Dennis M. Doby*
Title: *N/A*

By: *[Signature]*
Title: *Member*

"SUBTENANT"



Contract Control Number: PLANE-201208465-00

Contractor Name: FM Wok, LLC dba City Wok

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By _____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DOUGLAS J. FRIEDNASH, Attorney
for the City and County of Denver

By _____

By _____

By _____

