

1 BY AUTHORITY

2 ORDINANCE NO. _____
3 SERIES OF 2010

COUNCIL BILL NO. _____
COMMITTEE OF REFERENCE:
4 BUSINESS, WORKFORCE & SUSTAINABILITY

5 A BILL

6 For an ordinance approving a proposed Non-Disturbance and Attornment Agreement
7 between the City and County of Denver, Skyport Development Company, LLC and
8 DIA Baked Goods, Inc. concerning a concession at Denver International Airport.

9
10 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

11 **Section 1.** The proposed Non-Disturbance and Attornment Agreement between the City and
12 County of Denver, Skyport Development Company, LLC and DIA Baked Goods, Inc., in the words and
13 figures contained and set forth in that form of Agreement filed in the office of the Clerk and Recorder,
14 Ex-Officio Clerk of the City and County of Denver, on the 24th day of November, 2010, City Clerk's
15 Filing No. 10-1169 is hereby approved.

16
17 COMMITTEE APPROVAL DATE: November 19, 2010.

18 MAYOR-COUNCIL DATE: November 23, 2010.

19 PASSED BY THE COUNCIL _____ 2010

20 _____ - PRESIDENT

21 APPROVED: _____ - MAYOR _____ 2010

22 ATTEST: _____ - CLERK AND RECORDER,
23 EX-OFFICIO CLERK OF THE
24 CITY AND COUNTY OF DENVER
25

26 NOTICE PUBLISHED IN THE DAILY JOURNAL _____ 2010; _____ 2010

27
28 PREPARED BY: George "Skip" Gray, III.  DATE: November 24, 2010

29 Pursuant to Section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the
30 City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
31 ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to § 3.2.6
32 of the Charter.
33

34 David R. Fine, City Attorney

35 BY: _____, _____ City Attorney

36 DATE: November 24, 2010

NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS NON-DISTURBANCE AND ATTORNMENT AGREEMENT, is made and entered into this _____ day of _____, 2010, 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 **DIA Baked Goods, Inc.**, a Colorado corporation ("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; it's 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 _____, 2010 (the "Sublease"), under which Subtenant will sublease from Tenant certain premises within the Airport as described in the Sublease (the "Subtenant Space"); 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

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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. **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 .

5. **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	

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 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.

[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 day and year first above written.

ATTEST:

STEPHANIE Y. O'MALLEY
Clerk and Recorder, Ex-officio Clerk of the
City and County of Denver

APPROVED AS TO FORM:

DAVID R. FINE, City Attorney
for the City and County of Denver

By _____
Assistant City Attorney

CITY AND COUNTY OF DENVER

By _____
Mayor

RECOMMENDED AND APPROVED:

By  _____
Manager of Aviation

REGISTERED AND COUNTERSIGNED:

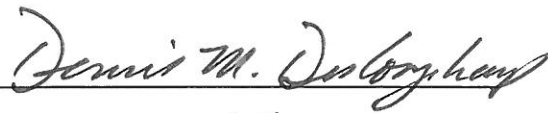
By: _____
Manager of Finance

Contract Control No. AR7A019


By _____
Auditor

"CITY"

ATTEST:

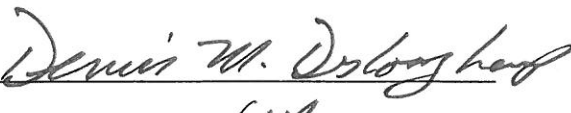
By:  _____
Title: N/A

SKYPORT DEVELOPMENT COMPANY, LLC


By:  _____
Title: Member

"TENANT"

ATTEST:

By:  _____
Title: N/A

DIA BAKED GOODS, INC.

By:  _____
Title: President

"SUBTENANT"