

BY AUTHORITY

ORDINANCE NO. _____

COUNCIL BILL NO. CB12-0855

SERIES OF 2012

COMMITTEE OF REFERENCE:

BUSINESS, WORKFORCE, & SUSTAINABILITY

A BILL

For an ordinance approving a proposed Eighth Amendment to Agreement between the City and County of Denver and Ayala's, Inc. for the operation of a concession at Denver International Airport.

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

Section 1. The proposed Eighth Amendment between the City and County of Denver and Ayala's Inc. dba The Candy Shoppe (AC35032) 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. 1993-0567-H, is hereby approved.

COMMITTEE APPROVAL DATE: November 15, 2012

MAYOR-COUNCIL DATE: November 20, 2012

PASSED BY THE COUNCIL: _____, 2012

_____ - PRESIDENT

APPROVED: _____ - MAYOR _____, 2012

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

NOTICE PUBLISHED IN THE DAILY JOURNAL: _____, 2012; _____, 2012

PREPARED BY: Skip Gray, III, Assistant City Attorney DATE: November 21, 2012

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: November 21, 2012

EIGHTH AMENDMENT TO AGREEMENT

THIS EIGHTH AMENDMENT TO AGREEMENT is made and entered into this as of the date stated on the signature page, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, for and on behalf of the Department of Aviation (the "City"), Party of the First Part, and **AYALA'S INC.** ("Concessionaire"), dba **The Candy Shoppe**, Party of the Second Part.

WITNESSETH:

WHEREAS, the Parties hereto entered into a concession agreement (AC35032) dated June 29, 1993; A First Amendment dated April 11, 1995; a Second Amendment dated February 5, 1996; a Third Amendment dated July 15, 2003; a Fourth Amendment dated May 17, 2004; a Fifth Amendment dated January 10, 2006, a Sixth Amendment dated August 2, 2011, and a Seventh Amendment dated October 31, 2011 (collectively the "Original Agreement") at Denver International Airport; and

WHEREAS, the Parties wish to amend the Original Agreement to add the Alternative Surety provision stated below:

NOW, THEREFORE, for the foregoing reasons and for other good and valuable consideration, the sufficiency of which is acknowledged, the parties hereby agree to revive and amend the Original Agreement as follows:

1. Section 8.03 of the Original Agreement hereby is amended by adding the following as a new subsection B:

B. Alternative Surety.

1. Upon the Concessionaire's request, the Manager may, in her sole discretion, permit a Concessionaire to make "Alternative Surety" as defined below instead of the surety required in Section 8.03 of this Agreement. Payment of the Alternative Surety is due in advance upon notification by the Airport of the amount due.
 - a. **Base Fee.** The Alternative Surety shall be a Base Fee paid to the City of two percent (2%) of the annual compensation due by Concessionaire in the prior calendar year, or if a full year is unavailable, 2% of the annualized compensation due, as calculated by the City. If no payment history is available, or if the Manager, in her sole discretion, determines the existing payment history is insufficient, the Base Fee shall be two percent (2%) of the Monthly Guarantee agreed to in this Agreement multiplied by twelve (12).
2. **No reduction in Amounts Due.** Payment of the Base Fee as surety in no way reduces or offsets the compensation or amounts due from the Concessionaire to the Airport under this Agreement.

3. Term of Alternative Surety; Extension.

- a. The Alternative Surety will apply for one year after all of the following have occurred (Alternative Surety Term):
 - i. Full execution of this amendment.
 - ii. Issuance of notice of Base Fee and Additional Fee (described below) under the terms of this subsection.
 - iii. Receipt of payment due of Base Fee and Additional Fee (described below) under the terms of this section.
- b. At the end of the Alternative Surety Term, the surety requirements of Section 8.03 shall automatically apply for the remainder of the term of the Concession Agreement unless the Alternative Surety is extended by the Manager.
 - i. The Alternative Surety may be extended by the Manager of Aviation, in the Manager's sole discretion, for additional one-year periods through the Term of this Agreement.
 - ii. The Base Fee shall be recalculated at the end of each Surety Term. The Base Fee may be adjusted by the Manager to account for the following:
 - a. For every late rent notice issued to Concessionaire, the Manager may, in her discretion, increase the Base Fee by ½ percent of the annual compensation due in the prior calendar year ("Additional Fee"); however, if no late rent notices were issued to Concessionaire in the prior calendar year then the Manager may reduce any existing Additional Fee by ½ percent of annual compensation due.
 - b. A factor consisting of some or all of the following: The airport's general risk due to local or national changes to the aviation industry, the Airport's cost for administering the alternative surety, and the market cost of Letters of Credit, Revenue Surety instruments, or similar instruments.
 - c. In no event shall the recalculated Base Fee be less than 2% of the greater of the following: the annual compensation due by Concessionaire in the prior calendar year; or if a full year is unavailable, the annualized compensation due, as calculated by the City; or if no payment history is available or the Manager, in her sole discretion, determines the existing payment history is insufficient, the Monthly

Guarantee agreed to in this Agreement multiplied by twelve (12).

iii. Concessionaire shall be notified of any recalculated Base Fee and Additional Fee in writing by the City at the time the Alternative Surety is extended.

c. If the Alternative Surety is extended and recalculated by the Manager, but Concessionaire no longer desires to comply with the Alternate Surety, Concessionaire may instead submit the surety required in Section 8.03.

4. Termination of Alternative Surety. The Alternative Surety may be terminated at any time at the discretion of the Manager or the Concessionaire upon 30 days written notice to the other party. Upon such termination, the surety requirements of Section 8.03 of this agreement shall apply. Any unamortized portion of the Base Fee and Additional Fee for the Alternative Surety shall be refunded to the Concessionaire upon Concessionaire's compliance with Section 8.03

2. Except as modified or revised herein, all terms, conditions, covenants and provisions of the Original Agreement shall remain in full force and effect as if fully set forth herein and the Original Agreement hereby is revived, confirmed and ratified in all respects.

3. This Eighth Amendment to Agreement, which is expressly subject to and shall not be or become effective or binding on the City until it has been approved by the City Council, if so required by law, 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 an original signature page to this Amendment, and this Amendment may be signed electronically by either party in the manner specified by the City.

[SIGNATURE PAGE FOLLOWS]

Contract Control Number: PLANE-AC35032-08

Contractor Name: Ayala's Inc.,

By: Dan R. Ayala

Name: DAN R. AYALA
(please print)

Title: PRESIDENT
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



Contract Control Number: PLANE-AC35032- 08

Contractor Name: Ayala's Inc.

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_____



