

1 BY AUTHORITY

2 ORDINANCE NO. _____
3 SERIES OF 2011

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

5 A BILL

6 For an ordinance approving a proposed Fifth Amendment to Agreement between the
7 City and County of Denver and A Massage, Inc., concerning a concession at Denver
8 International Airport.

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

11 **Section 1.** The proposed Fifth Amendment to Agreement between the City and County of
12 Denver and A Massage, Inc., in the words and figures contained and set forth in that form of the
13 Agreement filed in the office of the Clerk and Recorder, Ex-Officio Clerk of the City and County of
14 Denver, on the 7th day of April, 2011, City Clerk's Filing No. 96-1074-6 is hereby approved.

16 COMMITTEE APPROVAL DATE: April 1, 2011

17 MAYOR-COUNCIL DATE: April 5, 2011


18 PASSED BY THE COUNCIL _____ 2011

19 _____ - PRESIDENT

20 APPROVED: _____ - MAYOR _____ 2011

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

25 NOTICE PUBLISHED IN THE DAILY JOURNAL _____ 2011 _____ 2011

26 PREPARED BY: George "Skip" Gray, III  DATE: April 7, 2011

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

32 David R. Fine, City Attorney

33 BY: _____, _____ City Attorney

34 DATE: April 7, 2011

FIFTH AMENDMENT TO AGREEMENT

THIS FIFTH AMENDMENT TO AGREEMENT is made and entered into this ____ day of _____, 2011, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado acting for and on behalf of the Department of Aviation ("City"), and **A MASSAGE, INC.**, ("Concessionaire") dba A Massage.

WITNESSETH:

WHEREAS, the Parties hereto entered into an Agreement (AC67002) dated November 14, 1996, A Conditional Assignment dated May 22, 1997, a First Amendment dated July 10, 1997, A Second Amendment dated January 21, 2003; a Third Amendment dated July 11, 2003 and a Fourth Amendment dated September 30, 2008 (collectively the "Original Agreement") for the operation of a concession at Denver International Airport ("Airport" or "DIA"); and

WHEREAS, the Parties wish to amend the Original Agreement to add the Alternative Surety provisions stated below;

NOW, THEREFORE, for and in consideration of the premises and other good and valuable consideration, the Parties agree to amend the Original Agreement as follows:

1. Section 8.03 of the Original Agreement hereby is amended by adding the following:

Alternatively, upon the Concessionaire's request, the Manager may, in her sole discretion, permit Concessionaire to temporarily provide an "Alternative Surety" as defined below.

Alternative Surety Requirements. Payment of the Alternative Surety is due in advance upon notification by the Airport of the amount due.

Base Fee. The Alternative Surety shall be a Base Fee paid to the City of two percent (2%) of the annual rent due by Concessionaire in the prior calendar year, or if a full year is unavailable, 2% of the annualized rent due, as calculated by the City. If no rent payment history is available, or if the Manager, in her sole discretion, determines the existing rent payment history is insufficient, the Base Fee shall be two percent (2%) of the MAG agreed to in this Agreement.

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.

Term of Alternative Surety. 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, and (iii) receipt of payment due of Base Fee and Additional Fee (described below) under the terms of this

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section. At the end of the Alternative Surety Term, the surety requirements of this 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.

Extension of Alternative Surety. 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.

Base Fee Recalculation. 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 rent 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 rent 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 rent due by Concessionaire in the prior calendar year; or if a full year is unavailable, the annualized rent due, as calculated by the City; or if no rent payment history is available or the Manager, in her sole discretion, determines the existing rent payment history is insufficient, the MAG agreed to in this Agreement.
- D. 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.
- E. 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 this Section 8.03.

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 this 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 this Section 8.03

2. Except as provided herein, all of the provisions, terms and conditions of the Original Agreement shall remain in full force and effect as if fully set forth herein, and are hereby ratified and reaffirmed.

3. This Fifth Amendment to Agreement is expressly subject to and shall not become effective or binding on the City until it is approved by the City Council, if required, 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 Fifth Amendment to Agreement to be executed as of the day and year first above written.

ATTEST:

CITY AND COUNTY OF DENVER

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

By _____
Mayor

RECOMMENDED AND APPROVED:

By  _____
Manager of Aviation

APPROVED AS TO FORM:

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

REGISTERED AND COUNTERSIGNED:

By _____
Assistant City Attorney

By _____
Manager of Finance

By _____
Auditor

Contract Control Number AC67002-5

PARTY OF THE FIRST PART

ATTEST:

A MESSAGE, INC.

By: _____

By:  _____

(Title)

Title: President

"CONCESSIONAIRE"
"PARTY OF THE SECOND PART"

