

BY AUTHORITY

ORDINANCE NO.
SERIES OF 2013

COUNCIL BILL NO. CB13-0561
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 Skyport Development Company, LLC concerning subleasing and management of concessions on the mezzanine level of Concourse B at Denver International Airport.

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

Section 1. The proposed Eighth Amendment to Agreement between the City and County of Denver and Skyport Development Company, LLC (AC69004) 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. 1997-0326-J, is hereby approved.

COMMITTEE APPROVAL DATE: August 22, 2013

MAYOR-COUNCIL DATE: August 27, 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: August 29, 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: August 29, 2013

EIGHTH AMENDMENT TO AGREEMENT

THIS EIGHTH AMENDMENT TO AGREEMENT ("Amendment") is made and entered into this _____ day of _____, 2013, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, for and on behalf of its Department of Aviation (the "City"), Party of the First Part, and **SKYPORT DEVELOPMENT COMPANY, LLC**, a Colorado limited liability company ("Tenant"), Party of the Second Part.

RECITALS

WHEREAS, the City, through and on behalf of its Department of Aviation, owns and operates Denver International Airport ("DIA" or "Airport") located in the City and County of Denver, Colorado; and

WHEREAS, following a competitive proposal process, the parties hereto entered into an Agreement (AC-69004) dated June 17, 1997 which has been amended by a First Amendment dated September 1, 1998, a Second Amendment dated July 11, 2003, a Third Amendment dated May 17, 2004, a Fourth Amendment dated July 6, 2006, a Fifth Amendment dated February 13, 2007, an Amended and Restated Mezzanine Lease Amendment (Sixth Amendment to Agreement) dated April 11, 2007, and a Seventh Amendment dated October 21, 2008 (collectively, hereinafter, the "Original Agreement", or together with this Amendment, the "Lease"), implementing Tenant's B Mezzanine Development Project, by granting Tenant the right to develop, operate, sublease and manage various retail and food & beverage establishments on the Mezzanine level of Concourse B ("B Mezzanine") and granting Tenant a license to use the Mezzanine Commons Area of Concourse B ("Mezzanine Commons Area") at Denver International Airport for specified purposes in support of the foregoing; and

WHEREAS, Tenant has had discussions with a prospective subtenant to sublease space in a portion of the B Mezzanine for a duty free shop (the "Duty Free Shop Location") and Tenant became aware that the City's planned to solicit proposals for a duty free shop for another location at the B Concourse; and

WHEREAS, Tenant and the City do not believe it would be good for DIA's tenant mix to have two duty free shops at the B Concourse and have agreed that the City will terminate the Lease with respect to the Duty Free Shop Location, accept a return of that space, and the City will solicit proposals to operate the duty free shop at the Duty Free Shop Location; and

WHEREAS, the City and Tenant have also agreed on various methods by which the Tenant could make desired improvements to the B Mezzanine Commons Area as well as return the Duty Free Shop Location to shell condition in support of the City's solicitation of proposals for that space, the cost of which would be difficult for Tenant to recover over the remaining term of the Lease; and

WHEREAS, the City and Tenant have also agreed on revised development plans for the B Mezzanine, including a list of new Subtenants that have been approved by the City and Tenant has represented that those Subtenants, or other Subtenants acceptable to DIA in DIA's sole discretion, will sign Subleases for space at the B Mezzanine on or before December 31, 2013 and will open for business on or before July 1, 2014; and

WHEREAS, The City and Tenant have discussed methods of permitting Tenant to offer improvement incentives to the new Subtenants even though the cost of such incentives would be recovered over the entire term of such Subtenant's occupancy which would extend beyond the expiration of the Lease Term; and

WHEREAS, subject to the terms of this Amendment, the City and the Tenant have agreed on an increase in the minimum amount of Rent that the City will receive from the Tenant as a result of the changes described in this Amendment; and

WHEREAS, the City and Tenant wish to memorialize their agreements concerning: (i) recapture of the Duty Free Shop Location, (ii) the nature and amount of Tenant's additional investment in the B Mezzanine Commons Area, (iii) how the City and Tenant will share the cost of the additional investment in the B Mezzanine Commons Area and the improvement incentives offered to new Subtenants; and (iv) and the changes to the Rent payable by Tenant under the Lease; and

NOW THEREFORE, in consideration of the foregoing, the terms and conditions set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties have agreed to amend the Original Lease, as follows:

1. RETURN OF A PORTION OF THE LEASE PREMISES.

Effective as of the date this Amendment is executed (the "Return Date"), *Exhibit A-4* to the Original Lease Agreement is deleted and replaced by the new *Exhibit A-4* which is attached to this Amendment and, by this reference incorporated herein. The effect of amending *Exhibit A-4* is that the Lease Premises are reduced by the amount of space included in the Duty Free Shop Location (approximately 2,938.3 square feet) with a proportionate reduction of Tenant's Minimum Monthly Guaranty. On or before the Return Date, Tenant shall return the Duty Free Location to the City in shell condition, but otherwise as required by Section 4.02 of the Lease. Upon compliance with the requirements of the Lease with respect to such space, the City will accept the same and the revised *Exhibit A-4* shall become effective. As used herein, "shell condition" means the design and construction of a location barricade wall, removal of furniture, fixtures and equipment while leaving the electrical and communications conduits and cabling in place terminated just above the floor. The design and construction of the barricade wall shall be consistent with the Tenant's recent submittal to DIA's Design Review Committee ("DRC").

2. ADDITIONAL B MEZZANINE DEVELOPMENT OBLIGATIONS

- a. **ADDITIONAL B MEZZANINE IMPROVEMENTS.** Tenant agrees to make the improvements, including carpet, tile, signage upgrades to the B Mezzanine Commons Area described in and consistent with Tenant's design package submitted to the DRC on May 13, 2013, spending at least \$500,000. These improvements will be completed on or before ninety days (90) days after Tenant receives an NTP with respect to such improvements.
- b. **ADDITIONAL B MEZZANINE SUBTENANTS.** Tenant agrees to continue to seek subtenants for the B Mezzanine, using Tenant's funds to provide subtenant finish allowances, where necessary. On or before December 31, 2013, Tenant shall have entered into five (5) Subleases concerning a total of approximately

2,436 square feet of space located at the B Mezzanine, with five tenants previously approved by the City or such substitute subtenants as the City in the exercise of its sole discretion may approve (collectively, the "New Tenants"). Further, on or before July 1, 2014, the New Tenants shall all have opened for business. As used above, "entered into sublease agreements" means that Tenant and a New Subtenant shall have signed a sublease agreement and a non-disturbance and attornment agreement among the City, the Tenant, and the New Subtenant, both of which shall have been submitted to the Manager for approval and execution. Further, on or before July 1, 2014, the five New Subtenants identified above shall each have opened for business, subject to extension due to delays to the extent caused by the City. In addition, as used above, "shall have opened for business" means the date on or before July 1, 2014 (subject to extension due to delays to the extent caused by the City) and the Tenant has (i) delivered documentation to the City that construction and installation of tenant improvements for approved New Subtenant have been completed to the City's satisfaction; (ii) New Subtenant construction walls, have been removed after first obtaining prior written permission from the Manager or the Manager's Authorized Representative; and (iii) New Subtenants have commenced generating gross revenue from their locations.

3. **COMPENSATION.** Section 5.01 of the Lease is amended to add the following provision as Subsection E:

E. Guaranteed Rent. Beginning on the earlier of: (i) July 1, 2014, or (ii) the date on which at least two of the New Tenants have opened for business ("Guaranteed Rent Commencement Date") the provisions of Section 5.01.A and B. of the Lease shall not apply to the six (6) subtenant spaces identified on Attachment A-1 as spaces BM-4A, BM-4C, BM-4E4D, BM4G, and BM-2E (to be occupied by the New Subtenants) and BM-4B (occupied by City Wok) (together, the "Guaranteed Rent Spaces") and the provisions of this Subsection 5.01.E. shall apply to those spaces. Tenant covenants and agrees, without offset, deduction, or abatement to pay the City as compensation for the rights and privileges herein granted with respect to the Guaranteed Rent Spaces, \$1,500,000 per annum starting on the Guaranteed Rent Commencement Date. The Guaranteed Rent shall be payable in advance in equal quarterly installments of \$375,000 (the "Guaranteed Rent"), on or before the first day of each calendar quarter during the term of the Lease. The Guaranteed Rent for any partial quarter shall be prorated on a per month basis.

4. **RECOVERY OF TENANT'S INVESTMENTS.**

- a. Cost of Common Area Improvements. Subject to: (i) the satisfactory completion of the Additional B Mezzanine Improvements described above and (ii) the provisions of Section 5 below, the City will contribute \$500,000 to the cost of the Additional B Mezzanine Improvements described in Section 2.a above. The City's contributions will in the form of a Rent Credits of \$500,000 or, if the cost of such improvements is less than \$500,000, Rent Credits equal to the Actual Costs thereof. "Actual Costs" shall not include financial costs, interest, inventory, pre-opening expenses or unreasonable intra-company charges, but may include architectural and engineering fees not exceeding 15% of the total. Documentation of Actual Costs must include appropriate detail itemizing the

elements of design, decorations, furnishings, fixtures, and equipment. At City's request, Tenant shall also submit copies of invoices supporting such costs.

- b. Cost of Subtenant Incentives. The parties have agreed that the five (5) New Tenants may receive subtenant improvement incentives from Tenant (as determined by the Tenant and approved by the City in their reasonable discretion). The cost of such incentives will be recovered over the life of the Subtenant's occupancy including occupancy under a non-disturbance and attornment agreement, which will extend beyond the scheduled termination of the Lease. The parties have agreed to share the cost of these incentives based on the length of time that each will be receiving rent from each such New Tenant by determining the number of months of the Sublease term (excluding any free rent and/or construction period) (the "Cost Recovery Term"). The cost of the incentives shall include: the Actual Costs incurred by Tenant, including, but not limited to costs incurred with affiliates of Tenant to the extent such costs do not exceed the cost of similar services from a third party ("Sublease Incentive Costs"). The Sublease Incentive Costs will be divided by the Cost Recovery Term and the result will be multiplied times the number of months after October 31, 2017 and the result is the obligation of the City ("DIA Incentive Contribution") and the balance shall be the obligation of the Tenant. Subject to the provisions of Section 5 below, the Tenant shall recover the DIA Incentive Contribution through Rent Credits. For the avoidance of doubt, if a Sublease has a term of 84 months, Tenant provides \$50,000 of improvements, with the Lease term commencing November 1, 2013, the Tenant will receive rent for a period of 48 months out of 84 (57.14%) and the City will receive rent for 36 months out of 84 (42.86%). Tenant will be responsible for 57.14% of \$50,000 = \$28,570 and the City will be responsible for 42.86% of \$50,000 = \$21,428.58 and the City's obligation will be recovered by Tenant through Rent Credits.
- c. Rent Credits. Any amounts that the Tenant is entitled to recover through Rent Credits shall be used by Tenant to offset the Rent (including Percentage Rent, Additional Rent, and Guaranteed Rent) payments next due from Tenant under the Lease until the full amount of the Rent Credit has been used. Any Rent Credit remaining as of the termination or expiration of the Lease shall be paid by the City to Tenant in cash within thirty (30) days after any such termination or expiration of the Lease.
- d. Incentive Amounts. As an additional incentive for Tenant to perform its obligations under this Amendment and for Tenant to finance the costs to be incurred with no interest, the City shall pay Tenant 0.75% of the Gross Revenues of each Subtenant occupying any portion of the Lease Premises after October 31, 2017 pursuant to an active non-disturbance and attornment agreement among the City, the Tenant and the New Subtenant ("Tenant Incentive Payments"). Tenant Incentive Payments shall apply to each Subtenant occupying any portion of the Lease Premises as described on the Attachment A-1 that is attached to this Amendment (excluding any amendment occurring after the date of this Amendment). The Tenant Incentive Payments relate to the period commencing November 1, 2017 and shall continue through the term of occupancy of any such Subtenant, including renewals, replacements, and extensions. Gross Revenues reported by the Subtenant to the City shall be used

to calculate Tenant Incentive Payments. The Tenant Incentive Payments shall be payable by the City on or before the 15th day of the following month (e.g., the Tenant Incentive Payments for November, 2017 will be payable on or before December 15, 2017). The City's obligations under this provision are subject to the provisions of Section 5 below.

5. **TERMINATION OF AMENDMENT.** The parties have agreed that this Amendment is subject to the condition that Tenant shall have timely complied with each and every one of its obligations described in this Amendment. If Tenant fails to perform such obligations and such failure continues more than thirty (30) days after receipt of written notice from the City of such failure, then at the City's option, to be exercised by written notice to Tenant no later than thirty (30) days after expiration of the first thirty-day period, the City may terminate this Amendment. On or before fifteen (15) days following any such termination Tenant shall repay the City all amounts received as Rent Credits. The City's right of termination is conditioned on being timely exercised and shall be its sole and exclusive remedy for a breach by Tenant of any of its obligations under this Amendment and the City hereby waives the right to seek any other remedies, including damages or specific performance. Upon any such termination, all rights and obligations of the parties stated in this Amendment, except the obligation of Tenant to (i) repay Rent Credits and (ii) deliver the Duty Free Location (with a proportionate reduction of Tenant's Minimum Monthly Guaranty), shall be terminated. Further, commencing with the effective date of any such termination, the provisions of Sections 5.01.A. and B. shall apply to the six (6) Guaranteed Rent Spaces and any Guaranteed Rent paid by Tenant for any period after the effective date of any such termination shall be credited against Rent next payable by the Tenant.
6. **ENTIRE AGREEMENT.** The parties acknowledge and agree that this Amendment constitutes the entire agreement of the parties with respect to the subject matter described herein and that all representations made by any officer, agent or employee of the respective parties unless included herein are null and void and of no effect. Except as modified or revised by this Amendment, all terms, conditions, covenants and provisions of the Lease shall remain in full force and effect as if fully set forth herein and no further alterations, amendments, changes or modifications, unless expressly reserved to the Manager herein, shall be valid unless executed by an instrument in writing by all the parties with the same formality as the Lease.
7. **BINDING AGREEMENT.** This Amendment may be executed in two or more counterparts. Each counterpart will be deemed an original signature page to this Amendment. This Amendment is expressly subject to and shall not be or become effective or binding on the City until approved by the City Council, if so required by the City's Charter, and fully executed by all signatories of the City and County of Denver. This Amendment may be signed electronically by the parties in the manner specified by the City

[SIGNATURE PAGES FOLLOW]

Contract Control Number: PLANE-AC69004-09

Contractor Name: Skyport Development Company, LLC

By: 

Name: David Montelher
(please print)

Title: Member
(please print)

ATTEST: [if required]

By: N/A

Name: _____
(please print)

Title: _____
(please print)



Contract Control Number: PLANE-AC69004-09

Contractor Name: Skyport Development Company, LLC

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

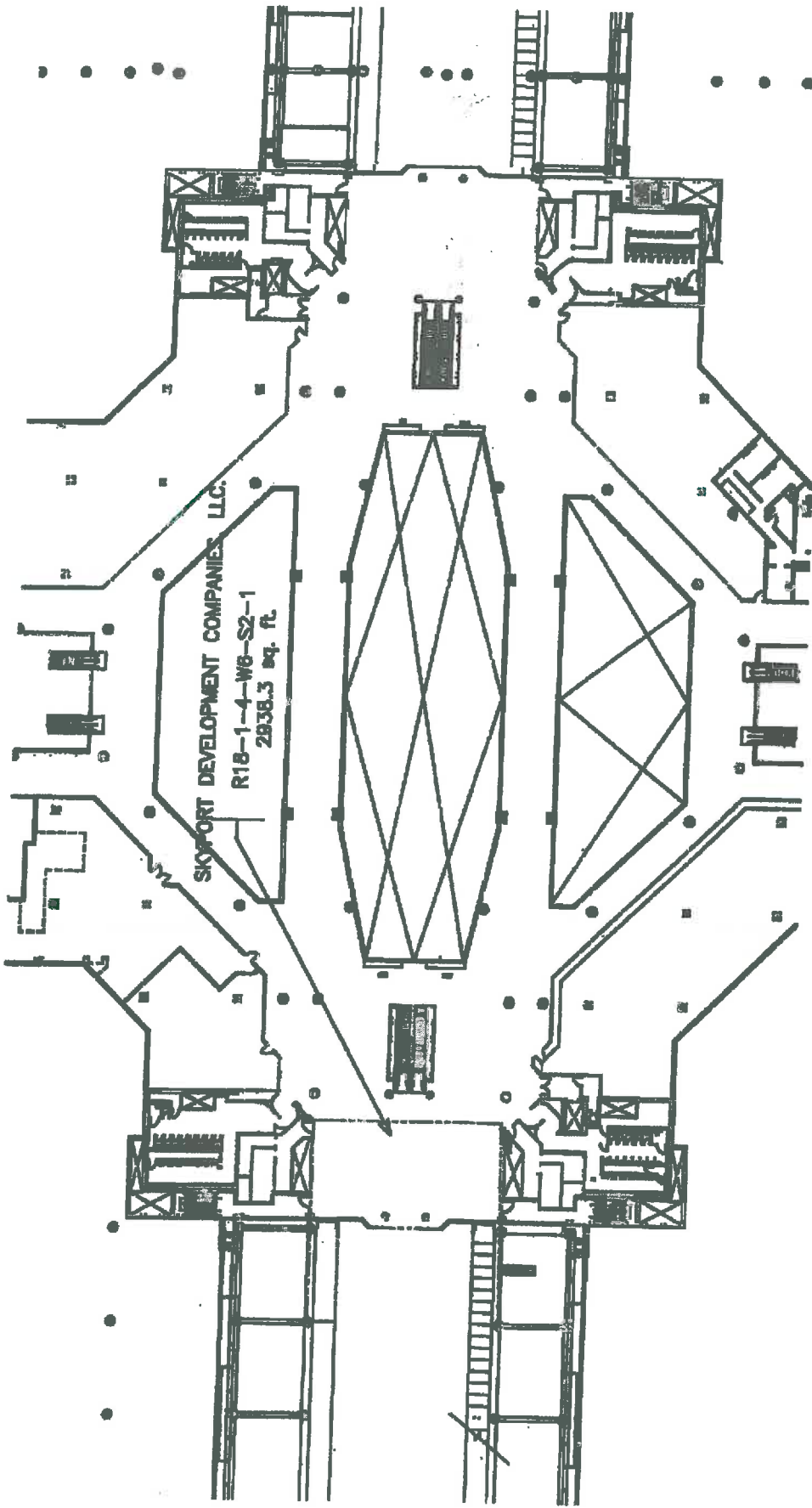
By _____

By _____

By _____



EXHIBIT A-4
LEASE PREMISES PLAN



[Signature]
 MANAGER OF DESIGN

NOTE: This exhibit depicts only square footage of leased area based upon planning data and is not intended to address construction details.

SCALE 1" = 50.00'



- WALL OR CURB
- SKYPORT DEVELOPMENT COMPANIES, LLC
- R18-1-4-W6-S2-1
- LEASED AREA
- CONCOURSE B
- ⊕ = NORTH
- MC = Not Included
- On basis of R18-1-4-W6-S2-1

REVISIONS		DENVER INTERNATIONAL AIRPORT EXHIBIT A-4 Concourse B Mezz. Level Skyport Development Companies, LLC. ccj: bmyv
KEY PLAN CONCOURSE B		

R18-1-4-11-8

ATTACHMENT A-1

PROPOSED NEW 5 RETAIL LOCATIONS

