

This Agreement made as of the ___ day of April, 2018 (the “Effective Date”)

BETWEEN:

CITY OF KELOWNA
1435 Water Street
Kelowna, BC, V1Y 1J4
(the “City”)

AND:

MODO CO-OPERATIVE
470 Granville St., Unit 200
Vancouver, BC V6C 1V5
(“Modo”)

RECITALS:

- a) The City has identified the need for a carsharing program in order to help achieve the City’s goals of reducing City fleet expenses, as well as help meet its long-term community and corporate climate change action plan and strategic goals, including the encouragement of employee and community use of car sharing.
- b) In furtherance of its goals, the City transitioned part of its City Hall Pool fleet (see Appendix B [City Vehicles]) to Okanagan Car Share (“OGO”) and became a significant user of OGO’s services.
- c) Modo and OGO intend to transition the carsharing activities of OGO into Modo. Post-transition, OGO will cease to operate and Modo will provide carsharing services in Kelowna. That transition will include the purchase of key OGO assets by Modo, the refund of membership share value by OGO to its members, and the purchase of Modo shares by those then former OGO members, with the result that OGO members will become Modo members.
- d) Modo will provide carsharing services in the Kelowna area in a way that assures substantial continuity of experience for former users of OGO services and in accordance with this Agreement.
- e) The City and Modo have signed a Memorandum of Understanding dated September 27, 2017 confirming the City’s intent to support the transition from OGO to Modo and to continue to source City Hall Pool services from Modo in a manner comparable to what it has been doing with OGO.
- f) The City and Modo wish to work together to continue the carsharing program for the City’s Drivers and have agreed to do so on the terms and conditions set out in this Agreement.
- g) Certain capitalized terms used in this Agreement and not otherwise defined will have the meanings given to them set out in Appendix A [Defined Terms].

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Services Provided by MODO to City's Drivers

During the Term, Modo will provide the City with access to Modo Vehicles and its services for those of the City's Drivers designated by the City from time to time and approved by Modo pursuant to Section 10 [City's Drivers – Approval Process/Eligibility Conditions].

2. Booking Vehicles

Modo will provide the Modo Vehicles based on the advance bookings made by the City's Drivers. Modo will continuously provide both telephone and on-line booking twenty-four (24) hours a day, seven (7) days a week in accordance with its current business practices.

3. No Personal Use Except by Separate Modo Agreement

The City acknowledges and will inform the City's Drivers that this Agreement does not provide for the use of Modo Vehicles for the City's Drivers' personal use. The City will assist Modo by encouraging the City's Drivers to establish personal Modo accounts. To encourage participation, Modo will make available the promotional offer described in Appendix C [Promotional Offer for City Employees] during the Term.

4. Parking at City Designated Parking Spots

Without any additional cost to Modo, the City will provide eight (8) City Designated Parking Spots, with six (6) City Designated Parking Spots at the City Hall location, for Modo's exclusive use for the duration of the Term. Modo agrees that it will use commercially reasonable efforts to maintain in Kelowna during the Term not less than eight (8) Modo Vehicles and make use of the City Designated Parking Spots at the City Hall location. Modo will consult with the City before reducing the number of Modo Vehicles below eight (8).

5. City Vehicles

- (a) Concurrently with the execution of this Agreement, the City will transfer and convey, or cause to be transferred and conveyed, all legal, beneficial and equitable right and title in each of the City Vehicles to Modo, free and clear of any encumbrances, for an aggregate purchase price of \$1.00. Modo agrees to remit all applicable excise taxes due and payable as a result of the registration with the applicable governmental agency of such City Vehicles in the name of Modo. Each of the parties agree to execute, deliver and register all such documents, instruments and conveyances as may be necessary to effect the transfer of title in such City Vehicles to Modo as of the Effective Date.
- (b) During the Term, if Modo determines, in its sole discretion, that a City Vehicle needs to be replaced, Modo shall notify the City in writing (the "**Retired City Vehicle Notice**") and the City shall have the option to repurchase the retiring City Vehicle from Modo for an aggregate purchase price of \$1.00 (the "**Retired Repurchase Option**"). The City shall elect whether to exercise its Retired Repurchase Option in writing within thirty (30) calendar days of its receipt of the Retired City Vehicle Notice from Modo, failing which, the Retired Repurchase Option will be deemed to be expired. The Retired Repurchase Option shall not be transferrable by the City. Upon delivering notice of its election to exercise the Retired Repurchase Option within the timeline provided above, Modo shall promptly thereafter transfer such retiring City Vehicle to the City in

consideration of such purchase price, and the City agrees to remit all applicable excise taxes due and payable as a result of the registration with the applicable governmental agency of such retiring City Vehicle in the name of the City. Following such transfer, that retiring vehicle will cease to be a City Vehicle for the purposes of this Agreement, with no further compensation to Modo.

- (c) Upon expiration of the Term, or if Modo withdraws its carsharing service from Kelowna during the Term, Modo shall notify the City in writing (the “**Unretired City Vehicle Notice**”) of the City Vehicles that have not been retired by Modo, and the City shall have an option to repurchase all such unretired City Vehicles for an aggregate purchase price of \$1.00 (the “**Unretired Repurchase Option**”). The City shall elect whether to exercise its Unretired Repurchase Option in writing within thirty (30) calendar days of its receipt of the Unretired City Vehicle Notice from Modo, failing which, the Unretired Repurchase Option will be deemed to be expired. The Unretired Repurchase Option shall not be transferrable by the City. Upon delivering notice of its election to exercise the Unretired Repurchase Option within the timeline provided above, Modo shall promptly thereafter transfer such unretired City Vehicle to the City in consideration of such purchase price, and Modo agrees to remit all applicable excise taxes due and payable as a result of the registration with the applicable governmental agency of such unretired City Vehicle in the name of the City. Following such transfer, that unretired vehicle will cease to be a City Vehicle for the purposes of this Agreement, with no further compensation to Modo.
- (d) In the event that the City does not exercise its Retired Repurchase Option or Unretired Repurchase Option, as the case may be, in accordance with the provisions above, then Modo shall be entitled to keep, sell, transfer or otherwise use the applicable vehicles as it wishes and in its sole discretion, and shall be entitled to retain any revenues or profits therefrom.

6. Term of Agreement

This Agreement has an initial term (the “**Initial Term**”) of three (3) years from the Effective Date. Where the parties continue to deal with each other following the expiry of such Initial Term, this Agreement will automatically renew for subsequent one (1) year periods (each, an “**Extended Term**”, and collectively together with the Initial Term, the “**Term**”) on all of the same terms and conditions as the Initial Term, unless otherwise indicated in this Agreement, unless and until such extension is cancelled by either party upon ninety (90) calendar days’ written notice in advance of the end of the Initial Term or Extended Term, as applicable.

7. Pricing and Payment

Pricing shall be the Business Rates applicable at the time of use of the Modo Vehicle, as posted on Modo’s web site and as may be amended from time to time. Modo agrees to waive the registration fee for each City’s Driver and the refundable security deposit.

The City understands that its use of the Modo Vehicles is critical to the success of Modo in Kelowna and agrees that a minimum monthly invoice amount of \$2,500 (less a credit of \$250 for each unretired vehicle mutually agreed to by the parties from time to time as an “out of town” vehicle, such designation as initially set forth in Appendix B [City Vehicles]) plus applicable taxes for carsharing services will be applied to the City during the Term, beginning after the transition from OGO car-

sharing to Modo as described in Recital C, payable in accordance with Modo's standard payment terms.

8. Other Charges

In addition to usage fees for Modo's carsharing services, the City will be subject to additional charges for fines and fees as per the price list available on Modo's web site, as may be amended from time to time.

Modo will provide monthly reports to the City's Fleet Services Manager regarding fines and fees amounts, itemized according to each of the City's Drivers.

9. Termination for Cause

Either party may terminate this Agreement for "cause" in the event of a default by the other party of any material terms of this Agreement or applicable Modo user terms and conditions, which breach is not cured within fifteen (15) calendar days after receipt of written notice from the other party specifying the nature of the breach. If the breach is of a nature that, with reasonable resources and diligence, would require more than fifteen (15) calendar days to remedy, then the party that has breached will not be in default if it, immediately after receiving notice of the breach, embarks on a diligent and continuous remedy of the breach.

Any termination for cause is to be given with sixty (60) calendar days' prior written notice.

10. City's Driver - Approval Process/Eligibility Conditions

- (a) Modo will provide the City from time to time and on the reasonable request of the City, electronic fobs as are reasonably necessary for the number of City's Drivers approved from time to time pursuant to this Section 10 [City's Driver - Approval Process/Eligibility Conditions] and Modo's standard approval conditions. The City will take diligent precautions with such "unissued" fobs but will not be liable for any losses arising from its failure to do so except where negligent and for charges as set out for lost or stolen fobs on Modo's web site. The City agrees to provide prompt notice to Modo upon becoming aware that a fob has been lost or stolen.
- (b) Each City's Driver must first be authorized in writing to Modo by the City's Fleet Services Manager, meet Modo's joining criteria as published in Modo's Carsharing Handbook, as may be amended from time to time, and complete registration with Modo using Modo's on-line registration process, prior to being permitted to use Modo Vehicles under this Agreement.
- (c) Except as set out above, the City will not be responsible for reviewing or approving any application from a proposed City's Driver. The City will give direction to City staff on the process required by Modo to be completed in order to receive such approval from Modo.
- (d) Except where otherwise agreed from time to time in writing between the City and Modo, Modo agrees to use the following process and criteria for determining whether or not to approve each proposed City's Driver:
 - i) The applicant completes the on-line application and an orientation for Modo.

- ii) The applicant reads and agrees to (by way of an online “click and accept” function or other means of ensuring that the applicant has read and agreed to same) all of Modo’s terms and conditions as described in Modo’s Carsharing Handbook.
 - iii) The applicant authorizes the applicable governmental authority(ies) to send to Modo the applicant’s driving record and auto insurance claims history.
 - iv) Modo will review and if acceptable and in compliance with this Section 10[City’s Driver - Approval Process/Eligibility Conditions] will approve the City’s Driver, activate the fob, and provide the City’s Driver with their driver account number and concurrently notify the City’s Fleet Services Manager and the City’s Driver via email.
- (e) Modo will be responsible for administering the list of proposed and approved City’s Drivers at all times during the Term and will provide a copy of same at any time and from time to time to the City upon request. Where the City requests periodic or regular copies of the list of the City’s Drivers, Modo will submit same to the City at such requested intervals.
- (f) The City’s Drivers that are eligible to drive OGO vehicles as at the Effective Date will be eligible to drive Modo Vehicles and will not be required to re-apply.

11. Vehicle Maintenance

Modo will ensure all Modo Vehicles are safe, clean, reliable and well maintained. Modo will inspect and clean as necessary Modo Vehicles every two weeks. As these are shared vehicles in a shared vehicle environment, it is understood that no attendants visit and inspect Modo Vehicles before each usage. Vehicles are accepted in an “as is” condition. For certainty, in this Section 11 [Vehicle Maintenance], the phrase “as is” refers only to the cleanliness and the aesthetic qualities of the vehicles and does in no way relieve Modo from its obligations to provide a safe, reliable and road worthy vehicle at all times and under no circumstances will Modo be relieved of those obligations to provide a safe, reliable and road worthy vehicle. During the winter season (i.e., October 15 – April 15), Modo will ensure that all Modo Vehicles stationed in Kelowna have premium winter tires that are specifically designed to provide traction in deeper snow and in sub-zero temperatures.

12. Accidents and Damage

The City will instruct the City’s Drivers to cooperate with all accident investigations and any resulting lawsuits related to the use by the City’s Drivers of Modo Vehicles.

13. Damage or Theft while Parked

Modo will release and hold the City, its elected officials, officers and employees harmless from any financial damages incurred as a direct result of any damage or theft of Modo Vehicles while parked anywhere, including while parked at any City Designated Parking Spot, except in the case where the damage was caused by the gross negligence or wilful misconduct of the City, its elected officials, officers or employees.

14. Insurance and Risk Allocation

Modo will keep in force throughout the Term automobile insurance including, without limitation, third party liability of not less than \$5,000,000 per occurrence. Before beginning use of the City Vehicles,

and on an annual basis, Modo will deliver to the City proof, satisfactory to the City, acting reasonably, that the foregoing insurance has been obtained and the premiums for it have been paid by Modo. With the exception of 'specific perils' coverage to cover loss or damage from theft, fire, earthquake, explosion and weather, Modo self-insures for other physical damage to the Modo Vehicles, including for collision and comprehensive perils.

In the event that a Modo Vehicle is damaged in an at-fault accident while in the care of a City's Driver, the City will be responsible for a Damage Fee, depending on the extent of the damage, as posted on Modo's web site for Business Accounts, and as may be amended from time to time.

15. Liens and Impoundment

If a Modo Vehicle is towed and impounded for illegal parking while booked to a City's Driver and while used by a City's Driver, the City is responsible for recovering the Modo Vehicle and paying any costs arising from the Modo Vehicle being towed. If, without the approval of Modo, through an act or omission of the City or the City's Driver, a lien is placed on a Modo Vehicle or the Modo Vehicle is impounded (for instance, by failing to pay for repairs) the City is responsible for any such reasonable costs, court and legal fees incurred by Modo in pursuing the speedy return of the Modo Vehicle as well as any service charges.

16. Suspension of Driving Privileges

In the event of a suspension or termination of a City's Driver's driving privileges, and upon receiving written notice of same from Modo, the City will instruct such City's Driver to return the access fob to the City's Fleet Services Manager.

17. Violations and Fines

In the event of traffic violations or other fines such as parking tickets, accidents, no shows, cancelled bookings, late fees, not fobbing out, overnight bookings, weekend and bookings over seven (7) hours, Modo will notify the City's Fleet Services Manager via e-mail and the applicable City's Drivers. A report of internal violations will be made available on request as needed.

18. Direct Negotiation

In the event of any dispute between the parties regarding this Agreement, the parties intend to use commercially reasonable good faith efforts to engage in direct negotiations between:

- a) Modo's manager and the City's Fleet Services Manager, or their designates, over a period of not less than three (3) Business Days (or such longer period as the parties may agree to in writing), and
- b) if such dispute remains unresolved following discussions pursuant to subsection (a), Modo's CEO and the City's Fleet Services Manager, or their designates, over a period of not less than two (2) further Business Days (or such longer period as the parties may agree to in writing).

If such direct negotiations are not successful or the parties fail to meet to carry out such negotiations within 5 Business Days (or such longer period as the parties may have agreed to in writing) of the dispute arising (the "**Direct Negotiation Period**"), then the parties must resolve the dispute through arbitration in accordance with Section 19 [Arbitration].

19. Arbitration

If a dispute has not been resolved following expiry of the Direct Negotiation Period in accordance with Section 18 [Direct Negotiation], such dispute will be settled exclusively by binding arbitration. The arbitration will be conducted in accordance with the British Columbia Domestic Commercial Arbitration Rules of the British Columbia International Commercial Arbitration Centre (the “**Rules**”). The arbitration will be performed by a single arbitrator selected by the parties within five (5) Business Days of either party commencing the arbitration process; the seat of the arbitration will be Vancouver, British Columbia.

The parties will share equally in the fees and expenses of the arbitrator and the cost of the facilities used for the arbitration hearing, unless the arbitrator determines otherwise, but will be responsible for their own respective legal costs incurred in connection with the arbitration. Depositions will not be allowed, but information may be exchanged by other means. The parties will use their commercially reasonable efforts to ensure that an arbitrator is selected promptly and that the arbitration hearing is conducted no later than twenty (20) Business Days after the arbitrator is selected. The arbitrator must decide the dispute in accordance with the substantive law (statutory, common law, and equitable law) which would govern the dispute if it were litigated in a British Columbia court under British Columbia law and, if requested by a party to the dispute, must specify a rectification period for a default or breach of this Agreement. Following the arbitration hearing and within ten (10) Business Days of such hearing, the arbitrator must issue his or her written decision, including a summary of the factual and legal basis for such decision. This requirement does not, however, mean that the arbitrator’s decision is reviewable by a court for errors of law or fact. The decision of the arbitrator will be final and binding on both parties. Judgement upon the decision may be entered in any court of competent jurisdiction.

20. Applicable Law

This Agreement will be governed by, and is to be interpreted according to, the laws of the Province of British Columbia and the federal laws of Canada applicable therein.

21. Assignment

Neither party may assign its interest in this Agreement without the prior written consent of the other party.

22. Amendments

Any amendments to the Agreement must be delivered in writing and signed by both Parties.

23. Severability

If any single part of this Agreement is found to be legally ineffective it shall not affect the validity of the rest.

24. Notice

Except for communications expressly contemplated to be made by phone or internet all notices and other communications under this Agreement will be sufficiently given if sent by courier or e-mail to the following civic/e-mail addresses:

a) to the City:

City of Kelowna
1435 Water Street
Kelowna, BC, V1Y 1J4
Attention: Alf Soros, Fleet Services Manager
E-mail: asoros@kelowna.ca

b) to MODO:

MODO Co-Operative
470 Granville St., Unit 200
Vancouver, BC V6C 1V5
Attention: Patrick Nangle, CEO
E-mail: patrick.nangle@modo.coop

and the communication will be deemed to have been received at the time stated on the courier waybill, or recipient's computer server, provided that, in the case of a courier delivery, it is made during Business Hours, and in the case of an e-mail the recipient's computer does not issue an "auto-reply" stating that the recipient is not currently reading their e-mail messages.

25. Further Assurances

The parties shall at all times do, execute, acknowledge and deliver such acts, deeds, agreements and other instruments as may be reasonably necessary or desirable to give full force and effect to the terms of this Agreement.

26. Entire Agreement

This Agreement, together with any instruments to be executed and delivered pursuant to this Agreement, constitutes the entire agreement between the parties and supersedes all prior understandings and memoranda.

27. Counterparts

This Agreement may be executed in any number of counterparts, and delivered by electronic means, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument.

[Remainder of page left intentionally blank – Execution page follows]

TO CONFIRM THEIR INTENT TO BE LEGALLY BOUND BY THIS AGREEMENT, each party has authorized its authorized signatory(ies) to sign and deliver this Agreement effective as of the Effective Date as set out below:

CITY OF KELOWNA, by its authorized signatory:

MODO CO-OPERATIVE, by its authorized signatory:

Patrick Nangle,

Chief Executive Officer

Appendix A – Defined Terms

In this Agreement, the following phrases and words have the following meanings:

1. Business Day

Any day on which banks are open for business in Vancouver, British Columbia, other than a Saturday, Sunday or statutory holiday in British Columbia.

2. City Designated Parking Spots

Parking spots located at the City Hall campus or other locations licensed to Modo from time to time specifically for the purpose of parking Modo Vehicles for car sharing by the City's Drivers and other drivers authorized by Modo.

3. City's Driver or City's Drivers

All employees as well as any others the City's Fleet Services Manager deems authorized to use Modo vehicles pursuant to this Agreement.

4. City's Fleet Services Manager

The City employee designated by the City in writing from time to time as the City's Fleet Services Manager, which is initially set in Section 24 [Notice].

5. City Vehicles

Those vehicles listed in Appendix B [City Vehicles], which shall be transferred to Modo as of the Effective Date.

6. Effective Date

The date set out at the beginning of this Agreement.

7. Modo Vehicles

The motor vehicles used by Modo from time for the purposes of providing car sharing services to its members and other clients, which, for the avoidance of doubt, includes the City Vehicles.

8. OGO

OGO has the meaning set forth in Recital B.

9. Retired City Vehicle Notice

Retired City Vehicle Notice has the meaning set out in Section 5 [City Vehicles].

10. Retired Repurchase Option

Retired Repurchase Option has the meaning set out in Section 5 [City Vehicles].

11. Unretired City Vehicle Notice

Unretired City Vehicle Notice has the meaning set out in Section 5 [City Vehicles].

12. Unretired Repurchase Option

Unretired Repurchase Option has the meaning set out in Section 5 [City Vehicles].

13. Term

The words "Term", "Initial Term" and "Extended Term" have the meanings set out in Section (d) [Term of Agreement]

APPENDIX B – City Vehicles

Year / Make / Model	Vehicle Identification Number (VIN)	“Out of Town” Vehicle
2007 Toyota Prius	JTDKB20U673216882	No
2009 Ford Ranger	1FTYR10DX9PA09861	No
2009 Honda Civic Hybrid	JHMFA36239S800969	No
2010 Ford Focus	1FAHP3FN5AW255122	No
2015 Ford Fusion	3FA6POLUXFR201519	Yes
2015 Ford Fusion	3FA6POLU8FR201518	Yes
2016 Ford Focus	1FADP3E22GL334294	No
2016 Nissan Leaf	1N4BZ0CP5GC301434	No

APPENDIX C – Promotional Offer for City Employees

To encourage City employees to adopt carsharing for their personal use, Modo will offer each City employee that joins Modo as an individual member during the Term:

1. Access to Modo's entire fleet of vehicles (nearly 600 as at March 2018);
2. \$120 in driving credit to be applied to usage and mileage charges, to expire three (3) months after registration; and
3. Initial registration fee waived.