

MODIFICATION AGREEMENT #2

THIS MODIFICATION AGREEMENT dated for reference the ___ day of _____ 2021 is BETWEEN:

CITY OF KELOWNA, a municipal corporation having offices at 1435 Water Street, Kelowna, B.C. V1Y 1J4

(the “City”)

AND:

YMCA OF OKANAGAN ASSOCIATION (Inc. No. S-16706), a society under the *Society Act* (British Columbia), 375 Hartman Road, Kelowna, B.C., V1X 2M9, Facsimile 250-765-7962 email ceo@ymca-ywca.com

(the “Y”)

WHEREAS:

The City is the registered owner of the lands in fee simple located at 4015 Gordon Drive, Kelowna, B.C. and legally described as:

PID: 026-563-355

Lot 2 District Lot 168 and Section 2 Township 26 ODYD Plan KAP80134

By a Management and Operating Agreement dated May 31st, 2012, as amended by Modification Agreement dated December 6, 2016, (collectively, the “Original Agreement”), the City assigned the operation and management of the Facility named, branded and marketed as the H2O Adventure and Fitness Centre to the Y for a term commencing January 1st, 2012 and terminating December 31st, 2016;

In accordance with section 4 of the Original Agreement, the Original Agreement was renewed for a five (5) year renewal term of being from January 1st, 2017 to December 31st, 2021;

The City and the Y wish to extend the renewal term by two (2) years and amend the Original Agreement to update the agreement to regarding GST and grant obligations;

NOW THEREFORE; in consideration of the mutual covenants, conditions and agreements herein contained, the City and the Y agree as follows;

1. The Original Agreement is amended as follows:

REPLACE

“WHEREAS (D). The Y wishes to manage and operate, and the City wishes to engage the Y to manage and operate, the Facility in accordance with this Agreement;

WITH

WHEREAS (D). The Y wishes to manage and operate, and the City wishes to engage the Y, and provide the Y with the right and opportunity, to manage and operate, the Facility in accordance with this Agreement and in consideration of a fee to be paid from Y to the City based on the surplus revenue generated from the operation of the Facility, set out in this Agreement;”

REPLACE

“OPTION TO RENEW

4. The parties may agree to renew this Agreement for an additional five (5) years as follows:
 - (a) on or before October 1, 2015, the Y advises the City through a written notice its desire to renew the Agreement for an additional 5 year term;
 - (b) at the time of giving such notice, the Y is not in breach of any covenant or condition herein contained ; and
 - (c) the Y has duly and regularly throughout the term observed and performed the covenants and conditions herein contained.

The City will respond through written notice to the Y’s request by December 31, 2015 as to whether it also desires to renew this Agreement. That decision will be at the City’s sole discretion.

Should the City elect to participate in negotiations towards an extension, those negotiations will commence on or before June 1, 2016.

The Y and the City will each be responsible for their own expenses incurred in negotiating a renewal of this Agreement. For clarity, the parties will not be obligated to renew this Agreement, unless they enter a written renewal agreement.”

WITH

“RENEWAL

4. The parties confirm and agree that this Agreement has been renewed for an additional seven (7) years, and that, despite section 3, the Term shall expire on December 31, 2023.”

REPLACE

“7. Operating Year

In this Agreement, “operating year” means a calendar year. The first operating year for this Agreement will commence January 1, 2012.

The Y shall operate the Facility in a fiscally responsible manner. The Y shall use all reasonable efforts to manage and operate the Facility in accordance with the established operating budget. The City acknowledges that adjustments to the budget may be required to accommodate unforeseen circumstances that result in shortfalls to projected sales or attendance levels but the Y shall continually strive to achieve positive financial performance.

In addition to the reporting requirements in sections 16 and 17, the Y will immediately inform the City of any anticipated significant deviations from the submitted annual operating budget. In the event of a projected operating budget deficit, the Y and City will collaborate on opportunities to minimize or eliminate any budget deficits.”

WITH

“7. Operating Year

In this Agreement, “operating year” means a calendar year. The first operating year for this Agreement will commence January 1, 2012.

The Y shall operate the Facility in a fiscally responsible manner. The Y shall use all reasonable efforts to manage and operate the Facility in accordance with the established operating budget. The City acknowledges that adjustments to the budget may be required to accommodate unforeseen circumstances that result in shortfalls to projected sales or attendance levels but the Y shall continually strive to achieve positive financial performance.

In addition to the reporting requirements in sections 16 and 17, the Y will immediately inform the City of any anticipated significant deviations from the submitted annual operating budget. In the event of a projected operating budget deficit, the Y and City will collaborate on opportunities to minimize or eliminate the proposed need for any budget deficits. The City and the Y recognize that decisions to mitigate budget deficits may have negative impacts on service levels available to H2O users. Together, the City and the Y will evaluate the impacts of proposed deficit containment measures. Notwithstanding the foregoing, the City retains the option to limit an operating budget deficit that does not align with the financial objectives of the City.”

REPLACE

“7b) Annual Financial Operating Surplus

Annual financial operating surplus is defined as year-end operating revenue in excess of operating expenses. The expenses for this equation are defined by those items outlined in the annual operating budget of the Facility including Y overhead fee and management fee but exclude, for clarity, any First Line Repair budget surplus as defined in First Line Repair section in Schedule F.

When the year-end budget is in a net surplus position, the surplus funds will be shared as follows: Net surplus funds less than \$100,000:

- 33% shall be retained by the City and used as determined by the City.
- 33% shall be retained by the Y to fund its programs and charitable activities within Kelowna.
- 34% shall be retained by the City and placed in an Equipment Replacement and Improvement Fund as outlined in this section below.

Net surplus funds greater than \$100,000, the first \$100,000 will be shared as outline above and the additional surplus over \$100,000 will be shared as follows:

- 25% shall be retained by the City and used as the determined by the City.
- 50% shall be retained by the Y to fund its programs and charitable activities within Kelowna.
- 25% shall be retained by the City and placed in the Equipment Replacement and Improvement Fund as outlined in this section below.

The City's share of the surplus will be paid by the Y within five working days of completion of the Annual Report and Audited Financial Statements under section 17."

WITH

"7b) Annual Shared Surplus

Annual shared surplus is defined as year-end operating revenue in excess of operating expenses. The expenses for this equation are defined by those items outlined in the annual operating budget of the Facility including Y overhead fee and management fee but exclude, for clarity, any First Line Repair budget surplus as defined in First Line Repair section in Schedule F.

When the year-end budget is in a net surplus position, the shared surplus funds will be shared as follows: Net surplus funds less than \$100,000:

- 33% shall be transferred to the City and used as determined by the City.
- 33% shall be retained by the Y to fund its programs and charitable activities within Kelowna.
- 34% shall be transferred to the City and placed in an Equipment Replacement and Improvement Fund as outlined in this section below.

Net shared surplus funds greater than \$100,000, the first \$100,000 will be shared as outline above and the additional surplus over \$100,000 will be shared as follows:

- 25% shall be transferred to the City and used as the determined by the City.
- 50% shall be retained by the Y to fund its programs and charitable activities within Kelowna.
- 25% shall be transferred to the City and placed in the Equipment Replacement and Improvement Fund as outlined in this section below.

The City's share of any shared surplus will be paid by the Y within five working days of completion of the Annual Report and Audited Financial Statements under section 17.In

addition, Y shall pay any GST (and any other applicable taxes that may be imposed from time to time) to the City payable with respect to shared surplus transferred to the City from time to time.”

REPLACE

“(b) Accessing the Budget

- The Plan as outlined in Schedule E (the “Furnishings and Equipment Plan”) shall be a guide for annual purchases. It is recognized that the Plan is only a guide and is subject to change based on actual needs.
- As part of the annual budget process and timeline required pursuant to this Agreement, the Y will submit an equipment purchase plan and budget.
- Any changes or deviations from the plan will be in consultation between both the Y and City.
- Upon approval from the City, the Y will complete purchases and invoice the City for reimbursement from the budget.”

WITH

“(b) Accessing the Budget

- The Plan as outlined in Schedule E (the “Furnishings and Equipment Plan”) shall be a guide for annual purchases. It is recognized that the Plan is only a guide and is subject to change based on actual needs.
- As part of the annual budget process and timeline required pursuant to this Agreement, the Y will submit an equipment purchase plan and budget.
- Any changes or deviations from the plan will be in consultation between both the Y and City.
- Upon approval from the City, the Y will complete purchases and invoice the City plus applicable taxes, for reimbursement from the budget.”

REPLACE

“COLLECTION OF TAXES & PROPERTY TAXES

19. The Y shall charge and collect from users and occupants of the Facility all applicable HST (or any such taxes that may replace the HST during the Term of this Agreement) and other taxes payable by users with respect to their use or occupation of the Facility and the Y shall remit such taxes in accordance with all applicable laws.

The Y shall not be responsible to pay any property taxes payable with respect to the Land or the Facility.”

WITH

“COLLECTION OF TAXES & PROPERTY TAXES

19. As the Y earns the revenue from the operation of the Facility, the Y shall be responsible for collecting, remitting and otherwise accounting for GST (or any such taxes that may replace the GST during the Term of this Agreement) and other taxes payable by users with respect to their use or occupation of the Facility.

The Y shall not be responsible to pay any property taxes payable with respect to the Land or the Facility.”

REPLACE

“INDEPENDANT CONTRACTOR

The parties have entered into an arm’s length contract for the provision of the services set out in this Agreement and the Y is an independent contractor, not an employee, of the City.”

WITH

“INDEPENDANT CONTRACTOR

For clarity, the relationship between the City and the Y is contractual only and the Y is an independent contractor, not an employee, of the City.”

In Schedule F, Facility Maintenance, Section 6. First Line Repairs:

REPLACE

“(h) Surplus

Any of the unused “First Line Repair” budget, not spent in a fiscal year, shall be returned to the City and placed in a “H2O Building Reserve” and will not become part of the calculation for net operating surplus as defined in the Budget and Performance section. The funds in this reserve will be expensed at the discretion of the City as follows:

- i) To fund the balance of “First Line Repair” expenses over and above the fiscal limit responsibility of the Y;
- ii) To fund capital replacement and/or repair of major building systems equipment as required.”

WITH

“(h) Surplus

Any amount equal to any unused “First Line Repair” budget, not spent in a fiscal year, shall be paid to the City and placed in a “H2O Building Reserve” and will not become part of the calculation for net operating surplus as defined in the Budget and Performance section. Y shall pay to the City any GST (and any other applicable taxes that may be imposed from time to time) payable with respect to amounts payable from time to time by

the Y to the City under this paragraph. The funds in this reserve will be expensed at the discretion of the City as follows:

- i) To fund the balance of "First Line Repair" expenses over and above the fiscal limit responsibility of the Y;
- ii) To fund capital replacement and/or repair of major building systems equipment as required."

2. This Modification Agreement will be read and construed together with the Original Agreement and the Original Agreement, as amended hereby, will continue in full force and effect in accordance with the terms thereof and hereof.

3. This Modification Agreement shall enure to the benefit of and be binding upon the parties and their respective successors and assigns.

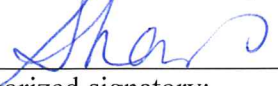
IN WITNESS WHEREOF the City and the Y have executed this Modification Agreement as of the dates written below.

DATED the ____ day of _____, 20____

CITY OF KELOWNA by its authorized)
 signatories:)
) C/S
 _____)
 _____)
 _____)
 _____)
 _____)
 _____)

DATED the ____ day of _____, 20____

YMCA OKANAGAN by its authorized signatories:


 _____)
 authorized signatory:)
) C/S
 SHARON PETERSON)
 Name:)
 _____)
 authorized signatory:)
)
 STEVEN PAVELICH)
 Name:)
 _____)
 _____)