

RESOLUTION NO. _____

A RESOLUTION APPROVING AN AGREEMENT WITH KIMLEY - HORN AND ASSOCIATES, INC., FOR THE CREATION OF THE KINGSPORT COMPREHENSIVE PLAN AND LAND USE MAP AND AUTHORIZING THE MAYOR TO EXECUTE THE AGREEMENT AND ALL OTHER DOCUMENTS NECESSARY AND PROPER TO EFFECTUATE THE PURPOSE OF THE AGREEMENT

WHEREAS, the city would like to enter into an agreement with Kimley-Horn and Associates, Inc., for the creation of a Comprehensive Plan for the City of Kingsport as well as a new Land Use Map to be used by the Planning Department; and

WHEREAS, this project is to create a comprehensive plan and future land use map that incorporates the City's existing plans and strategies into an overarching vision for the community, and this new document will provide the framework for staff to plan for Kingsport's future growth and provide strategies related to current issues such as housing, economic development and quality of life; and

WHEREAS, this plan will help the city develop goals, objectives and actions for housing in our city and will include recommended polices, projects and programs to deliver housing that is affordable for our community; and

WHEREAS, throughout the process, various stakeholder interviews, steering committee meetings and public events will be scheduled to gather feedback as the plan is developed; and

WHEREAS, the current Land Use Plan for the City of Kingsport was adopted in 2010 and is set to expire 2030.

WHEREAS, the total cost for the project will be an amount not to exceed \$214,000.00, and funding is identified in NC2213.

Now therefore,

BE IT RESOLVED BY THE BOARD OF MAYOR AND ALDERMEN AS FOLLOWS:

SECTION I. That the agreement with Kimley-Horn and Associates, Inc., for the creation of a Comprehensive Plan for the City of Kingsport as well as a new Land Use Map to be used by the Planning Department, is approved.

SECTION II. That the mayor, or in his absence, incapacity, or failure to act, the vice-mayor, is authorized and directed to execute, in a form approved by the city attorney and subject to the requirements of Article X, Section 10 of the Charter of the City of Kingsport, the Agreement with Kimley-Horn and Associates, Inc., for the creation of a Comprehensive Plan for the City of Kingsport as well as a new Land Use Map to be used by the Planning Department, to deliver the agreement and take any and all action as may be required on the part of the city to carry out, give effect to, and consummate the transactions contemplated by the agreement and this resolution as set out below:

AGREEMENT BETWEEN CLIENT AND
KIMLEY-HORN AND ASSOCIATES, INC. FOR PROFESSIONAL SERVICES

THIS AGREEMENT is made this 29 day of October, 2024, by and between The City of Kingsport ("Client") and KIMLEY-HORN AND ASSOCIATES, INC. ("Consultant").

NAME OF PROJECT: "Kingsport Comprehensive Plan and Land Use Map"

The Client and the Consultant agree as follows:

1) Scope of Services and Additional Services. The Consultant will perform only the services specifically described in Exhibit A, which is made a part of this Agreement ("Services"). Any services that are not set forth in the scope of Services described in Exhibit A will constitute additional services ("Additional Services"). If requested by the Client and agreed to by the Consultant, the Consultant will perform Additional Services, which shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including telecommunications, in-house reproduction, postage, supplies, project related computer time, and local mileage. Other direct expenses will be billed at 1.15 times cost.

2) Client's Responsibilities. In addition to other responsibilities herein or imposed by law, the Client shall:

a) Designate in writing a person to act as the Client's representative, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.

b) Provide all criteria and information as to the Client's requirements, objectives, and expectations for the Project, and all standards of development, design, or construction.

c) Provide the Consultant all available studies, plans, or other documents pertaining to the Project, such as surveys, engineering data, environmental information, etc., all of which the Consultant may rely upon.

d) Arrange for access to the site and other property as required for the Consultant to provide its services.

e) Review all documents or reports presented by the Consultant and communicate decisions pertaining thereto within a reasonable time so as not to delay the Consultant.

f) Furnish approvals and permits for all government authorities having jurisdiction over the Project and approvals and consents from other parties as may be necessary.

g) Obtain any independent accounting, legal, insurance, cost estimating, and feasibility services required by the Client.

h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the Consultant's services, or any defect or nonconformance in any aspect of the Project.

3) Period of Services. Unless otherwise stated herein, the Consultant shall begin work after receipt of a properly executed copy of this Agreement. This Agreement assumes conditions permitting orderly and continuous progress of the Project through completion of the Services. Times for performance shall be extended as necessary for delays or suspensions due to circumstances that the Consultant does not control. If such delay or suspension extends for more than six months, the Consultant's compensation shall be renegotiated.

4) Compensation for Services.

a) The Consultant's compensation shall be as stated herein, unless otherwise provided in Exhibit A. The Client shall pay the Consultant an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including telecommunications, in-house reproduction, postage, supplies, project related computer time, and local mileage. Other direct expenses will be billed at 1.15 times cost.

b) If the Consultant's compensation is on an hourly basis, the parties may have estimated in Exhibit A costs and expenses for the various portions of the scope of Services. Services undertaken or expenses incurred by the Consultant exceeding any estimates shall be the liability of the Client.

c) In no event however, shall Consultants fees for services, costs, and expenses exceed \$250,000 unless agreed to in writing by the Parties.

5) Method of Payment.

a) Invoices will be submitted periodically for services performed and expenses incurred. Payment of each invoice will be due within 30 days of receipt. As a tax exempt entity Client shall not be responsible for the payment of sales taxes and shall upon request provide Consultant with a copy of its tax exempt certificate. Consultant shall bear the burden of providing its suppliers with a copy of Client's tax exemption certificate and Vendor shall assume all liability for such applicable Sales and Use Taxes, if any, that should be incurred. All retainers will be held by the Consultant and applied against the final invoice. Interest will be added to accounts not paid within 30 days at the maximum rate allowed by law. If the Client fails to make any payment due the Consultant under this or any other agreement within 30 days after the Consultant's transmittal of its invoice, the Consultant may, after giving notice to the Client, suspend services and withhold deliverables until all amounts due are

paid in full.

b) The Client will remit all payments electronically to:
Account Name: KIMLEY-HORN AND ASSOCIATES, INC.
Bank Name and Address: WELLS FARGO BANK, N.A., SAN FRANCISCO, CA 94104
Account Number: 2073089159554
ABA#: 121000248

c) The Client will send the project number, invoice number and other remittance information by e-mail to payments@kimley-horn.com at the time of payment.

d) If the Client relies on payment or proceeds from a third party to pay Consultant and Client does not pay Consultant's invoice within 60 days of receipt, Consultant may communicate directly with such third party to secure payment.

e) If the Client objects to an invoice, it must advise the Consultant in writing giving its reasons within 25 days of receipt of the invoice or the Client's objections will be waived, and the invoice shall conclusively be deemed due and owing. If the Client objects to only a portion of the invoice, payment for all other portions remains due.

f) The Client agrees that the payment to the Consultant is not subject to any contingency or condition. The Consultant may negotiate payment of any check tendered by the Client, even if the words "in full satisfaction" or words intended to have similar effect appear on the check without such negotiation being an accord and satisfaction of any disputed debt and without prejudicing any right of the Consultant to collect additional amounts from the Client.

6) Use of Deliverables. All documents, data, and other deliverables prepared by the Consultant are related exclusively to the services described in this Agreement and may be used only if the Client has satisfied all of its obligations under this Agreement. They are not intended or represented to be suitable for use or reuse by the Client or others on extensions of this Project or on any other project. Any modifications by the Client to any of the Consultant's deliverables, or any reuse of the deliverables without written authorization by the Consultant will be at the Client's sole risk and without liability to the Consultant, and the Client shall indemnify, defend and hold the Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, resulting therefrom. The Consultant's electronic files and source code remain the property of the Consultant and shall be provided to the Client only if expressly provided for in this Agreement. Any electronic files not containing an electronic seal are provided only for the convenience of the Client and use of them is at the Client's sole risk. In the case of any defects in the electronic files or any discrepancies between them and the hardcopy of the deliverables prepared by the Consultant, the hardcopy shall govern.

7) Intellectual Property. Consultant may use or develop its proprietary software, patents, copyrights, trademarks, trade secrets, and other intellectual property owned by Consultant or its affiliates ("Intellectual Property") in the performance of this Agreement. Intellectual Property, for purposes of this section, does not include deliverables specifically created for Client pursuant to the Agreement and use of such deliverables is governed by section 6 of this Agreement. Unless explicitly agreed to in writing by both parties to the contrary, Consultant maintains all interest in and ownership of its Intellectual Property and conveys no interest, ownership, license to use, or any other rights in the Intellectual Property to Client. Any enhancements of Intellectual Property made during the performance of this Agreement are solely owned by Consultant and its affiliates. If Consultant's services include providing Client with access to or a license for Consultant's (or its affiliates') proprietary software or technology, Client agrees to the terms of the Software License Agreement set forth at <https://www.kimley-horn.com/khts-software-license-agreement> ("the License Agreement") updated as of March 22, 2022 and accessed as of November 20, 2024 (7:15 p.m.) which terms are incorporated herein by reference except that the provisions of Sections 5, 6(c), 8, 9(d), 10, 16(b), 16(c), shall not apply to the extent those provisions are in conflict with any provision contained herein or Tennessee law.

8) Opinions of Cost. Because the Consultant does not control the cost of labor, materials, equipment, or services furnished by others, methods of determining prices, or competitive bidding or market conditions, any opinions rendered as to costs, including but not limited to the costs of construction and materials, are made solely based on its judgment as a professional familiar with the industry.

The Consultant cannot and does not guarantee that proposals, bids or actual costs will not vary from its opinions of cost. If at any time the Client wishes greater assurance as to the amount of any cost, it shall employ an independent cost estimator. Consultant's services required to bring costs within any limitation established by the Client will be paid for as Additional Services.

9) Termination. The obligation to provide further services under this Agreement may be terminated by either party upon seven days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof, or upon thirty days' written notice for the

convenience of the terminating party. The Consultant shall be paid for all services rendered and expenses incurred to the effective date of termination, and other reasonable expenses incurred by the Consultant as a result of such termination.

10) Standard of Care. The standard of care applicable to Consultant's services will be the degree of care and skill ordinarily exercised by consultants performing the same or similar services in the same locality at the time the services are provided. No warranty, express or implied, is made or intended by the Consultant's performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.

11) LIMITATION OF LIABILITY. In recognition of the relative risks and benefits of the Project to the Client and the Consultant, the risks are allocated such that, to the fullest extent allowed by law, and notwithstanding any other provisions of this Agreement or the existence of applicable insurance coverage, that the total liability, in the aggregate, of the Consultant and the Consultant's officers, directors, employees, agents, and subconsultants to the Client or to anyone claiming by, through or under the Client, for any and all claims, losses, costs, attorneys' fees, or damages whatsoever arising out of or in any way related to the services under this Agreement from any causes, including but not limited to, the negligence, professional errors or omissions, strict liability or breach of contract or any warranty, express or implied, of the Consultant or the Consultant's officers, directors, employees, agents, and subconsultants shall not exceed twice the total compensation received by the Consultant under this Agreement or \$50,000, whichever is greater. Higher limits of liability may be negotiated for additional fee. This Section is intended solely to limit the remedies available to the Client or those claiming by or through the Client, and nothing in this Section shall require the Client to indemnify the Consultant.

12) Mutual Waiver of Consequential Damages. In no event shall either party be liable to the other for any consequential, incidental, punitive, or indirect damages including but not limited to loss of income or loss of profits.

13) Construction Costs. Under no circumstances shall the Consultant be liable for extra costs or other consequences due to changed or unknown conditions or related to the failure of contractors to perform work in accordance with the plans and specifications. Consultant shall have no liability whatsoever for any costs arising out of the Client's decision to obtain bids or proceed with construction before the Consultant has issued final, fully approved plans and specifications. The Client acknowledges that all preliminary plans are subject to substantial revision until plans are fully approved and all permits obtained.

14) Certifications. All requests for the Consultant to execute certificates, lender consents, or other third-party reliance letters must be submitted to the Consultant at least 14 days prior to the requested date of execution. The Consultant shall not be required to execute certificates, consents, or third-party reliance letters that are inaccurate, that relate to facts of which the Consultant does not have actual knowledge, or that would cause the Consultant to violate applicable rules of professional responsibility.

15) Dispute Resolution. All claims arising out of this Agreement shall be submitted first to mediation in accordance with the American Arbitration Association as a condition precedent to litigation. Any mediation or civil action by the Client must be commenced within one year of the accrual of the cause of action asserted but in no event later than allowed by applicable statutes.

16) Construction Phase Services.

a) If the Consultant prepares construction documents and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction observation, and the Client waives any claims against the Consultant in any way connected thereto.

b) The Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, equipment maintenance and inspection, sequence, schedule, safety programs, or safety practices, nor shall Consultant have any authority or responsibility to stop or direct the work of any contractor. The Consultant's visits will be for the purpose of observing construction and reporting to the Client whether the contractors' work generally conforms to the construction documents prepared by the Consultant. Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.

c) The Consultant is not responsible for any duties assigned to it in the construction contract that are not expressly provided for in this Agreement. The Client agrees that each contract with any contractor shall state that the contractor shall be solely responsible for job site safety and for its means and methods; that the contractor shall indemnify the Client and the Consultant for all claims and liability arising out of job site accidents; and that the Client and the Consultant shall be made additional insureds under the contractor's general liability insurance policy.

17) Hazardous Substances. Consultant shall not be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation. The Consultant shall notify the Client of unanticipated hazardous substances or conditions of which the Consultant actually becomes aware. The Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated.

18) Assignment and Subcontracting This Agreement gives no rights or benefits to anyone other than the Client and the Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole benefit of the Client and the Consultant. The Client shall not assign or transfer any rights under or interest in this Agreement, or any claim arising out of the performance of services by Consultant, without the written consent of the Consultant. The Consultant reserves the right to augment its staff with subconsultants as it deems appropriate due to project logistics, schedules, or market conditions. If the Consultant exercises this right, the Consultant will maintain the agreed-upon billing rates for services identified in the contract, regardless of whether the services are provided by in-house employees, contract employees, or independent subconsultants.

19) Confidentiality. The Client consents to the Consultant's use and dissemination of photographs of the Project and to the use by the Consultant of facts, data and information obtained by the Consultant in the performance of its services. If, however, any facts, data or information are specifically identified in writing by the Client as confidential, the Consultant shall use reasonable care to maintain the confidentiality of that material. As to Client's obligations, the parties acknowledge and agree that any records produced or created in conjunction herewith which qualify as public records pursuant to the Tennessee Public Records Act codified at Tenn. Code Ann. § 10-7-503, *et. seq.* are not confidential, and are subject to disclosure in whole or in part to any citizen of Tennessee, without regard to any provision contained in the Agreement, including those terms incorporated herein by reference, declaring information confidential. Client must, upon proper request by a citizen of Tennessee, release public documents and records without the requirement to disclose such request to Consultant or provide Consultant with notice or the time to obtain a protective order. Client does not have the burden of establishing that information is not confidential information or that its release is authorized pursuant hereto.

20) Miscellaneous Provisions.

a) This Agreement is to be governed by the law of the State where the Project is located. This Agreement contains the entire and fully integrated agreement between the parties, and supersedes all prior and contemporaneous negotiations, representations, agreements, or understandings, whether written or oral. Except as provided in Section 1, this Agreement can be supplemented or amended only by a written document executed by both parties. Any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. If Client requires Consultant to register with or use an online vendor portal for payment or any other purpose, any terms included in the registration or use of the online vendor portal that are inconsistent or in addition to these terms shall be void and shall have no effect on Consultant or this Agreement. Any provision in this Agreement that is unenforceable shall be ineffective to the extent of such unenforceability without invalidating the remaining provisions. The non-enforcement of any provision by either party shall not constitute a waiver of that provision or affect the enforceability of that provision or the remainder of this Agreement.

b) Article II, Section 29 of the Tennessee Constitution prohibits Client, as a municipal corporation formed pursuant to the laws of the State of Tennessee, from lending its credit to private entities and, therefore, prohibits an agreement by Client to indemnify Consultant or agree to a limitation of liability provision. Any indemnity or hold harmless provision contained in the Agreement, including any terms incorporated by reference, requiring Client to indemnify or hold harmless Consultant or any other person or entity and any limitation of liability is enforceable only to the extent permitted by Tennessee law, provided Client's monetary limits of liability under any such provision is limited to the monetary limits of liability as provided for in the Tennessee Governmental Tort Liability Act. (Tenn. Code Ann. § 29-20-101 *et. seq.*) No provision of the Agreement shall act or be deemed a waiver by Client of any immunity, including its rights or privileges or of any provision of the Tennessee Governmental Tort Liability Act. Because Tennessee law may not allow Client to agree to the disclaimer of warranties any such disclaimer of warranties shall be enforceable only to the extent permitted by Tennessee law. Client reserves all rights afforded to local governments under law for all general and implied warranties.

c) Any dispute which may arise between the parties that cannot be resolved by mutual agreement shall be brought in the state courts in Kingsport, Sullivan County, Tennessee or the Federal court for the Eastern District of Tennessee. The parties waive their right to a jury trial. Mandatory and exclusive venue and jurisdiction for any disputes shall be in the state court located in

Kingsport, Sullivan County, Tennessee or the Federal court for the Eastern District of Tennessee to which the parties waive any objection and expressly agree to the jurisdiction and venue thereof. Furthermore, the parties waive their right to a jury trial.

d) The terms of this agreement and the rights and obligations of the parties shall be governed by the laws of the State of Tennessee, without regards to its conflict of laws principles.

e) To the extent software is a component of the project interface or a deliverable Consultant warrants that the software conforms to the accessibility guidelines, including, but not limited to, supporting assistive software or devices such as large-print interfaces, text-to-speech output, refreshable braille displays, voice-activated input, and alternate keyboard or pointer interfaces, *etc.*, established by the World Wide Web Consortium's Web Content Accessibility Guidelines 2.2 (WCAG 2.2) [the new WCAG 2.2 goes into effect in June 2021], and the accessibility guidelines established by Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), and implementing regulations set forth in 36 C.F.R. Part 1194. Consultant shall provide Client a current completed Voluntary Product Accessibility Template 2.4 (VPAT 2.4) detailing compliance with federal Section 508 standards. Consultant shall promptly respond to and resolve any complaint regarding accessibility of its products or services. Consultant further agrees to indemnify and hold harmless Client from any claims arising out of Consultant's failure to comply with the aforesaid requirements. Failure to comply with these requirements shall constitute a material breach of the Agreement.

f) The provisions of Sections 19 and 20 shall survive the completion of or any termination of this Agreement.

[Acknowledgements Deleted for Inclusion in this Resolution]

SECTION III. That the mayor is further authorized to make such changes approved by the mayor and the city attorney to the agreement set out herein that do not substantially alter the material provisions of the agreement, and the execution thereof by the mayor and the city attorney is conclusive evidence of the approval of such changes.

SECTION IV. That the board finds that the actions authorized by this resolution are for a public purpose and will promote the health, comfort and prosperity of the citizens of the city.

SECTION V. That this resolution shall take effect from and after its adoption, the public welfare requiring it.

ADOPTED this the 3rd day of December, 2024.

PAUL W. MONTGOMERY, MAYOR

ATTEST:

ANGELA MARSHALL, DEPUTY CITY RECORDER

APPROVED AS TO FORM:

RODNEY B. ROWLETT, III, CITY ATTORNEY