



December 14, 2015

Mr. Mike Benard  
Wheaton Park District  
102 E. Wesley St.  
Wheaton, IL 60187

Re: Agreement for Professional Consulting Services  
Memorial Park Master Plan

Dear Mike:

Kimley-Horn and Associates, Inc. ("Kimley-Horn" or "the Consultant") is pleased to submit this Agreement (the "Agreement") to the Wheaton Park District ("the Client") for professional consulting services for the proposed Master Plan for Memorial Park located at the southeast corner of West Union Avenue and North Wheaton Avenue in Wheaton, Illinois.

### ***Project Understanding***

Kimley-Horn understands the scope of work to include preparation of a master plan documenting the site evaluation, review of the existing downtown Wheaton parking analysis (prepared as a part of the Wheaton Downtown Master Plan), review of related results of the Wheaton Park District Comprehensive Attitude and Interest Survey to be conducted in early 2016, conceptual design, feasibility analysis (provided by others), and a draft and final master plan for adoption by the Wheaton Park District Board.

### ***Scope of Services***

#### **Task 1 – Project Kick-Off**

Upon contract approval, Kimley Horn will begin the project by conducting a Project Kick-Off Meeting. We will schedule a meeting with the Wheaton Park District (WPD) staff and project architect to finalize the project schedule – including the project timeline, identification of relevant resources, define key player roles, and gather data and base information. One (1) meeting is anticipated as a part of this task, included as a part of Task 7 - Meetings, below.

Deliverables include:

- Meeting minutes for kick-off meeting

#### **Task 2 – Information Gathering**

Kimley Horn will work to ensure the Plan evaluates and integrates current and future planning efforts related to adjacent properties and existing and ongoing Downtown Wheaton master plans and streetscape improvements. Review of existing plans, studies and reports shall also be conducted to gain an understanding of the project area. A topographic survey, provided under a separate contract, shall be reviewed as a part of this task.

The project team will review existing land uses, including both passive and active recreation areas, accessibility, connectivity, current usage, and infrastructure plans.

Deliverables include:

- Inventory-Analysis Plan
- Analysis of Downtown Wheaton Parking Study

### **Task 3 – Focus Group Meetings with Key Stakeholder Groups**

Focus Group meetings enable us to gather pertinent information on the needs of partners and user groups, key issues to be addressed through the plan, as well as identification of potential partnerships and funding opportunities. Our team will work with the WPD to identify the best forums, dates, times and strategies to gain valuable input from a diverse representation of Village residents. Four (4) focus group meetings are anticipated as a part of this task, included as a part of Task 7 – Meetings, below.

Deliverables include:

- Meeting minutes for community input meetings

### **Task 4 – Conceptual Design**

Utilizing base data information gathered from the Information Gathering phase of the project and input from the Focus Group Meetings, Kimley Horn will work closely with the project architect and WPD to develop a park program and prepare a color rendered schematic park design that reflects the needs and demands of its users. Connectivity, signage and wayfinding, and sustainable design principles will be identified as a part of this plan. Detailed vignettes of key areas of the park will be developed to illustrate proposed features of the War Memorial, Entry and Concession Plazas. One (1) meeting with the WPD staff and project team is anticipated as a part of this task, included as part of Task 7 – Meetings, below.

Deliverables include:

- One (1) rendered Master Plan graphic
- Up to three (3) rendered vignettes
- Up to two (2) color cross-sections, perspectives or elevations

### **Task 5 – Feasibility Analysis**

Kimley-Horn will develop an initial budget of project costs based on knowledge of and past experience providing services for projects of similar scope of work. We will identify and make recommendations on how to utilize alternative funding and public and private partnership opportunities to maximize financial support for the Memorial Park Improvements.

Economic development analysis shall not be provided as a part of this task, however, if provided by the Park District, the information will be incorporated as a part of the Master Plan document.

Deliverables include:

- One (1) initial budget

**Task 6 – Draft & Final Master Plan**

For use as an internal document and guide for future improvements of Memorial Park, the Kimley-Horn team will assemble the findings of the plans developed in previous tasks to prepare a Draft Master Plan for review by the WPD Staff and Board. Once feedback and comments are received, Kimley-Horn will revise the document and furnish the Park District with ten (10) hard copies and a digital copy of the Master Plan Document. We anticipate one (1) meeting with the WPD Staff and one (1) presentation to the WPD Board as a part of this task, included in Task 7 - Meetings, below.

Deliverables include:

- Draft and Final Master Plan report

**Task 7 - Meeting Phase**

Kimley-Horn will attend meetings with the WPD Staff and project team as required and requested by the Client. As identified above, Kimley Horn anticipates eight (8) total meetings as a part of the project scope of services.

**Additional Services**

Any services not specifically provided for herein, as well as changes in the scope of proposed services and revisions requested by the Client after substantial completion of the proposed services, will be considered Additional Services and will be performed at our hourly rates. Potential services not addressed in this Agreement, but which may be required include, but are not limited to:

1. Final Engineering Design Services
2. Site Furnishing Design and Selection
3. Irrigation Design Services
4. Illustrative Graphics (other than those identified above)
5. ALTA or Topographic Survey
6. Lighting Design
7. Bidding and Construction Administration Services

8. Any services not specifically mentioned in the Scope of Services above

### Information Provided By Client

Kimley-Horn shall be entitled to rely on the completeness and accuracy of all information provided by the Client. The Client shall provide all information requested by Kimley-Horn during the project, including but not limited to the following:

1. Relevant surveys, studies, reports, or data in the Client's possession
2. Site Plan and all building plans (in AutoCAD format)
3. Full access to the site
4. Executed copy of this Agreement

### Fees and Invoicing

Tasks identified in the table below as "Lump Sum" shall be completed for the sum of the lump sum fees listed below. In addition, other direct expenses and reimbursable expenses will be billed at 1.15 times actual cost. Kimley-Horn will keep the Client apprised of the budget status on hourly tasks with monthly invoices so that appropriate decisions can be made by the Client with regard to scope, schedule, and budget.

Task	Fee	Fee Type
1-6	\$23,100	Lump Sum
7	\$6,900	Hourly
Estimated Total		\$30,000

An estimated additional reimbursable expenses budget of approximately \$2,000 will be used to cover travel, printing and reproduction, courier and overnight delivery services, etc. Kimley-Horn will keep the Client updated, via monthly invoices, on the expenses incurred and the possible need for additional expense budget. Fees will be invoiced monthly based on the percentage completed for each of the major lump sum elements plus reimbursable expenses or for services actually accomplished under the cost-plus elements. Invoicing will be due and payable within 30 days.

### Closure

In addition to the matters set forth herein, our agreement shall include, and shall be subject to the Standard Provisions attached hereto and hereby incorporated herein. As used in the Standard Provisions, the term "the Consultant" refers to Kimley-Horn and Associates, Inc. The term "the Client" shall refer to Wheaton Park District.

If you concur in the foregoing and wish to direct us to proceed with the aforementioned services, please execute of this letter Agreement in the space provided, and return a copy to us. Execution of this Agreement formalizes our working arrangement.

We appreciate the opportunity to provide these services to you.

Sincerely,

**Kimley-Horn and Associates, Inc.**



Keith Demchinski, P.L.A.  
Sr. Project Manager



Dean M. Antony, P.E.  
Vice President

Agreed to this 14<sup>th</sup> day of January, 2016

**Wheaton Park District**

By: 

Printed Name and Title:

Michael J. Benon Exec Dir

**KIMLEY-HORN AND ASSOCIATES, INC.**  
**STANDARD PROVISIONS**

(1) **Consultant's Scope of Services and Additional Services.** The Consultant's undertaking to perform professional services extends only to the services specifically described in this Agreement. However, 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 described herein or imposed by law, the Client shall:

- (a) Designate in writing a person to act as its representative with respect to this Agreement, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.
- (b) Provide all information and criteria as to the Client's requirements, objectives, and expectations for the project including all numerical criteria that are to be met and all standards of development, design, or construction.
- (c) Provide to the Consultant all previous studies, plans, or other documents in Client's possession pertaining to the project and all new data reasonably necessary in the Consultant's opinion, such as site survey and engineering data, environmental impact assessments or statements, upon all of which the Consultant may rely.
- (d) Arrange for access to the site and other private or public property as required for the Consultant to provide its services.
- (e) Review all documents or oral reports presented by the Consultant and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the Consultant.
- (f) Furnish approvals and permits from governmental authorities having jurisdiction over the project and approvals and consents from other parties as may be necessary for completion of the Consultant's services.
- (g) Cause to be provided such independent accounting, legal, insurance, cost estimating and overall feasibility services as the Client may require.
- (h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the scope, timing, or payment of the Consultant's services or any defect or noncompliance in any aspect of the project.
- (i) Bear all costs incidental to the responsibilities of the Client.

(3) **Period of Services.** Unless otherwise stated herein, the Consultant will begin work timely after receipt of a properly executed copy of this Agreement and any required retainer amount. This Agreement is made in anticipation of conditions permitting continuous and orderly progress 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 (cumulatively), Consultant's compensation shall be renegotiated.

(4) **Method of Payment.** Compensation shall be paid to the Consultant in accordance with the following provisions:

- (a) Invoices will be submitted periodically for services performed and expenses incurred. Payment of each invoice will be due within 30 days of receipt. The Client shall also pay any applicable sales tax. Interest will be added to accounts not paid within 30 days at 4% over the prime rate of U.S. Bank N.A. If the Client fails to make any payment due to 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 and may commence proceedings, including filing liens, to secure its right to payment under this Agreement.
- (b) 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.

(c) If the Client objects to an invoice, it must advise the Consultant in writing giving its reasons within 14 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 within 30 days of receipt.

(d) If the Consultant initiates legal proceedings to collect payment, it may recover, in addition to all amounts due, its reasonable attorneys' fees, reasonable experts' fees, and other expenses related to the proceedings. Such expenses shall include the cost, at the Consultant's normal hourly billing rates, of the time devoted to such proceedings by its employees.

(e) 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.

**(5) Use of Documents.** All documents, including but not limited to drawings, specifications, reports, and data or programs stored electronically, 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, partial use or reuse by the Client or others on extensions of this project or on any other project. Any modifications made by the Client to any of the Consultant's documents or reuse of the documents without written authorization or adaptation 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 from such reuse. The Consultant's electronic files and source code developed in the development of application 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 documents prepared by the Consultant, the hardcopy shall govern. Because data stored in electronic media format can deteriorate or be modified without the Consultant's authorization, the Client has 60 days to perform acceptance tests, after which it shall be deemed to have accepted the data.

**(6) 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 opinions as to the costs of construction and materials, shall be made on the basis of its experience and represent its judgment as an experienced and qualified 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 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.

**(7) 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 through no fault of the terminating party, or upon thirty days' written notice for the convenience of the terminating party. If any change occurs in the ownership of the Client, the Consultant shall have the right to immediately terminate this Agreement. In the event of any termination, 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. If the Consultant's compensation is a fixed fee, the amount payable for services will be a proportional amount of the total fee based on the ratio of the amount of the services performed, as reasonably determined by the Consultant, to the total amount of services which were to have been performed.

**(8) Insurance.** The Consultant carries Workers' Compensation insurance, professional liability insurance, and

general liability/and automobile insurance. Upon request and prior to commencing its services hereunder, Consultant shall provide Client with an executed copy of Consultant's proof of liability insurance.

(9) **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 undertaking herein or its performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.

(10) **LIMITATION OF LIABILITY.** In recognition of the relative risks and benefits of the Project to the Client and the Consultant, the risks have been allocated such that the Client agrees, to the fullest extent of the 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 or damages whatsoever arising out of, resulting from or in any way related to the services under this Agreement from any cause or 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. Under no circumstances shall the Consultant be liable for extra costs or other consequences due to changed conditions, or for costs related to the failure of contractors to perform work in accordance with the plans and specifications. This Section 10 is intended solely to limit the remedies available to the Client or those claiming by or through the Client, and nothing in this Section 10 shall require the Client to indemnify the Consultant.

(11) **Mutual Waiver of Consequential Damages/and Indemnification.** In no event shall either party be liable to the other for any punitive or indirect damages. Each party shall indemnify, defend and hold the other party harmless from their negligent and intentional acts causing damages, injuries, or losses to the other party or third party.

(12) **Certifications.** The Consultant shall not be required to execute certifications 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.

(13) **Dispute Resolution.** All claims by the Client arising out of this Agreement or its breach shall be submitted first to nonbinding mediation in accordance with the Mediation Procedures of a mediator mutually selected by the parties as a condition precedent to litigation. Any mediation or civil action by Client/or Consultant 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.

(14) **Hazardous Substances and Conditions.** In no event shall Consultant be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to professional analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation. The Consultant shall notify the Client of hazardous substances or conditions not contemplated in the scope of services of which the Consultant actually becomes aware. Upon such notice by the Consultant, the Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated.

(15) **Construction Phase Services.**

(a) If the Consultant's services include the preparation of documents to be used for construction 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) If the Consultant provides construction phase services, the Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, 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 endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform 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 the design professional 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.

**(16) No Third-Party Beneficiaries; 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 except to an assignee which is controlled by Client and takes title to the subject property. 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 and insurance identified in the contract, regardless of whether the services are provided by in-house employees, contract employees, or independent subconsultants.

**(17) Confidentiality.** The Client consents to the use and dissemination by the Consultant 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.

**(18) Miscellaneous Provisions.** This Agreement is to be governed by the law of the State of Illinois. 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. Provided, however, that any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. 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 nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

## RIDER

### TO AGREEMENT BETWEEN KIMLEY-HORN AND ASSOCIATES, INC. ("Consultant") AND WHEATON PARK DISTRICT ("Park District") FOR MASTER PLANNING SERVICES

This Rider amends, supplements and supersedes that certain Agreement by and between Consultant and Park District dated as of December 14, 2015. In the event of any conflict between any of the provisions of this Rider and the provisions of the Agreement, the provisions of this Rider will control.

- R-1 The section labeled "Fees and Invoicing" of the Agreement is amended as follows:
- a. The first sentence of the second paragraph is hereby deleted and replaced with the following: "Reimbursable expenses are for travel, printing and reproduction, courier and overnight deliver services, and other similar costs, shall not exceed \$2,000 without prior written approval from the Park District."
  - b. Delete the last sentence in the second paragraph in its entirety.
- R-2 Section 1 of the Standard Terms and Conditions is hereby amended as follows:
- a. In the second sentence after the word "Client" add "in writing."
  - b. In the third sentence, delete "then-current hourly rates" and replace with "hourly rates as set forth in this Agreement as Exhibit 1, attached to and incorporated herein by reference,".
- R-3 Section 2 of the Standard Terms and Conditions is hereby amended as follows:
- a. In subsection (b), delete from "including all..." to the end of the sentence.
  - b. In subsection (e), add before the word "render" the following: ", if applicable,".
  - c. In subsection (h), delete from "or any defect or noncompliance...." to the end of the sentence.
  - d. In subsection (i), add at the end of the sentence ",unless otherwise specified herein,".
- R-4 Section 3 of the Standard Terms and Conditions is hereby amended by adding "or does not cause" at the end of the second to last sentence.
- R-5 Section 4 of the Standard Terms and Conditions is hereby deleted in its entirety and replaced with the following:

**"Method of Payment.** Consultant shall invoice Park District on a monthly basis for all services provided by the Consultant to Park District for the preceding month. Payment of said invoices, and any late payment penalties, shall be governed by the applicable provisions of the Local Government Prompt Payment Act (50 ILCS 505 *et seq.*).

a. Prior to final payment to Consultant, the following conditions shall be fulfilled by Consultant:

i. Consultant shall have made, or caused to have been made, all corrections and completion in Consultant's services which are required to remedy any defects therein or obtain compliance with this Agreement. Consultant shall, if required by Park District, deliver a certificate to Park District certifying such matters Park District may reasonably require.

ii. Consultant will provide Park District releases and waivers of lien from Consultant and Consultant's consultants and sub-consultants for the performance of the services provided under this Agreement.

iii. Consultant shall have delivered to Park District all deliverables required by this Agreement.

b. Reimbursable Expenses. Consultant's reimbursable expenses shall not exceed Two Thousand and 00/100 Dollars (\$2,000.00) without prior written approval of Park District.

c. Additional Services. Except for this Agreement, there shall be no other basis for compensation for services or reimbursement for expenses rendered on behalf of the project by Consultant ("Additional Services") unless otherwise mutually agreed upon by the parties. In the event any other Additional Services are required, Consultant shall notify Park District regarding the nature and extent and cost of any said Additional Services. Consultant shall not perform any Additional Services unless approved in writing in advance by Park District."

d. Payments in Dispute. Any provision of this Agreement to the contrary notwithstanding, Park District shall not be obligated to make any payment to Consultant hereunder for any one or more of the following reasons:

- (a) Consultant is in default of any of its obligations under this Agreement;
- (b) Any part of such payment is attributable to services which are not performed in accordance with this Agreement; provided, however, such payment shall be made as to the part thereof attributable to services which were performed in accordance with this Agreement; or
- (c) Consultant has failed to make payments promptly to consultants or other third parties used in connection with the services for which Park District has made payment to Consultant.

As provided in the Illinois Local Government Prompt Payment Act, Park District shall notify Consultant in writing that a request for payment has been disapproved, and shall specify the reasons for the disapproval. Consultant shall not have the right to terminate this Agreement in accordance with the Termination section of these Standard Terms and Conditions in the event the Park District withholds payment in accordance with this provision or otherwise withholds payment in accordance with the Prompt Payment Act."

R-6 Section 5 of the Standard Terms and Conditions is deleted in its entirety and replaced with the following:

**"Ownership of Instruments of Service.** Any and all documents, including but not limited to, any plans, notes, analysis, and any other documents prepared by Consultant in the performance of its services under this Agreement ("Instruments of Service") is work done for hire and ownership of such Instruments of Service vests in Park District. Park District retains exclusive property rights including all common law, statutory, federal and other reserved rights in the Instruments of Services, including copyrights."

R-7 Section 6 of the Standard Terms and Conditions is amended by deleting the last sentence in this section.

R-8 Section 7 of the Standard Terms and Conditions is hereby deleted in its entirety and replaced with the following:

**“Termination:** This Agreement may be terminated or suspended by Park District, in whole or in part, for convenience and without cause upon five (5) days written notice. In the event of such termination, Consultant will be paid for all approved services rendered to the date of termination, and upon such payment, all obligations of Park District to Consultant under this Agreement shall cease.

Park District shall have the right to terminate this Agreement immediately and without notice upon Consultant’s default of its obligations hereunder or its violation of any federal or state laws, or local regulations or ordinances. Upon termination due to Consultant’s breach of this Agreement, Consultant shall pay Park District all reasonable costs incurred by Park District due to said breach. In the event of such termination, payment to Consultant of any sums earned to the date of such termination shall be in full satisfaction of any and all claims by Consultant against Park District under this Agreement, and acceptance of sums paid by Consultant shall constitute a waiver of any and all claims that may be asserted by Consultant against Park District.

If Park District fails to make payments to Consultant in accordance with this Agreement, and such payments are not in dispute in accordance with R-5 above, such failure shall be considered substantial nonperformance and cause for termination at Consultant’s option. If Consultant elects to terminate services in accordance with this Section, Consultant shall give fifteen (15) days’ written notice to Park District before terminating services. Unless payment in full is received by Consultant within fifteen (15) days of the date of the notice, termination shall take effect without further notice.

Promptly upon the termination of this Agreement for any reason and payment in full of all outstanding invoices received from Consultant and not in dispute, Consultant shall deliver to Park District all Instruments of Services generated in the performance of their services under this Agreement up to and including the date of termination.”

- R-9 Section 8 of the Standard Terms and Conditions is hereby amended by deleting this section in its entirety and replacing with the following:

“Consultant shall purchase and maintain the types and amounts of insurance as set forth in **Exhibit 2**, attached to and incorporated as part of this Agreement.”

- R-10 Section 9 of the Standard Terms and Conditions is hereby amended by deleting this section in its entirety and replacing with the following:

**“Standard of Care.** Consultant agrees to perform faithfully, industriously, and to the best of Consultant’s ability, experience, and talents, in accordance with generally accepted standards of professional skill and care among recognized industry experts engaged in similar services, all of the duties described in the Agreement or as otherwise required by the express and implicit terms of this Agreement, to the reasonable satisfaction of Park District. Consultant shall perform all of its duties hereunder according to Park District’s requirements and procedures and in compliance with all applicable federal, state and local laws, regulations, codes, ordinances, orders and with those of any other body having jurisdiction. Park District shall be the sole judge of whether the Consultant’s duties are performed satisfactorily.”

- R-11 Section 10 of the Standard Terms and Conditions is hereby amended by deleting this section in its entirety and replacing with the following:

**“No Liability.** Park District shall not be responsible or liable for any injury, damages, loss or costs sustained or incurred by any person including, without limitation Consultant’s employees, or for any

damage to, destruction, theft or misappropriation of any property, to the extent caused by the Consultant's services and obligations under this Agreement. Park District shall not be liable for acts or omissions of Consultant or any of Consultant's employees, subcontractor's, agents or other persons purporting to act at the direction or request, on behalf, or with the consent, of Consultant."

- R-12 Section 11 of the Standard Terms and Conditions is hereby amended by deleting this section in its entirety and replacing with the following:

**"Indemnification.** To the fullest extent permitted by law, Consultant, its officers, directors, employees, volunteers and agents shall indemnify and hold harmless Park District and its officers, officials, employees, volunteers and agents from and against all claims, suits, damages, causes of action, judgment, losses, costs and expenses, including but not limited to reasonable legal fees (attorney's and paralegals' fees and court costs), caused by the services performed by Consultant, its officers, directors, employees, volunteers and agents under this Agreement, including but not limited to any accident, injury, damage, property loss or theft, except to the extent caused by Park District, or arising from or caused by any negligent act, omission, wrongful act of Consultant, its officers, director, employees, volunteers and agents, except to the extent caused by Park District. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to Park District. Consultant shall similarly protect, indemnify and hold and save harmless Park District, its officers, officials, employees, volunteers and agents against and from any and all claims, costs, causes, actions and expenses including but not limited to reasonable legal fees, incurred by reason of Consultant's breach of any of its obligations under, or Consultant's default of, any provision of this Agreement.

- R-13 Section 13 of the Standard Terms and Conditions is hereby amended by:

- a. Deleting the last sentence in this section.
- b. Adding the following to the end of the section: "Any suit or action arising under this Agreement shall be commenced in the Circuit Court of DuPage County, Illinois. In any suit or action arising under this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees and costs of litigation."

- R-14 Section 15 of the Standard Terms and Conditions is hereby deleted in its entirety.

- R-15 Section 16 of the Standard Terms and Conditions is hereby amended as follows:

- a. In the second sentence, delete ",or any claim arising out of the performance of the services by Consultant,"
- b. In the third sentence after "deemed appropriate" add "upon prior written approval of Park District".
- c. Add the following new sentence at the end of this section: "This Agreement is non-assignable in whole or in part by Consultant, and any assignment shall be void without prior written consent of Park District."

- R-16 Section 17 of the Standard Terms and Conditions is hereby deleted in its entirety and replaced with the following:

**"Release of Project Information/Confidentiality.** Park District reserves the sole right to release all project information, as well as to time its release, form and content. This requirement shall survive the expiration of this Agreement. Notwithstanding the foregoing, Park District shall not withhold permission unreasonably for Consultant to release general promotional information concerning the project, provided that such information shall be reviewed and approved in advance in writing by Park District.

The foregoing shall not be deemed to preclude Consultant from (i) including Park District's name in a list of former clients in specific proposals to prospective clients or (ii) listing Park District's name or project in Consultant's internal publications.

If Consultant or Park District receives information specifically designated by the other party as "confidential" or "business proprietary," the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except to (1) its employees, (2) those who need to know the content of such information in order to perform services and exclusively for this project, (3) its consultants and contractors whose contracts include similar restrictions on the use of confidential information, or (4) or as otherwise required by law."

R-17 Add the following to the end of Section 18 of the Standard Terms and Conditions:

"Nothing herein shall be construed as an express and/or implied waiver of any common law and/or statutory immunities, defenses and/or privileges of Park District and/or Consultant, and/or any of their respective officials, officers and/or employees.

The headings for each paragraph of this Agreement are for convenience and reference purposes only and in no way define, limit or describe the scope or intent of said paragraphs or of this Agreement nor in any way affect this Agreement.

All notices, demands, requests, exercises and other communications required or permitted to be given by either Party under this Agreement shall be in writing and shall be deemed given when such notice has been personally delivered, sent by facsimile or deposited in the United States mail, with postage thereon prepaid, addressed to each party at the following addresses:

If to Consultant: Keith Demchinski  
Kimley-Horn and Associates, Inc.  
1001 Warrenville Road, Suite 350  
Lisle, Illinois 60532  
Fax:

If to the Park District: Executive Director  
Wheaton Park District  
102 Wesley Drive  
Wheaton, Illinois 60187  
Fax: (630) 665-5880

Waiver of any of the terms of this Agreement shall not be valid unless it is in writing and signed by all parties. The failure of claimant to enforce the provisions of this Agreement, or require performance by opponent of any of the provisions, shall not be construed as a waiver of such provisions or affect the right of claimant to thereafter enforce the provisions of this Agreement. Waiver of any breach of this Agreement shall not be held to be a waiver of any other or subsequent breach of the Agreement.

R-18 Add the following new sections to the Standard Terms and Conditions:

**"Independent Contractor.** The relationship between Consultant and Park District is that of an independent contractor. Consultant shall supply all personnel, equipment, materials, and supplies at its

own expense, except as specifically set forth herein. Consultant shall not be deemed to be, nor shall it represent itself as, employees, partners, or joint venturers of Park District. Consultant is not entitled to workers' compensation benefits or other employee benefits from Park District and is obligated to directly pay federal and state income tax on money earned under this Agreement.

**Laws, Permits, Approvals and Licenses.** Consultant shall comply with all applicable codes, laws, ordinances and regulations of Park District, the City of Wheaton, DuPage County, the State of Illinois, and the Federal Government. Consultant shall, at its sole cost and obligation, be responsible for obtaining all permits and licenses required to perform its duties under this Agreement.

**Term.** Consultant shall complete the services on or before June 30, 2016."

WHEATON PARK DISTRICT

By: \_\_\_\_\_

As Its: \_\_\_\_\_

Date: \_\_\_\_\_

KIMLEY-HORN AND ASSOCIATES, INC.

By: \_\_\_\_\_

As Its: \_\_\_\_\_

Date: \_\_\_\_\_

## **Exhibit 2**

### **Insurance Requirements**

Consultant shall obtain insurance of the types and in the amounts listed below.

A. **Commercial General and Umbrella Liability Insurance.** Consultant shall maintain commercial general liability (CGL) and, if necessary, commercial umbrella insurance with a limit of not less than \$1,000,000 for each occurrence. If such CGL insurance contains a general aggregate limit, it shall apply separately to this project/location. CGL insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 10 93, or a substitute form providing equivalent coverage, and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured Agreement (including the tort liability of another assumed in a business Agreement). Park District shall be included as an insured under the CGL, using ISO additional insured endorsement CG 20 10 or a substitute providing equivalent coverage, and under the commercial umbrella, if any. This insurance shall apply as primary insurance with respect to any other insurance or self-insurance afforded to Park District. There shall be no endorsement or modification of the CGL limiting the scope of coverage for liability arising from pollution, explosion, collapse, or underground property damage.

B. **Professional Liability Insurance.** Consultant shall maintain professional liability and, if necessary, commercial umbrella liability insurance with a limit of not less than \$1,000,000 for each wrongful act arising out of the performance or failure to perform professional services and \$2,000,000 aggregate.

C. **Business Auto and Umbrella Liability Insurance.** Consultant shall maintain business auto liability and, if necessary, commercial umbrella liability insurance with a limit of not less than \$1,000,000 for each accident. Such insurance shall cover liability arising out of any auto including owned, hired and non-owned autos. Business auto insurance shall be written on Insurance Services Office (ISO) form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01.

D. **Workers Compensation Insurance.** Consultant shall maintain workers compensation as required by statute and employers liability insurance. The commercial umbrella and/or employers liability limits shall not be less than \$1,000,000 for each accident for bodily injury by accident or for each employee for bodily injury by disease. If Park District has not been included as an insured under the CGL using ISO additional insured endorsement CG 20 10 under the Commercial General and Umbrella Liability Insurance required in this Agreement, Consultant waives all rights against Park District and its officers, officials, employees, volunteers and agents for recovery of damages arising out of or incident to Consultant's work.

#### **E. General Insurance Provisions**

(1) **Evidence of Insurance.** Prior to beginning work, Consultant shall furnish Park District with a certificate(s) of insurance and applicable policy endorsement(s), executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements set forth above. All certificates shall provide for 30 days' written notice to Park District prior to the cancellation or material change of any insurance referred to therein. Written notice to Park District shall be by certified mail, return receipt requested. Failure of Park District to demand such certificate, endorsement or other evidence of full compliance with these insurance requirements or failure of Park District to identify a deficiency from evidence that is provided shall not be construed as a waiver of Consultant's obligation to maintain such insurance. Park District shall have the right, but not the obligation, of prohibiting

Consultant from entering the project site until such certificates or other evidence that insurance has been placed in complete compliance with these requirements is received and approved by Park District. Failure to maintain the required insurance may result in termination of this Agreement at Park District's option. Consultant shall provide certified copies of all insurance policies required above within 10 days of Park District's written request for said copies.

(2) Acceptability of Insurers. For insurance companies which obtain a rating from A.M. Best, that rating should be no less than A VII using the most recent edition of the A.M. Best's Key Rating Guide. If the Best's rating is less than A VII or a Best's rating is not obtained, Park District has the right to reject insurance written by an insurer it deems unacceptable.

(3) Cross-Liability Coverage. If Consultant's liability policies do not contain the standard ISO separation of insureds provision, or a substantially similar clause, they shall be endorsed to provide cross-liability coverage.

(4) Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to Park District. At the option of Park District, Consultant may be asked to eliminate such deductibles or self-insured retentions as respects Park District, its officers, officials, employees, volunteers and agents or required to procure a bond guaranteeing payment of losses and other related costs including but not limited to investigations, claim administration and defense expenses.

(5) Subconsultant. Consultant shall cause each subconsultant employed by Consultant to purchase and maintain insurance of the type specified above. When requested by Park District, Consultant shall furnish copies of certificates of insurance evidencing coverage for each subconsultant.