

**CONSULTANT AGREEMENT
BETWEEN
TOWN OF KENNEBUNKPORT
AND
TZM PLANNING and EF | DESIGN & PLANNING, LLC**

THIS AGREEMENT, made this 17th day of September 2019, is by and between the TOWN OF KENNEBUNKPORT, a municipal corporation, 6 Elm Street, Kennebunkport, Maine (hereinafter "Town") and TZM Planning of 39 Richards Avenue, Portsmouth, New Hampshire and EF | Design & Planning, LLC of P.O. Box 4621, Portsmouth, New Hampshire (hereinafter collectively "Consultants") who together state and agree as follows:

WITNESSETH:

WHEREAS, the Town issued a certain Request for Proposal ("RFP") on or about May 22, 2019 seeking professional consulting services to work with and assist the Growth Planning Committee in preparing a comprehensive review, rewrite and update to Kennebunkport's Comprehensive Plan; and

WHEREAS, the Town received several proposals in response to the Town's RFP including a joint proposal submitted by Consultants dated June 20, 2019; and

WHEREAS, the Town evaluated the proposals received in accordance with the criteria established in the RFP; and

WHEREAS, the Town finds Consultants qualified to provide the services; and

WHEREAS, the Town determined Consultants' proposal to be the best and undertaking it to be in the Town's best interests,

NOW, THEREFORE, in consideration of the promises and covenants herein, the Parties hereby agree as follows:

ARTICLE 1: DEFINITIONS.

1.1 As used in this Agreement:

- (a) "Agreement" shall mean this contract, the document identified as Appendix 1, affixed hereto, the Town's RFP, incorporated herein by reference, and Consultants' Proposal dated June 20, 2019, incorporated herein by reference.

- (b) “Town” shall mean the Town of Kennebunkport, Maine, a municipal corporation, 6 Elm Street, Kennebunkport, Maine, as well as its employees and designated elected and appointed officials.
- (c) “Consultants” shall mean collectively TZM Planning of Portsmouth, New Hampshire and EF | Design & Planning, LLC, of Portsmouth, New Hampshire.
- (d) “Project” shall mean the comprehensive review, rewrite and update to Kennebunkport’s Comprehensive Plan.
- (e) “Standard of care” shall mean performance of work by Consultants at a level of care, professional skill, and diligence as similarly situated professional Land Use and Town Planners within New England.
- (e) “Work Product” shall mean all drawings, files, sketches, designs, design data, technical and scientific data, photographs, reports, findings, recommendations, memorandum, draft chapters, maps, and any other information reduced to writing, electronic format or otherwise, that has been produced by Consultants pursuant to request of Town hereunder.

ARTICLE 2. TERM

- 2.1. This Agreement shall not have a specific termination date but shall run pursuant to the satisfactory attainment of Tasks set out in Appendix 1 (Reference is made to Table 1 therein).
- 2.2. If Consultants shall fail to perform any provision herein contained or fail to complete any milestone by the Anticipated Completion Date as set out in Table 1 (the “Project Timeline”), Town may terminate this Agreement upon thirty (30) days’ prior notice. After such termination for cause, Consultants shall have no claim for any damages except for work completed and unpaid at the time of such termination. In the event of such termination, Town shall pay Consultants any amount due for the work completed or materials furnished but only upon delivery by Consultants of all Work Product completed prior to termination. Consultants will have the affirmative duty and obligation to assist Town in the transition to a new consultant. Consultants shall turn over all work product, and they shall coordinate in good faith with those successor consultants selected and designated by the Town.
- 2.3. In the event that the Town breaches a material obligation of this Agreement, Consultants may terminate this Agreement by providing thirty (30) days’ written notice to Town and the Town fails to cure such breach within that 30 day period. In the event of Consultants’ termination for cause, Consultant shall turn over all work product, and they shall coordinate in good faith with those successor Consultants selected and designated by the

Town. Town shall pay Consultants for work performed up to the point of the termination but no other fees, charges or damages shall be owed.

ARTICLE 3. SERVICES CONTEMPLATED

- 3.1 Consultants shall provide the planning, land use, and consulting services required and set out in the Town's RFP, and as set out in the scope of services specified in Consultant's Proposal dated June 20, 2019, attached hereto. To the extent there is any conflict in terms between the documents, then the terms of this Agreement and the Town's RFP shall control and govern.
- 3.2 Consultants shall, as needs dictate, employ a capable, experienced and reliable workforce relating to the services contemplated herein.
- 3.3 Consultants shall execute and complete the work according to generally accepted work methods, and with and by Consultants' own means and subcontractors, free from detailed supervision, inspection or control by Town, except such inspection as may be necessary to enable Town to confirm that the work performed complies with the requirements of this Agreement, and except as may be detailed, set out and obligated by the RFP and the Consultant's proposal.
- 3.4 In performing work under this Agreement, Consultants shall be and remain always independent contractors and not Town employees, and nothing herein shall be construed as inconsistent with that status.
- 3.5 Consultants will work cooperatively with one another, and with all stakeholders, Town staff, Kennebunkport's Board of Selectmen, Planning Board, and Growth Management Committee, and with any other parties or Consultants retained by Town.
- 3.6 The Town shall be free to retain and hire any additional consultants to assist with the Project as it determines.

ARTICLE 4. PERFORMANCE & RECORDS

- 4.1. Consultants shall complete all work in a timely and responsive manner consistent with the standard of care set forth above and pursuant to the Project Timeline
- 4.2. Consultants shall be responsible for maintaining and providing all labor, tools, equipment, software and support necessary to fully and effectively complete all requested services.

- 4.3 All Work Product produced at the request and expense of the Town shall become, and remain always, the intellectual property of the Town upon full payment thereof. The Town is free, always and in all circumstances, hereafter to use, re-use, employ, transfer, promote, copy, forward and distribute such Work Product for its purposes and advantage without further consent, permission, fee or obligation from and to Consultants. Consultants waive, upon full payment of fees legally earned under this Agreement, all right, claim, title or interest in such Work Product.
- 4.4 Title to all documents, information and data of Town provided to or received by Consultants for the purposes of the Project shall remain in Town's name and title. Consultants will retain these documents until the termination of this Agreement. Any charges for shipment of documents back to Town at termination will be at the Town's cost. In the event that Consultants do not receive written instructions regarding document disposition within sixty (60) days of the termination of this Agreement then Consultants may dispose of such Town documents, information and data in a manner of Consultants' choice and Consultant shall incur no liability thereby, except Consultants may not in any manner place or permit third parties to use or employ such materials.
- 4.5 Consultants acknowledge that Town is bound by Maine's Freedom of Access Act, 1 M.R.S.A. § 401 et seq., which law makes most Town records available for public review and inspection. Consultants will cooperate where necessary to comply with requirements of such statutes. However, Consultants will not independently disclose any information to any third party, except to an authorized subcontractor, without knowledge and consent of Town.

ARTICLE 5. RATES AND CHARGES

- 5.1 Consultants will charge those fees set out in Table 1, but any additional work beyond that described in the Proposal and provided such additional work has been approved in advance by the Town, shall be charged at an agreed time and materials basis. Invoices will be submitted at the end of each month. Payment from the Town for shall be made in a check made payable to TZM Planning.
- 5.2 The Town shall pay fees to Consultants as set forth in this Agreement. Any dispute or concern as to the distribution of those fees between the Consultants themselves thereafter, such distribution is solely and wholly a matter between the Consultants themselves and shall not obligate the Town in any way, each individual Consultant waiving claims against the Town once payment is earned and paid.

ARTICLE 6. BILLING AND PAYMENT

- 6.1 Consultants shall submit a detailed invoice in a form satisfactory to Town, showing the amount due under this Agreement by Tasks and Deliverables. If found correct, Town will pay each invoice within thirty (30) calendar days of invoice receipt. If Town disputes any

portion of an invoice, it shall notify Consultants within fifteen (15) days from receipt of such invoice of the reasons for such dispute, and Town and Consultants shall cooperate in resolving such dispute.

- 6.2 If this Agreement is terminated for convenience by the Town pursuant to Article 7, the Consultants shall be paid \$80.00 per hour for the time spent through the date of termination.
- 6.3 All invoices are to be mailed to:

Town of Kennebunkport
Attn: Werner Gilliam
P.O. Box 566, 6 Elm Street
Kennebunkport, ME 04046

ARTICLE 7. MISCELLANEOUS

- 7.1 Town reserves the right to stop work hereunder in whole or in part at any time before completion. Upon receipt of notice to such effect, Consultants shall comply promptly therewith. Consultants shall have no claim whatsoever for damages due to stopping the work, except for work completed or in progress and unpaid at the time of cancellation. Upon receipt of a properly completed invoice, Town agrees to pay for work that is completed or in progress and unpaid in accordance with the terms of Article 6.2 of this Agreement.

ARTICLE 8. LIMITS OF LIABILITY

- 8.1 Consultants state that the services, materials and work provided pursuant to this Agreement will be completed in accordance with the standard of care described in Article 1. Town will notify Consultants within sixty (60) days of completion of any Task and Deliverable if any portion of the work is found or believed to be substandard. In such case, the Parties will discuss a remedy but if they are unable to agree on a remedy, no party may file suit or claim until the Parties have availed themselves of the dispute resolution process set out in Article 13 below.
- 8.2 Under any circumstance or dispute, Town agrees that the limits of liability for Consultants for any negligence, defective work or service performed hereunder, shall not exceed \$1,000,000.00.

- 8.3 Consultants warrant they will for all times this Agreement is in force and effect maintain those professional licenses and/or accreditations necessary to fully and lawfully perform hereunder.

ARTICLE 9. INDEMNIFICATION

- 9.1 Consultants shall indemnify and hold Town harmless from any and all demands, claims, suits, losses, damages or expenses (including reasonable attorney's fees) on account of damages, injuries to or death of any and all persons, as well as any and all property damage, arising from, related to or in any manner connected with, the negligent performance of work under this Agreement or caused or occasioned by reason of the negligence of Consultants, and/ or their employees or agents.

ARTICLE 10. ASSIGNMENT

- 10.1 Each and all of the covenants and Agreements herein contained shall extend to and be binding upon the heirs, administrators, executors, successors and/or assigns of the parties hereto. Neither Party shall assign its rights under this Agreement without the written approval of the other Party.

ARTICLE 11. APPLICABLE LAW

- 11.1 The construction, interpretation, and performance of this Agreement shall be governed by and construed in accordance with the laws of Maine.

ARTICLE 12. CONFIDENTIALITY

- 12.1 Consultants will not disclose to third parties, excepting authorized subcontractors or other parties authorized by Town, information concerning work undertaken pursuant to this Agreement without the express approval of Town.

ARTICLE 13. MEDIATION

- 13.1 Any and all claims, disputes, and other matters in question arising out of or relating to this Agreement which are not disposed of by mutual discussion and agreement of the Parties shall be submitted to mediation in Portland, Maine. Only if mediation fails may a Party secure relief by legal action, but such legal action may only be brought in York County or in the U.S. District Court, Portland, Maine. The Parties shall jointly select and jointly pay

for a mediator, and each Party will bear their own legal fees, and no award may include legal fees.

ARTICLE 14. SEVERABILITY

- 14.1 If any term or provision of the Agreement or the application thereof is held invalid, unlawful, or unenforceable in any respect, such invalidity, unlawfulness, or unenforceability shall not be deemed or construed to affect other terms or provisions of the Agreement. To this end, the terms and provisions of the Agreement are agreed to be severable; and as a rule of construction, the Agreement shall be construed and applied as if such invalid, unlawful, or unenforceable term, provision, or application had never been contained in the Agreement.

ARTICLE 15. CONFLICTING DOCUMENTS

- 15.1 The Parties shall make every effort to assure the Agreement is read and interpreted in harmony. To the extent the documents referenced herein conflict with the provisions of this Agreement, this Agreement and the terms and conditions herein shall take precedence and govern.

ARTICLE 16. FORCE MAJEURE, IMPRACTICABILITY, EXCUSE

- 16.1 Consultants shall not be charged with any liability for failure to perform when such failure is due to any cause beyond the control and without the fault or negligence of Consultants, provided that the Consultants have used their best efforts and rendered to Town prompt notice in writing when it appears that such cause will result in non-performance.

ARTICLE 17: CONSTRUCTION, HEADINGS

- 17.1 This Agreement having been freely and voluntarily negotiated by the Parties, the rule that ambiguous contractual provisions are construed against the drafter of the provision shall be inapplicable.
- 17.2 The headings in this Agreement are for the convenience of the Parties and shall not be construed to limit or otherwise define the terms of this Agreement.
- 17.3 This Agreement, and the documents incorporated by reference, is the final, complete and exclusive statement of the agreement between Consultants and the Town. It supersedes all prior agreements and inducements relating to the subject of this Agreement. No promises or agreements made at or after the execution of this Agreement are binding unless in writing and signed by the Parties.

17.4 This Agreement may be executed in several counterparts, each of which shall be an original, and together shall constitute one and the same instrument.

ARTICLE 18. NOTICE

18.1 Whenever any provision of the Agreement requires or allows the giving of written notice, such notice will be properly given if delivered personally to the party or sent by a recognized overnight delivery service, or mailed to the party first class postage pre-paid addressed as follows:

CONSULTANTS:

Thomas Morgan
TZM Planning
39 Richards Avenue
Portsmouth, NH 03801

And

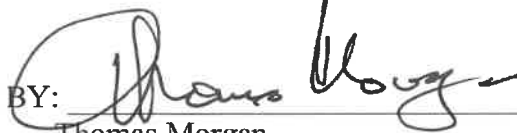
Elizabeth Durfee
EF | Design & Planning, LLC
P.O. Box 4621
Portsmouth, NH 03802

TOWN OF KENNEBUNKPORT:

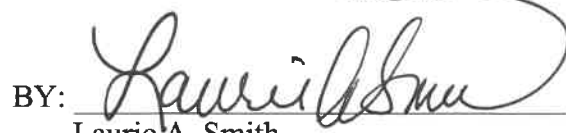
Town of Kennebunkport
ATTN: Town Manager
6 Elm Street
Kennebunkport, ME 04046

IN WITNESS WHEREOF, the Parties hereto have executed this instrument as of the day and year first above written.

CONSULTANTS:

BY: 
Thomas Morgan
Principal
TZM Planning

TOWN OF KENNEBUNKPORT:

BY: 
Laurie A. Smith
Town Manager

BY: 
Elizabeth Durfee
Member/Manager
EF | Design & Planning, LLC

Appendix 1

I. Scope of Services

Consultants will provide the following services between September 2019 and February 2021:

- Lead and manage the Comprehensive Plan update process.
- Collaborate closely with the Director of Planning and Development and Growth Planning Committee (GPC).
- Engage citizens in visioning and providing input on the future of their community.
- Prepare a baseline review of existing plans and relevant information.
- Prepare a two part (Volumes I and II) Comprehensive Plan that is consistent with the Growth Management Act. Volumes I and II will be data-driven, informative, and reader friendly documents that incorporate maps, images, tables, and charts and reflect the vision of the community. Volume I will serve as an engaging, graphic-rich summary document that highlights key trends, findings, and recommendations found in Volume II. The chapters and scope of each chapter to be included in Volume II are summarized in the Consultants' Proposal dated June 20, 2019.
- Meet with staff, the Growth Planning Committee (GPC), board and commission members, and other stakeholders throughout the project.
- Attend and support Comprehensive Plan discussions at public meetings for the duration of the project.
- Supply meeting materials.
- Implement a public participation plan, including event tabling, hosting educational forums, conducting a SWOT workshop and a future planning workshop, and maintaining a project website. Document the public input process.
- Perform all clerical and graphical services associated with the development of reports, memoranda, charts, maps, multimedia, and other materials associated with the project.
- Provide interim reports and progress memos, as requested.
- Travel and production expenses associated with the services specified.
- Provide digital, editable, and printable copies of the final Comprehensive Plan. Provide fifty (50) professionally printed, bound paper copies of the final work products on high quality silk stock (Volumes I and II).
- Provide GIS data created during the preparation of the plan in ESRI shapefile or another format desired by the Town.

II. Assumptions

Town of Kennebunkport Staff and/or Growth Planning Committee will:

- Provide guidance and oversight.
- Provide or arrange for meeting and workshop space.
- Provide and distribute minutes for all Comprehensive Plan Committee meetings.
- Collaborate with consultants to develop meaningful public engagement events.
- Review draft material and maps and provide feedback in a timely manner.

- Provide Consultants with local GIS data, such as parcel data and building footprints, to the extent that that such data exists.
- Assist Consultants in obtaining local permitting data for the purpose of analyzing types of development and trends.
- Provide Consultants with studies and information relevant to the Comprehensive Plan.

III. Schedule/Timeline

The Consultants will strive to adhere to the timeframe in Table 1 below. Significant delays in scheduling workshops or public meetings, changes in scope, or delays in receiving comments from the Town on draft material submitted by the Consultants may impact the proposed timeframe.

Table 1

	Task & Deliverable	Anticipated Completion Date*	Hours	Fee	% of Total Project Cost
Task 1	Project Meetings with staff and GPC	Ongoing	96	\$7,680	9%
Task 2	Meetings with GPC, staff, Planning Board, and Selectmen	Ongoing	60	\$4,800	5%
Task 3	Public Engagement and Communications Plan	Oct 19 – Aug 20	89.6	\$7,168	8%
A	Initial Outreach and Branding	Oct 2019	6	\$480	
B	Website design & maintenance	Oct 2019	25	\$2,000	
C	Event Tabling	June/July 2020	6	\$480	
D	Climate 101 Event - Dr. Wake	May 2020	5.4	\$675	
	Climate 101 Event - Morgan & Durfee		4	\$320	
E	Groundwater Rising Event - Dr. Knott	June 2020	4.2	\$672	
	Groundwater Rising - Morgan & Durfee		4	\$320	
F	SWOT Workshop	June 2020	15	\$1,200	
G	Future Planning Workshop	Aug 2020	20	\$1,600	
Task 4	Comprehensive Plan Development	Oct 19 – Dec 20	698	\$55,840	62%
A	Baseline review	Oct 2019	22	\$1,760	
B	Initiate Topic Chapters + Prepare Introduction	July 2020	250	\$20,000	
C	Community Character + Vision	Aug 2020	50	\$4,000	
D	Develop Goals, Policies, and Strategies for Each Topic Chapter	Oct 2020	258	\$20,640	
E	Future Land Use Chapter	Nov 2020	86	\$6,880	
F	Prepare Implementation Matrix	Nov 2020	16	\$1,280	
G	Produce Final Draft Deliverables	Dec 2020	16	\$1,280	
	Graphic Design (Layout, Branding)	Oct 19 – Dec 20	100	\$10,000	11%
	Estimated Supplies and Map Production		-	\$2,000	2%
	Final Printing (50 copies)		-	\$2,500	3%
	Travel		-	-	0%
TOTAL				\$89,988	100%

*May be refined following discussions with the GPC.

Table 2
Detail on Tasks 4B & 4D

Comprehensive Plan Chapters	Estimated Hours	Fee
Introduction & History	5	\$400
Historic & Archaeological Resources	20	\$1,600
Marine Resources	35	\$2,800
Water Resources	40	\$3,200
Natural Resources	50	\$4,000
Economy	30	\$2,400
Existing Land Use	40	\$3,200
Housing	40	\$3,200
Demographics	30	\$2,400
Recreational & Cultural Resources	40	\$3,200
Public Facilities & Services	43	\$3,440
Fiscal Capacity & Capital Investment Strategies	30	\$2,400
Hazard Mitigation	8	\$640
Transportation	45	\$3,600
Energy	45	\$3,600
Regional Coordination	5	\$400
Public Participation Summary	2	\$160
Total	508	\$40,640

Table 3
Hourly Rates

Name	Company	Project Role	Hourly Rate
Elizabeth Durfee, AICP	EF Design & Planning, LLC	Principal	\$80
Thomas Morgan, AICP	TZM Planning	Principal	\$80
Dr. Cameron Wake	University of New Hampshire	Climate Scientist	\$125
Dr. Jayne Knott	University of New Hampshire	Groundwater Expert	\$160
Alicen Brown	Studio NaCl	Graphic Design	\$100
Jeffrey Hyland, PLA, ASLA	Ironwood Design Group	Urban Design & Public Engagement	\$120
Jen Martel	Ironwood Design Group	Landscape Architect	\$80
Claudie Marston-Miner, CET	Envision Exceptional Instruction	Meeting Facilitation	\$80

I. Fees and Payment

The Consultants will submit a monthly invoice to the Town. The invoice will detail time spent by project task and a brief summary of work completed. Payment may be made to TZM Planning, 39 Richards Avenue, Portsmouth, NH 03801.