

March 3, 2014

To: Mayor Bemrich and City Council

From: David Fierke, City Manager

Subject: Right of Way Use Agreement



ACTION: Approve right of way use agreement for a driveway

Background

Jonathan and Morgan Fitzgerald are requesting a right of way use agreement for a portion of Williams Drive, located adjacent to their property at 1196 Colonial Drive (see attached map and agreement). The right-of-way adjacent to their property is part of Fox Briar Addition, a subdivision platted in the 1980's. 2 of the 4 phases of the subdivision have been developed; however, the portion that is platted east of the Fitzgerald property was never developed.

The Fitzgerald's home was constructed in 1989 with the assumption that the street to the east (Williams Drive) would be developed. The garage to the home is constructed at the rear, which requires access via the undeveloped portion of Williams Drive. The Fitzgerald's would like to lay a gravel driveway within the undeveloped right-of-way of Williams Drive to ensure that access to the garage is maintained.

Analysis of Issue

It is currently the Fitzgerald's desire to lay a gravel drive within the undeveloped right of way of a portion of Williams Drive. In reviewing the Fitzgerald's request, City Staff has informed the owners that any driveway in the public right-of-way shall be paved with Portland Cement Concrete (PCC); therefore, the owner would need to receive approval of a Variance from the Board of Adjustment prior to a gravel drive being laid. The Board of Adjustment typically recommends that all other issues are resolved prior to considering a request. To ensure this, it was recommended that the owner bring the Right of Use Agreement to the City Council for review and consideration.

Budget Impact

This request will not require any City expenditures.

Strategic Plan Impact

N/A

Existing Plan Impact

The undeveloped area east of the Fitzgerald's property is identified in the City's 2012 Housing Assessment as a potential area for new residential development.

Staff Conclusions / Recommendations

Subject to Council Review, Staff recommends approval of the resolution to approve the Right of Use Agreement for the Driveway.

Alternatives

The alternative would be to not approve the waiver, which would make the undeveloped portion of Williams Drive unusable until a road is constructed.

Implementation and Accountability

If the Council approves the request for waiver, the owner may move forward with the Board of Adjustment Variance request.

Signed



Carissa Miller
Associate Planner
Business Affairs & Community Growth

Approved

David R. Fierke
City Manager

Prepared by: Bus. Affairs & Comm. Growth, 819 1st Ave S, Fort Dodge, IA 50501 (515) 573-8321
Return to: Bus. Affairs & Comm. Growth, 819 1st Ave S, Fort Dodge, IA 50501

RIGHT OF WAY USE AGREEMENT FOR DRIVEWAY

THIS RIGHT OF WAY USE AGREEMENT (hereinafter the "Agreement") is made and entered into this ____ day of _____, 2014, by and between JONATHAN AND MORGAN FITZGERALD, ("Owner"), and the CITY OF FORT DODGE, IOWA ("City").

RECITALS

WHEREAS, Owner is/are the owner(s) of certain real property located at 1196 Colonial Drive, Fort Dodge, Webster County, Iowa ("Property"); and,

WHEREAS, the City is the owner of the public rights-of-way within or adjacent to the area identified as the Owner's Property (hereinafter the "the City Right-Of-Way"); and,

WHEREAS, Owner desires to continue to use and maintain a portion of the City Right-Of-Way for the continued use of driveway within the City right of way. The portion of the City Right-Of-Way to be used by Owner is described as the West 25' of the South 250' of Williams Drive located in the Fox Briar Addition of the City of Fort Dodge, Webster County, Iowa; this area is depicted on Exhibit A, which is attached to and incorporated into this Agreement by this reference (hereinafter the "Encroachment Area"); and,

WHEREAS, The City has determined that the driveway will not materially affect the City's rights to and use of the right of way. The City has agreed to authorize the continued use of the driveway within the City right of way, in accordance with and subject to the terms, conditions and limitations of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants, and obligations contained herein and other good and valuable consideration received by each party, the sufficiency of which is hereby acknowledged, the parties agree as follows:

AGREEMENT

1. *Incorporation of Recitals.* The foregoing recitals are hereby incorporated into this Agreement in their entirety.
2. *Grant of Use.* The City hereby grants to Owner permission and authorization to enter upon the City right of way and the continued use of the Encroachment Area described above, subject to, however, to the terms, conditions and limitations of this Agreement.
3. *Term.* This Agreement shall commence as of the date of this Agreement and shall continue until terminated in accordance with the terms of this Agreement.
4. *No Interest in Land.* Owner understands, acknowledges and agrees that this Agreement does not create an interest or estate in Owner's favor in the City Right-Of-Way. The City retains legal possession of the full boundaries of its right-of-way and this Agreement merely grants to Owner the use of the Encroachment Area described above throughout the term of this Agreement.
5. *Non-Transferability.* The privilege granted to Owner by this Agreement is a mere personal privilege granted by the City to Owner, and is neither transferable nor assignable by Owner without the City's prior written consent.
6. *Termination.* This Agreement may be terminated by the City for any reason or no reason upon giving sixty (60) days written notice. In addition, this Agreement may be terminated by the City, immediately, in the event the City Right-Of-Way is developed into a street or alley, or vacated.
 - a. *Recording of Notice of Termination.* Upon termination of this Agreement the City may cause to be recorded with the County Recorder of Webster County, Iowa, a written Notice of Termination.
 - b. *No Compensation to Owner.* In the event of termination of this Agreement, Owner shall not be entitled to any compensation or reimbursement for any costs or expenses incurred in any way arising from this Agreement or relating to the maintenance or repairs in the Encroachment Area, nor any monetary damages of any kind whatsoever.
 - c. *Removal of Obstructions.* Upon termination of this Agreement the Owner shall, at the Owner's sole cost and expense, remove all materials placed by the Owner other than natural vegetation, located within the Encroachment Area.
7. *Repairs and Maintenance.* During the term of the Agreement, Owner shall, at Owner's sole cost and expense, maintain the Encroachment Area in a safe, neat and good physical condition at all times. Gravel, sod or seeded grasses are acceptable materials to use within the Encroachment Area; concrete, asphalt and/or brick pavers may not be used. Any gravel material that spreads onto the existing concrete right-of-way located directly

south of the Encroachment Area shall be cleaned up by the Owner prior to June 1st of each year. Any maintenance or repairs shall be completed at the sole cost and expense of the Owner.

8. *Compliance with Law.* Owner shall adhere to and comply with all ordinances, laws, rules and regulations that may pertain to or apply to the Encroachment Area and the Owner's use thereof. Owner shall perform under this Agreement in accordance with all applicable legal requirements.
9. *Indemnification.* To the fullest extent permitted by law, Owner agrees to indemnify, defend and save the City, its officers, agents, servants, employees, boards and commissions harmless from and against any claims, suits, judgments, costs, attorney's fees, loss, liability, damage or other relief to any person or property in any way resulting from or arising out of the existence of this Agreement and/or the existence, use or location of Owner's use of the City Right-Of-Way.
10. *Breach and Limitation on Damages.* If either party violates or breaches any term of this Agreement, such violation or breach shall be deemed to constitute a default, and the other party shall have the right to seek such administrative, contractual or legal remedies as may be suitable for such violation; provided, however, that in no event shall the City be liable to Owner for monetary damages of any kind relating to or arising from any breach of this Agreement, and that no action of any kind shall be commenced by Owner against the City for monetary damages. In the event any legal action is brought by the City for the enforcement of any of the obligations of Owner relating to or arising from this Agreement and the City is the prevailing party in such action, the City shall be entitled to recover from Owner reasonable interest and attorney's fees.
11. *Notices.* Any notice required or permitted under this Agreement shall be in writing and shall be sufficient if personally delivered or mailed by certified mail, return receipt requested, addresses as follows:

To the City:	To the Owner:
City Clerk 819 1 st Ave. South Fort Dodge, Iowa 50501	Jonathan and Morgan Fitzgerald 1196 Colonial Drive Fort Dodge, Iowa 50501
12. *No Joint Venture or Partnership.* This Agreement shall not be construed so as to create a joint venture, partnership, employment, or other agency relationship between the parties hereto.
13. *Governing Law.* This Agreement shall be subject to and governed by the laws of the State of Iowa.
14. *References in Agreement.* All references in this Agreement to the singular shall include the plural where applicable.

15. *Paragraph Headings.* Paragraph headings are inserted for convenience only and in no way limit or define the interpretation to be placed upon this Agreement.
16. *Assignment.* This Agreement and the obligations herein may not be assigned without the express written consent of each of the parties hereto. Any attempt to assign this Agreement will automatically terminate the Agreement and privileges granted hereunder.
17. *Entire Agreement.* This Agreement and its exhibits constitute the entire agreement and understanding between the parties and supersedes any prior agreement or understanding relating to the subject matter of this Agreement.
18. *Modification.* This Agreement may be changed, modified or amended only by a duly authorized written instrument executed by the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date referenced above.

PROPERTY OWNER(S)

ATTEST:

STATE OF IOWA,

ss:

WEBSTER COUNTY,

On this ____ day of _____, 2014, before me, the undersigned, a Notary Public in and for said State, personally appeared _____ to me known to be the identical person named in and who executed the foregoing instrument and acknowledged that they executed the same as their voluntary act and deed.

Notary Public in and for said State of Iowa

CITY OF FORT DODGE, IOWA

ATTEST:

By _____
Matt Bemrich, Mayor

Jeff Nemmers, City Clerk

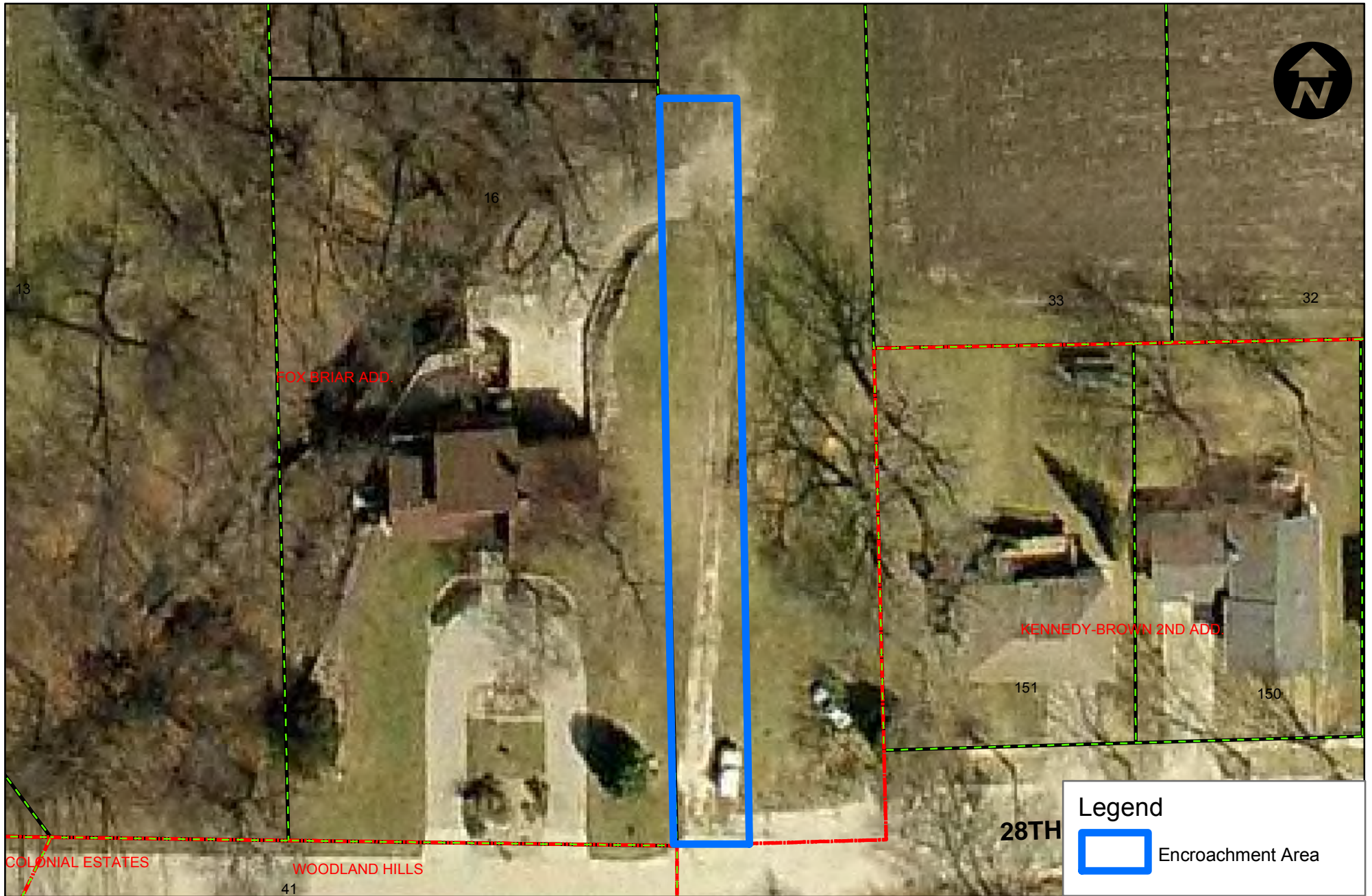
STATE OF IOWA, WEBSTER COUNTY, ss:

On this _____ day of _____, 2014 before me, the undersigned, a Notary Public in and for said State, personally appeared Matt Bemrich and Jeff Nemmers to me personally known, who being by me duly sworn, did say that they are the Mayor and City Clerk, respectively, of said corporation, that the seal affixed thereto is the seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its City Council; and that the said Mayor and City Clerk as such officers, acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by them voluntarily executed.

Dawn M. Siebken, Notary Public

Exhibit A - Encroachment Area

Described as the West 25' of the South 250' of Williams Drive located in the Fox Briar Addition of the City of Fort Dodge, Webster County, Iowa



RESOLUTION NO. _____

RESOLUTION APPROVING A RIGHT OF WAY USE AGREEMENT ON CITY-OWNED PROPERTY IN THE CITY OF FORT DODGE, WEBSTER COUNTY, IOWA.

BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF FORT DODGE, IOWA:

SECTION I. PURPOSE.

The purpose of this Resolution is to grant a Right of Way Use Agreement for an allowed Encroachment Area described as follows:

The West 25' of the South 250' of Williams Drive located in the Fox Briar Addition of the City of Fort Dodge, Webster County, Iowa.

SECTION II.

The City Council of the City of Fort Dodge, Iowa, hereby makes the following findings:

- (1) That the Right of Way Use Agreement grants Jonathan and Morgan Fitzgerald the right to use City right of way for a driveway;
- (2) That concrete, asphalt and/or brick pavers shall not be placed within the legally described Encroachment Area;
- (3) That gravel, sod or seeded grass may be placed within the legally described Encroachment Area;
- (4) That any maintenance or repairs shall be completed at the sole cost and expense of the owner; and
- (5) That the legally described right of way use agreement is non-transferrable.

SECTION III.

The Right of Way Use Agreement, above described, is hereby declared approved.

SECTION VI.

This Resolution shall be in effect after its approval, and publication, as by law provided. Passed and approved by the City Council of the City of Fort Dodge, Iowa, this _____ day of _____, AD, 2014.

Ayes: _____

Nays: _____

Other: _____

CITY OF FORT DODGE

BY: _____

Matt Bemrich, Mayor

ATTEST:

Jeff Nemmers, City Clerk

STATE OF IOWA, WEBSTER COUNTY, ss:

On this _____ day of _____, 2014 before me, the undersigned, a Notary Public in and for said State, personally appeared Matt Bemrich and Jeff Nemmers to me personally known, who being by me duly sworn, did say that they are the Mayor and City Clerk, respectively, of said corporation, that the seal affixed thereto is the seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its City Council; and that the said Mayor and City Clerk as such officers, acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by them voluntarily executed.

Dawn M. Siebken, Notary Public