

**March 17, 2014**

**To: Mayor Bemrich and City Council**

**From: David Fierke, City Manager**

**Subject: Right of Way Use Agreement**



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**ACTION: Approve right of way use agreement for a parking lot**

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**Background**

Lighthouse Ministries, Inc. is requesting a right of way use agreement for a portion of 4<sup>th</sup> Avenue North and North 14<sup>th</sup> Street, located adjacent to their property at 1333 4<sup>th</sup> Avenue North (see attached map and agreement). The proposed Encroachment Area of the right-of-way consists of an existing paved parking area that was used by the previous owner of the Church. Lighthouse Ministries, Inc. purchased the property in 2011, under the presumption that they would also own the parking area that is actually located within the City right-of-way. This existing parking area is considered a pre-existing non-conforming use. There is no known documentation showing the date that the Encroachment Area was paved for such use.

**Analysis of Issue**

The Church has continued to plow the parking area during the winter months. The Church would like to install signs to restrict parking from external users during worship times and snow events, in order to clear snow from the parking area.

The Church will be responsible for maintaining the Encroachment Area on a daily basis (snow removal, etc.); however, City Engineering recommends that the City conduct any extensive repairs, to ensure conformity with other portions of the right of way; said repairs include any pavement and curb and gutter repair.

**Budget Impact**

This request will not require any City expenditures.

**Strategic Plan Impact**

N/A

**Existing Plan Impact**

N/A

**Staff Conclusions / Recommendations**

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

**Alternatives**

The alternative would be to not approve the resolution to approve the Right of Use Agreement, which would not allow this space to be used as a parking area for the Church.

**Implementation and Accountability**

If the Council approves the resolution to approve the Right of Use Agreement, the owner may use the right-of-way for parking.

Signed

Approved



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Carissa Miller  
Associate Planner  
Business Affairs & Community Growth

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David R. Fierke  
City Manager

**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 South 20' of 4th Avenue North beginning at North 14th Street and extending westerly 260', and the west 20' of North 14th Street between the alley located in block 5 and 4th Ave North, excluding all sidewalks within said area; all located in Ringland's Subdivision 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 Lighthouse Ministries the right to use City right-of-way for existing parking;
- (2) That any day-to-day maintenance or repairs such as snow removal and keeping the area safe, neat and in good physical condition, shall be completed at the sole cost and expense of the owner;
- (3) That any extensive maintenance or repairs, such as pavement or curb and gutter repairs shall be completed at the sole cost and expense of the City; and
- (4) That the agreement may be terminated by the City for any reason upon giving sixty days notice.

**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

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

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## **RIGHT OF WAY USE AGREEMENT FOR PARKING LOT**

THIS RIGHT OF WAY USE AGREEMENT (hereinafter the "Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2014, by and between LIGHTHOUSE MINISTRIES, INC., ("Owner"), and the CITY OF FORT DODGE, IOWA ("City").

### RECITALS

WHEREAS, Owner is/are the owner(s) of certain real property located at 1333 4<sup>th</sup> Avenue North, 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 a parking lot within the City right of way. The portion of the City Right-Of-Way to be used by Owner 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 parking lot 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 parking lot 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, 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 Owner makes any exterior improvements to the building or site, which would trigger or require site plan review per City Ordinance 17.08.03.
  - 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 obstructions that were placed by the Owner within the Encroachment Area.
7. *Repairs and Maintenance.* During the term of this Agreement, the Owner shall, at Owner's sole cost and expense, complete any daily maintenance or repairs, including but not limited to snow removal. The Owner, shall, at the Owner's sole cost and expense, maintain the Encroachment Area in a safe, neat and good physical condition at all times; with the exception of any extensive maintenance or repairs, including but not limited to

pavement or curb and gutter maintenance or repairs, which shall be completed at the sole cost and expense of the City.

- a. *Signage.* This Agreement permits the Owner to install signage that prohibits vehicle parking within the Encroachment Area by external users after snow events and/or during service times. Upon placing said signage within the Encroachment Area, during those times of prohibited parking established on said signage, the Owner may have the vehicles of external users towed at the external users' sole cost and expense.
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 <sup>st</sup> Ave. South Fort Dodge, Iowa 50501	Lighthouse Ministries, Inc. 1333 4 <sup>th</sup> Avenue North 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.

**LIGHTHOUSE MINISTRIES, INC.**                      ATTEST:

\_\_\_\_\_  
By: Rev. John L. Elkin, Sr.,  
    President

\_\_\_\_\_  
Vickie L. Reeck  
Secretary/Treasurer

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 Rev. John L. Elkin, Sr. and Vickie L. Reeck to me personally known, who being by me duly sworn, did say that they are the President and Secretary/Treasurer, respectively, of said corporation; that said instrument was signed on behalf of said corporation by authority of its Board of Deacons; and that the said President and Secretary/Treasurer 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.

\_\_\_\_\_  
Notary Public in and for said State of Iowa

**CITY OF FORT DODGE, IOWA**                      ATTEST:



By \_\_\_\_\_  
Matt Bemrich, Mayor

\_\_\_\_\_  
Jeff Nemmers, City Clerk

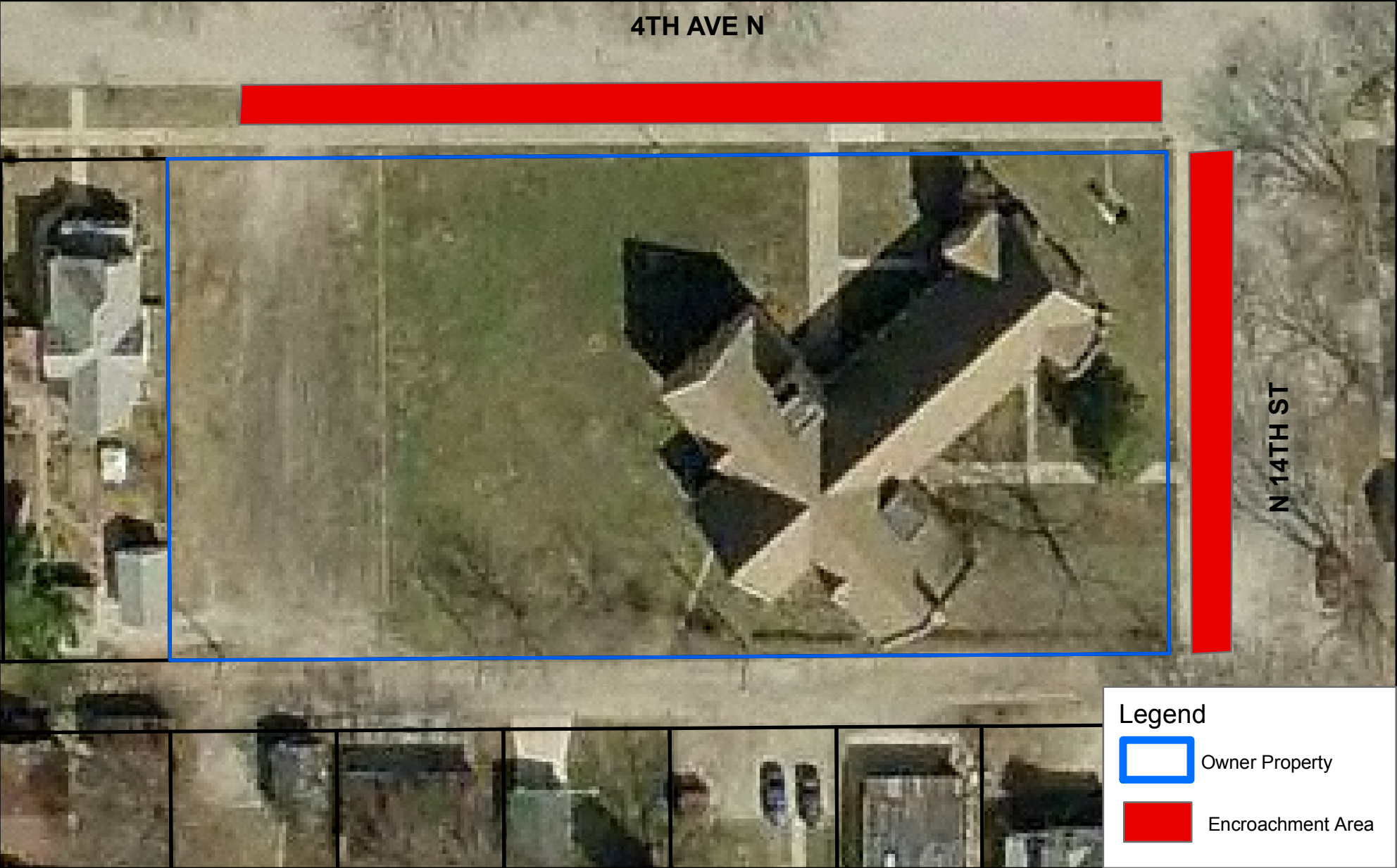
STATE OF IOWA, WEBSTER COUNTY, ss:

On this \_\_\_\_ day of \_\_\_\_\_, 2014 before me, the undersigned, a Notary Public in and for said State, personally appeared \_\_\_\_\_ and \_\_\_\_\_ 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.

\_\_\_\_\_  
Notary Public in and for said State of Iowa

# Exhibit A - Right of Way Use Agreement

Described as the South 20' of 4th Avenue North beginning at North 14th Street and extending westerly 260', and the west 20' of North 14th Street between the alley located in Block 5 and 4th Ave North, excluding all sidewalks within said area; all located in Ringland's Subdivision of the City of Fort Dodge, Webster County, Iowa.



**Legend**

-  Owner Property
-  Encroachment Area

20 10 0 20 Feet



Map created 3/14/14