

TIMBER CREEK SOUTHWEST COMMUNITY DEVELOPMENT DISTRICT

FENCE ENCROACHMENT

APPLICATION INSTRUCTIONS

Attached to these instructions is a template of the Fence Encroachment Agreement typically used by Timber Creek Southwest Community Development District (“**District**”) when a landowner desires to encroach into a Drainage Easement (“**Drainage Easement**”) dedicated or granted to the District. Please familiarize yourself with the terms and conditions of the form agreement prior to submitting the application. All potential fence encroachments are reviewed on a case-by-case basis and may be approved, approved with conditions or denied by the District in its discretion.

INSTRUCTIONS:

1. The property owner seeking a Fence Encroachment Agreement must provide to the District the following information:
 - a) Landowner’s name (exactly as shown on title to the property), physical address, folio number, and contact information.
 - b) A description of the proposed fence and/or gate that will encroach into the Drainage Easement, including copies of professional plans and specifications and permits and approvals applied for or received. The materials must include details of fence post foundation size and depth.
 - c) A letter of acknowledgement and approval of the gate, as described in the plans and specifications, from any applicable homeowners’ association.
 - d) Proof of ownership of landowner’s property (i.e. copy of deed to landowner’s property).
 - e) A copy of the applicable subdivision plat.
 - f) A copy of a land survey depicting the proposed encroachment area into the Drainage Easement. The survey shall include surveyed as-builts of existing facilities within the encroachment area including pipe inverts, pipe location, pipe material and pipe size.
 - g) Any other information reasonably requested by the District and pertaining to the proposed improvement or structure.
2. The landowner is responsible for paying all costs incurred by the District with respect to the landowner’s request to encroach into a Drainage Easement, including all legal and professional fees and any other fees and costs incurred by the District. Owner shall include a nonrefundable Application Fee in the amount of \$500.00 with the application materials. The application fee must be paid by check to “Timber Creek Southwest Community Development District”. In the event that the actual costs for legal and professional fees and any other fees and costs incurred by the District in connection with the Fence Encroachment Agreement exceed \$500.00, then landowner

will be required to pay such costs prior to the District's approval and execution of the Fence Encroachment Agreement. To the extent the District approves allowing the encroachment, the landowner and the District will sign a Fence Encroachment Agreement and the landowner will be responsible for the recording fee associated with recording the document in the Public Records of Lee County, Florida. The recording fee is estimated to be \$69.50.

3. The application information and documentation listed above and the application fee must be delivered to the District, c/o the District Manager, 2301 Northeast 37th Street, Fort Lauderdale, FL 33308.
4. Following receipt of the above, the District will review the application and make a determination whether to approve, approve with conditions or deny the application.
5. Any changes to the Fence Encroachment Agreement or any provision thereof, must be approved by District Counsel prior to execution and recording by the District.
6. Landowner is solely responsible for obtaining permits and approvals of government agencies, homeowners' associations, or any other person or entity having jurisdiction over the property or the improvements, including all costs thereof. Nothing in the Fence Encroachment Agreement shall constitute any acknowledgement, approval or waiver by the District of any requirement, permit, or approval of any applicable government agency, homeowners' association, or any other person or entity having jurisdiction over the property or the improvements.
7. Send submittals as follows:
 - a. Initial application:
 - i. Ryan Shute – Morris DePew Engineering – tshute@m-da.com
 - ii. Cori Dissinger – JPWard & Associates – CoriDissinger@JPWardAssociates.
 - b. Payment:
 - i. James P. Ward – JPWard & Associates, LLC., 2301 NE 37 Street, Ft. Lauderdale, FL. 33308
8. Payment must be received before any work on the application is begun.

This instrument was prepared
without an opinion of title and
after recording return to:
Gregory L. Urbancic, Esq.
Coleman, Yovanovich & Koester, P.A.
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
(239) 435-3535

FENCE ENCROACHMENT AGREEMENT

THIS FENCE ENCROACHMENT AGREEMENT (this "**Agreement**") is made this _____ day of _____, 202__, by and between **TIMBER CREEK SOUTHWEST COMMUNITY DEVELOPMENT DISTRICT** ("**District**") and _____ ("**Owner**").

RECITALS

A. Owner is the owner in fee simple of that certain real property located at _____, Fort Myers, Florida 33913, which real property is legally described as follows (the "**Owner's Property**"):

Lot ____, Block ____, Timber Creek, according to the plat thereof as recorded as Instrument Number 2020000059084 of the Public Records of Lee County, Florida.

B. Pursuant to the terms of the plat of Timber Creek, a subdivision according to the plat thereof, as recorded as Instrument Number 2020000059084 of the Public Records of Lee County, Florida (the "**Plat**"), the _____ side of the Owner's Property is subject to and encumbered by a 7.5' drainage easement (the "**Drainage Easement**"). District is the owner and holder of rights in the Drainage Easement.

C. Owner intends to construct and maintain a fence and gate (collectively, the "**Fencing Improvements**") that will partially encroach into the Drainage Easement (the "**Encroachment**") as shown on the site plan attached as **Exhibit "A"** and made a part of this Agreement (the "**Site Plan**").

D. The parties to this Agreement have reached certain understandings with regard to the Encroachment and now desire to set forth their understandings in writing for recordation.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

1. **Recitals.** The foregoing recitals are true and correct and incorporated by reference into this Agreement.

2. **Consent to the Encroachment and Covenant not to Construct.** Subject to the terms of this Agreement, District hereby expressly consents to the Encroachment and Owner, for itself and on behalf of all of its heirs, successors and/or assigns agrees and covenants that, in consideration for such consent by District, no portion of the Fencing Improvements encroaching into the Drainage Easement shall ever be expanded or increased beyond that which is permitted herein. In the event District determines that, notwithstanding Owner's agreement to the restrictive covenant set forth herein, any portion of the Fencing

Improvements within the Drainage Easement has been expanded or increased or Owner has otherwise constructed or installed improvements beyond or in addition to the permitted Fencing Improvements in the Drainage Easement in violation of the terms hereof, and gives written notice to Owner of such determination, Owner or its successors and/or assigns shall have thirty (30) calendar days to correct such violation at its sole cost and expense after such written notice is actually received or deemed to have been received, whichever is earlier. In the event such violation is not corrected within such thirty (30) day period, Owner expressly agrees District may, and hereby further authorizes District to, take all steps necessary to remove such violating improvements, including, but not limited to, the right to enter onto the Owner's Property. Owner acknowledges that the Encroachment into the Drainage Easement is by consent of District and not by any claim of some other right.

3. **Owner's Responsibilities.** Owner shall have the following responsibilities as a condition to District's consent to the Encroachment:

a. Be fully responsible for the installation, operation, and maintenance of the Fencing Improvements, including any permits or approvals required for the work;

b. Ensure the installation, operation, and maintenance of the Fencing Improvements are conducted in compliance with all applicable laws;

c. Ensure the installation, operation, and maintenance of the Fencing Improvements does not damage any property of the District, or any third-party's property, and in the event of any such damage, Owner shall immediately repair the damage at Owner's sole cost;

d. Continue to operate, maintain, and repair the Fencing Improvements, in good and proper working condition and repair;

e. Ensure that the District has access through the Fencing Improvements to and from components of the District's stormwater management system to allow the District to operate, maintain and repair the same, as needed; and

f. Maintain the Drainage Easement free from any materialmen's or mechanic's liens and claims or notices with respect to such liens and claims, which arise by reason of Owner's exercise of rights under this Agreement, and Owner shall immediately discharge any such claim of lien.

4. **Additional Costs.** In the event that at any time subsequent to this Agreement the Encroachment encumbers or inconveniences District's use of the Drainage Easement (including, without limitation, the maintenance, repair, and/or replacement of improvements within or adjacent to the Drainage Easement such as buried pipes or other drainage lines), District will make reasonable efforts to work around the Encroachment; provided, however, that Owner shall pay for all of District's costs associated with working around the Encroachment to the extent that such costs would not have been incurred but for the Encroachment. Said additional costs are, at the election of District, to be paid to District in advance of any work to be performed by District. District shall be the sole judge of such incremental costs. Only if District, in its sole judgment, is not able to work around the Encroachment, will District mandate that the Encroachment be moved or removed, at no cost to District, as then may be needed to allow District the needed use of the Drainage Easement. If Owner fails to remove the Encroachment after written request of the District, the District may remove the Encroachment and charge Owner for the cost thereof. Removal of the Encroachment will be the last alternative solution of any such use problem(s) unless the incremental cost of the least expensive and viable alternative solution exceeds the cost of removal.

5. **Indemnification.** In order to induce District to consent to the Encroachment, as evidenced by this Agreement, Owner hereby agrees to fully protect, indemnify, defend, save and hold District, and its supervisors, officers, employees, agents, administrators, and all of their respective heirs, successors and assigns (collectively, the “**Indemnified Parties**”), harmless from and against any and all claims, damages, expenses, costs, charges, obligations, liabilities, fees, penalties, assessments, taxes, losses, etc. of any kind or nature whatsoever, whether mature or not, in law or in equity, whether as a result of settlement, litigation or arbitration which may be incurred or suffered by one or more of the Indemnified Parties arising out of, relating to or resulting from the construction, use, maintenance and occupation of the Encroachment and any removal of any improvements within the Encroachment, and in all events including, but not limited to, any and all attorneys’ fees, court costs, and including costs incurred in any appellate proceedings, or costs of arbitration and all expenses in defending same, in connection with any and all of the above.

6. **Other Approvals.** Owner shall be responsible for obtaining any and all approvals of any other entity having an interest in the Drainage Easement, including, without limitation, the Timber Creek Property Owners Association, Inc.

7. **Binding Effect.** This Agreement shall be binding upon and shall inure to the benefit of the parties, their respective heirs, successor and assigns forever. This Agreement, the rights and privileges herein granted and the burdens imposed hereby shall be perpetual and shall run with and bind Owner’s Property.

8. **Governing Law / Venue.** This Agreement shall be construed in accordance with Florida law (exclusive of choice of law rules). Venue for any action arising hereunder shall lie exclusively in Lee County, Florida.

9. **Prevailing Party.** The prevailing party in any litigation arising out of this Agreement shall be entitled to recover from the non-prevailing party all attorneys’ fees, paralegal fees, and costs incurred in connection with such litigation, whether pre-trial, at trial, in arbitration, on appeal, or otherwise.

10. **Partial Invalidity.** If any term or provision of this Agreement or the application thereof to any person or circumstances shall, to any extent, be declared invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, such term or provision shall be modified to the minimum extent necessary to make it or its application valid and enforceable, and the validity and enforceability of all other provisions of this Agreement and all other applications of any such term or provision shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

11. **Modifications.** This Agreement may not be modified in any respect whatsoever or rescinded, in whole or in part, except by written instrument duly executed and acknowledged by both of the Parties.

12. **Severability.** In the event any term or provision of this Agreement is determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be construed or deleted as such authority determines, and the remainder of this Agreement shall be construed to be in full force and effect.

13. **Integration.** This Agreement embodies the entire understanding of the parties with respect to the subject matter contemplated herein, and the terms hereof control over and supersede all prior and contemporaneous understandings pertaining to the subject matter hereof.

14. **Interpretation.** This Agreement has been negotiated fully between the parties as an arms' length transaction. Both parties participated fully in the preparation of this Agreement. In the case of a dispute concerning the interpretation of any provision of this Agreement, both parties are deemed to have drafted, chosen, and selected the language, and the doubtful language will not be interpreted or construed against any party.

15. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon and all of which shall together constitute one and the same instrument.

16. **Termination.** This Agreement shall continue in full force and effect until terminated by recording an instrument in the Public Records of Lee County, Florida, signed by the parties or their successors and assigns to this Agreement or upon the removal by Owner of the Encroachment.

(Remainder of Page Intentionally Left Blank. Signatures Begin on Next Page.)

The parties have executed this Agreement as of the date first written above.

DISTRICT:

**TIMBER CREEK SOUTHWEST
COMMUNITY DEVELOPMENT DISTRICT**

ATTEST:

James P. Ward, Secretary

By: _____
Barry Ernst, Chairman

STATE OF FLORIDA)
) ss.
COUNTY OF LEE)

The foregoing instrument was acknowledged before me by means of () physical presence or () online notarization this _____ day of _____, 2021, by Barry Ernst, as Chairman of Timber Creek Southwest Community Development District, on behalf of said community development district, who is () personally known to me or () has produced _____ as evidence of identification.

(SEAL)

NOTARY PUBLIC
Name: _____
(Type or Print)
My Commission Expires:

OWNER:

Print Name: _____

Print Name: _____

STATE OF FLORIDA)
) ss.
COUNTY OF LEE)

The foregoing instrument was acknowledged before me by means of () physical presence or () online notarization this _____ day of _____, 2021, by _____, who () is/are personally known to me or () have/has produced _____ as evidence of identification.

(SEAL)

NOTARY PUBLIC
Name: _____

(Type or Print)

My Commission Expires:

EXHIBIT "A"
Site Plan