

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARRIER BUSTERS; SHONA EAKIN;
MICHAEL EAKIN; MARY ANN PARSNIK;
and CAROLYN CREHAN, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

CITY OF ERIE, PENNSYLVANIA,

Defendant.

Civil Action No.: 02-203E

Magistrate Judge:

Paradise-Baxter

FIFTH CONSENT DECREE AMONG PLAINTIFFS AND DEFENDANT CITY OF ERIE

WHEREAS Plaintiffs filed on June 27, 2002 a class-action Complaint against the Defendant, City of Erie, alleging violations of Title II of the Americans With Disabilities Act, and the City of Erie denies any violations of federal law; and,

WHEREAS during November, 2002 all parties entered into a First Partial Consent Decree; and, during September 2003 the parties entered into a Second Consent Decree and Partial Settlement; and, the parties entered into a Third Consent Decree on April 29, 2004; and the parties entered into a Fourth Consent Decree in November 2004; and,

WHEREAS Pursuant to Consent Decrees duly entered in this action, each year Defendant, City of Erie ("Erie"), is required to file reports that identify each and every Erie street, road and highway where milling, paving or other alteration occurred in the prior year, (see e.g. *Second Consent Decree and Partial Settlement*, ¶4, [Doc. 31], and

also to report the location and measurements of each curb ramp installed during the previous year, the purpose of such reporting being to allow confirmation that Erie has installed curb ramps required by such alteration work; and,

WHEREAS, on August 11, 2014, Defendant emailed to Plaintiffs' Counsel "Erie's August 10, 2014 Interim Progress Report" and, when they reviewed that Interim Report, Plaintiffs' Counsel raised issues regarding the number and locations of curb ramps Erie had recently installed as a part of these alterations; and,

WHEREAS, through Counsel, during August 2014 through May 2015, Plaintiffs and Erie exchanged several emails, letters, written diagrams, conducted inspections of several recent street, road and highway alterations, and personally met in several meetings at Erie City Hall, all discussing and negotiating these and closely related issues; and,

WHEREAS, on March 11, 2015, Plaintiffs filed a Motion To Enforce Consent Decrees and the Parties briefed these issues to the Court, which held a May 7, 2015 hearing on this matter; and,

WHEREAS, after that hearing, the parties met at City Hall and agreed to a process to resolve these issues;

THEREFORE: the parties agree and the Court hereby enters the following Fifth Consent Decree.

1. Earlier Consent Decrees and Stipulated Orders Remain in Effect.

The parties agree and the Court hereby enters the following Fifth Consent Decree. The requirements of the parties' earlier First Consent Decree (document 14), Second Consent Decree (document 31), Third Consent Decree (document 36), and Fourth Consent Decree (document 40) remain in full force and effect, except to the extent expressly set forth below. The same is true for the First (document 42), Second (document 50), Third (document 53) and Amended Third (document 55) Stipulated Orders.

2. "Alteration" and "Routine Maintenance" Defined. Throughout this Consent Decree, the term "Alteration" shall have the meaning as set forth in the **June 2013 Department of Justice/Department of Transportation Joint Technical Assistance Guidance**, attached hereto as Exhibit 1.

3. Current Year and Future Alteration Of Any Part Of An Intersection. Beginning Year 2015, and continuing into the future, whenever Erie shall make any alteration to any part of an intersection (see Illustration "A" attached hereto), Erie shall ensure that at each such "T" intersection there shall be six (6) fully ADAAG-compliant curb ramps and that at each such "plus" ("+") intersection there shall be eight (8) fully ADAAG-compliant curb ramps.

4. Current Year and Future Alteration Of Any Part Of A Pedestrian Crossing. Beginning Year 2015, and continuing into the future, whenever Erie shall make any alteration to any part of a pedestrian crossing (see Illustration "B" attached hereto), Erie shall ensure that each such pedestrian crossing shall have a fully ADAAG-

compliant curb ramp at each end of that pedestrian crossing. In addition, during construction of each such curb ramp, Erie shall install another curb ramp adjacent to each curb ramp entering into the pedestrian crossing, except for the rare occasion that a sidewalk is set so far back that the curb ramps will not, or do not, share a common landing. In such an event, Erie shall follow the procedures of paragraph 6 below.

5. Curb Ramps to be Installed at Specific Listed "T" Intersections. The parties have been having a dispute regarding numerous intersections throughout Erie. Plaintiffs allege that during Years 1994 through 2014, Erie paved at least one of two streets so as to cause an alteration to the intersection (the area constituting an intersection is shown in Illustration C attached hereto), but that Erie installed fewer than six (6) ADAAG-complaint curb ramps at such "T" intersections and fewer than eight (8) ADAAG-compliant curb ramps at such "plus +" intersections. Beginning in August 2014 and continuing to present, the parties have been negotiating this issue. All parties agree that the Consent Decree language mandated installation of six curb ramps at such "T" intersections and eight curb ramps at such "plus" intersections, but Erie argued that the ADA itself only required installation of curb ramps crossing the paving. The Plaintiffs filed a motion, the parties filed briefs, and the Court held a hearing on the issue. Paragraphs 3 and 4 above resolve the issue of curb ramps to be installed in 2015 and in the future. To resolve the issue of remediation, the parties agree to the following process.

5A. Creation of List of Subject "T" Intersections. Erie has created a draft listing for the Year 2014, but only for that year, of intersections where it failed to install

curb ramps that were required by the foregoing language of the Consent Decrees. Plaintiffs shall attempt to verify that list. To prepare for the Court Hearing on this issue, Plaintiffs began creating a draft listing for years prior to 2014. Erie now has requested that Plaintiffs create a draft listing for each year, using the following protocol. Plaintiffs shall continue to review Erie's Annual Reports to identify "T" intersections where Erie may have installed fewer than six ADAAG-compliant curb ramps. Then, Plaintiffs shall either visit those intersections or view the intersection on Google Maps "Street View" or "Satellite". Plaintiffs will attempt to identify "T" intersections where Erie installed ADAAG-compliant curb ramps at two of the three pedestrian crossings (a.k.a. "Legs"), but not at the third crossing (a.k.a. "Leg"). Plaintiffs shall provide the draft listing to Erie, who shall check the listing to verify its accuracy. If Erie discovers additional such intersections that Plaintiffs have missed, Erie shall add those to the listing. No later than 30 days from the filing of this Consent Decree, the parties shall negotiate and then agree to the listing. Upon the agreement of the parties on the listing, the final listing shall be filed with the court. In the event that there is a dispute, the listing shall be presented to the Court for a final determination.

5B. Timetable for Installation of Missing Curb Ramps at The "Listed" Intersections. All curb ramps on the listing described in paragraph 5A above, shall be installed by Erie at the rate of no less than 75 curb ramps per year commencing in 2015. In the annual reports filed by the City each year, Erie shall identify in a separate section, the number and location of each such curb ramp that it installed in the prior year.

6. Potential Exceptions Pursuant to 28 C.F.R. Part 36, App. A § 4.1.6(i). The parties agree that the ADAAG at 28 C.F.R. Part 36, App. A § 4.1.6(j) shall be the standard to judge allegations that construction or alterations cannot meet in full the construction and design standards set out in the Consent Decrees. Any time during the life of this Consent Decree that Erie believes that any particular intersection prohibits construction or alteration in full compliance with each of the standards, Erie shall within 15 days of discovery of such an intersection inform Plaintiffs' counsel in writing. This writing shall list which engineer(s) who have reviewed the intersection, the location of the intersection, and a statement of which standard(s) allegedly cannot be met, why not, and how much of a deviation from the standard(s) is contemplated.¹ Erie shall include a detailed drawing(s) of each such proposed deviant ramp, with the proposed final measurements for each direct slope, cross-slope, lip and level landings. The parties shall allow at least 15 days from the postmark of the written notification to attempt to resolve the matter. The goal is that any disputed corner or ramp is to be built during the current construction season. Thus, it is important that Erie notify Plaintiffs of a potential problem promptly. Erie shall not allow the issue to remain unresolved so long that the ramp is not installed during the current construction season. **Unresolved Disputes.** The parties expressly agree that the Court shall have jurisdiction to resolve any disputes under the terms of this paragraph. If the dispute cannot be resolved during the fifteen (15) day period, the parties shall submit written letter briefs to the Court. When one side

¹ Special attention shall be given to the measurements of the direct slope, the cross-slope, the juncture of the ramp and the street, and the level landing at the top and bottom of each ramp.

submits such a brief, the other side shall be permitted ten (10) days to submit an opposing brief, if it wishes. The Court's decision under this paragraph shall be treated as any decision by the trial Court.

7. Procedure to Reach Agreement and to Resolve Disputes. The parties through Counsel shall work together in good faith to evaluate and to attempt to mutually agree if any ramps are triggered by alterations, and that each ramp be promptly installed. If the parties, through Counsel, cannot agree, any party may file an appropriate motion or otherwise request judicial intervention in, or the resolution of, all unresolved disputes. Changes required by changes of conditions, changes in schedule, available funding or emergencies will be reported via email to Plaintiffs' Counsel in advance if at all possible. In the rare event that this prior written notice is impossible, Erie will notify Plaintiffs' counsel via email as soon as possible, but no later than one week following the beginning of the work. The written notice will state all reasons the City claims that prior notice was impossible. The parties through Counsel shall confer in good faith to permit Counsel to determine and agree if a curb ramp triggering event occurred.

8. Attorneys Fees. The parties, through Counsel, have met and have agreed upon a payment to liquidate all potential claims by Plaintiffs for fees and costs from Erie for the time period of May 14, 2014 through [date on Invoices]. Erie shall pay these amounts to Heberle & Finnegan, PLLC, and to the Elderkin Firm within fifteen days. By agreeing upon this payment, Erie and Plaintiffs expressly do not waive any claims or defenses relating to any future fees and costs that may be claimed for any future work.

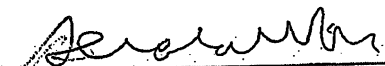
9. Changes in Applicable Law or Controlling Regulations. The prior consent decrees and stipulated orders filed in this matter are the product of negotiation and compromise. Among other things, the parties have negotiated and agreed upon the construction standards for curb ramps and have agreed upon the alterations that trigger Erie's obligations to install curb ramps as part of ongoing and future repaving of streets. In the event that either party believes that applicable governing law or regulations have been changed since the time of the entry of these consent decrees or stipulated orders, that party shall notify the other party in a writing that specifically identifies the alleged change in law or regulation and that describes the manner in which that such change would alter either parties' obligations under the existing consent decrees or stipulated orders if the change were to be applied prospectively. The responding party shall then have 30 days to reply in writing. Within 30 days following this reply, the parties shall then attempt to resolve the matter. If the matter is not resolved within that period, then either party may seek relief from the court. The fact that the parties have agreed to the foregoing process to address such claims shall not be construed as an agreement to change or modify the governing law or the burden imposed by law upon a party who seeks relief from a consent decree.

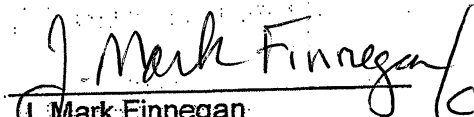
10. Consideration for Fifth Consent Decree. Plaintiffs agree that the Court shall be informed that the Plaintiffs' Motion To Enforce Consent Decrees has been resolved by this Fifth Consent Decree. In further consideration of Erie's successful completion of each of the terms herein, Plaintiffs agree to forbear from filing at this time a Motion for Contempt alleging Erie's failure to install timely all required curb ramps

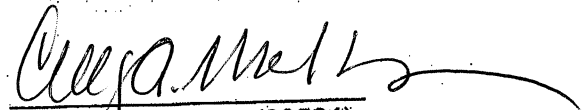
triggered by its alteration of street segments discussed above. As long as Erie is meeting its obligations pursuant to this Consent Decree, the earlier Consent Decrees and the earlier Stipulated Orders, Plaintiffs agree not to file for contempt, and will not do so unless and until all reasonable efforts to resolve the matters without additional litigation are exhausted, with previous written notice to Erie. The parties reserve all issues, claims, rights and defenses that have not been expressly resolved by this Fifth Consent Decree or by the prior Consent Decrees and Stipulated Orders.

11. Retention of Jurisdiction. The parties expressly agree, and the Court Orders, that the Court shall retain jurisdiction to enforce the terms and conditions of this Fifth Consent Decree, as well as all existing Consent Decrees and Stipulated Orders between Plaintiffs and the City of Erie.

Agreed and Accepted on This 22 Day of May, 2015 by:


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