

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

DAVID HIGGINBOTHAM,)
CHARLES RIDLEY, BERRY)
PERRY, COLLEEN MACCORT,)
C.E. MILLIGAN, BETTY)
HOPPER, and KATHERINE)
SIMMONS,)

Civil Action Number
2:08-cv-1293-AKK

Plaintiffs,)

vs.)

CITY OF BIRMINGHAM,)

Defendant.)

CONSENT DECREE

1. The Plaintiffs filed this action to enforce Title II of the Americans with Disabilities Act of 1990 (the "ADA"), as well as §504 of the Rehabilitation Act of 1973 against the Defendant, the City of Birmingham.

2. All of the Plaintiffs allege that each is a person with disabilities who requires a wheelchair for mobility and who has encountered architectural barriers to access in connection with existing sidewalks and curb ramps throughout the City of Birmingham.

3. In response to the concerns raised by the Plaintiffs and in order to

resolve the parties' differences expeditiously and without the burden, expense and delay of litigation, the parties have engaged in good faith negotiations. As a result of these negotiations, the parties have agreed to enter into this Consent Decree.

B. AGREEMENT OF THE PARTIES

Accordingly, it is hereby AGREED by the parties and ORDERED by the Court as follows:

1. This Court has jurisdiction of this claim pursuant to 42 U.S.C. § 12101; 29 U.S.C. § 794 and 28 U.S.C. §§ 1331 and 1343.
2. Venue is proper in this district.
3. **DEFINITIONS.** The following definitions shall apply in this Consent Decree: "ADAAG" means 28 C.F.R. Chapter 1, part 36, Appendix A (7-1-94).
4. **ALTERATIONS AND IMPROVEMENTS.** The Defendant agrees to adopt the following policies and make the necessary modifications and alterations at sidewalks and intersections in the City of Birmingham within the subject area of the City of Birmingham.¹

¹ The area of Birmingham subject to this agreement shall be limited to that area reflected within the attached Exhibit A, including and within the following borders:

N: 11th Avenue North

E: Carraway Boulevard (26th Street North); 34th Street South

W: 12th Street North; 12th Street South

S: 14th Avenue South

A. **Collection of Accessibility Data Concerning Existing Sidewalks and Curb Ramps.** Defendant shall begin within six (6) months from the date of this order collecting data concerning the accessibility of its existing sidewalks and curb ramps within the subject area. This data shall be gathered for the sole purpose of determining whether existing sidewalks and curb ramps comply with §§4.3, 4.4, 4.5, and 4.7 of the ADAAG. The City shall ensure that the individual(s) charged with the task of obtaining this data are properly trained in the correct methods of obtaining the critical data, the identity of the critical data and the context of viewing that data in light of the existing structural conditions that impact the ability of the City to correct any existing barriers to access.

1. **Sidewalk Data.** Defendant shall seek to identify the following categories of issues of the type referenced in §§4.3, 4.4, 4.5 of the ADAAG, including, but not limited to: changes in level, broken or absent portions of sidewalk, severe running or cross slopes (in areas where the terrain permits correction to conform to ADAAG standards), protruding objects (whether natural or man made), and unobstructed width. The parties agree, however, that the existence of such issues do not necessarily require correction, unless there is no accessible route around such conditions. In other words, if there is a 36-inch-wide route in full compliance with §§4.3, 4.4, 4.5 of the ADAAG, the existence of broken portions of

sidewalk, severe slopes, changes in level, or protruding objects adjacent to such a route do not require the City to make repairs under this agreement.

2. Curb Ramp Data. Defendant shall seek to identify the following categories of issues of the type referenced in §4.7 of the ADAAG, including, but not limited to: running slope, slope of flared sides, detectable warnings, slope of adjoining gutter, change in level from gutter to curb ramp, change in level from gutter to street, slope ratio from gutter to street and from gutter to curb ramp, obstacles adjacent to a given ramp that impact the slope that can be provided (such as utility poles, drains, traffic control boxes, etc.).

3. Categorization of Data. Upon gathering the data described above, the City shall determine whether the barrier to access² can be removed without undue burden and without fundamental alteration of the program or service at issue and, if so, to what extent. In the event that Defendant determines that a barrier to access cannot be removed in whole or in part, Defendant shall record the reason with particularity and publish this information as well as the data itself. In the event a barrier cannot be removed in whole or in part, Defendant shall address whether

² For purposes of this agreement, “barriers to access” is defined as any nonconformance with ADA new construction standards currently in effect. At the time of this agreement, these standards are located at 28 CFR Part 36, Appendix A and are entitled the ADA Accessibility Guidelines for Buildings and Facilities, 1994 Edition (hereinafter referred to as “ADAAG”).

alternatives to barrier removal are appropriate and available to provide program access.

B. Publication of Data. Periodically as data is collected, the City shall publish the data to the community at large by methods designed to reach individuals with disabilities in particular (by way of example, via newspaper, bulletin board, public service announcement, the City's website, etc.). Defendant shall keep such data available in an accessible location for review and comment by the public for a period of thirty-six (36) months after publication.

C. Barrier Removal. Within twelve (12) months from the date of this order, the City shall begin removing barriers to access identified within the subject area. The City shall continue to remove barriers in good faith as data is collected until such time as all existing sidewalks and curb ramps within the subject area have been reviewed and, as necessary, modified to comply with applicable ADAAG standards, but in no event shall barriers in existing sidewalks or curb ramps remain for greater than seven (7) years from the date of this order. In making these modifications, the City shall ensure that gutters adjacent to curb ramps contain slopes no greater than 5% (1:20). However, nothing in this agreement shall require the City to remove barriers to access identified when such efforts would result in undue burden to the City or would result in the fundamental alteration of any

program, service, or activity of the City.

D. Prioritization & Barrier Removal Schedule. Defendant shall study the pedestrian traffic flow patterns and shall organize both the collection of data and the removal of barriers in order of priority based on the frequency and volume of pedestrian traffic within the subject area, which, by way of example would likely determine the areas around UAB and the downtown business district to be the areas of highest priority, with the sole exception that citizen complaints shall be given highest priority and shall be resolved in order of receipt. Upon completing that study, the City shall create a barrier removal schedule to ensure that all barriers identified under this agreement are identified and removed in accordance with this Agreement, as soon as practicable.

E. Alterations. Nothing in this agreement shall waive the City's ongoing obligation to remove barriers to access at existing curb ramps as the adjacent streets and sidewalks are altered³ by the City. However, such planned alterations may be utilized and coordinated with barrier removal efforts to maximize efficiency in the removal of barriers to access identified by the City in accordance with this Agreement.

³ Paving, repaving, or resurfacing a street, road, or highway is considered an alteration for purposes of this Agreement. Filling a pothole is not considered an alteration for the purposes of this Agreement.

F. Responsible Official. The City shall designate the official (or his/her designee) responsible for implementation of this Agreement and shall notify Plaintiffs of the identity and contact information for such official within three (3) months from the date of this order. The City retains the right to change the official (or his/her designee) and shall notify the Plaintiffs of the identity and contact information of such change of official (or his/her designee).

5. RESPONSIBILITY OF PLAINTIFFS. Plaintiffs' representatives shall be provided reasonable access to the sidewalks and curb ramps throughout the City to verify completion of the above referenced-to work on a date mutually agreed to by the parties.

6. ENFORCEMENT CONSIDERATIONS.

A. NO UNDUE BURDEN. The parties hereto acknowledge that the process for identification and removal of barriers to access in sidewalks and existing curb ramps within the subject area agreed to by the Plaintiffs, and as set forth in this Stipulation for Settlement, consist of what the parties believe to be required pursuant to and for the purposes of Title II of the ADA in that such process does not require the fundamental alteration of any program or service and does not constitute an undue financial or administrative burden. However, Defendant may yet determine, after gathering the data required by this Agreement or in the course of investigating

a complaint of a resident as required by this Agreement, that the removal of an existing barrier to access would pose an undue financial or administrative burden, would require the fundamental alteration of a program or service, or would be structurally impracticable. In such an event, Defendant shall: (1) determine to what extent the barrier to access may be minimized and whether program access can be afforded by alternative means; and (2) maintain records documenting the rationale for such a conclusion and shall make such findings available as provided in Paragraph 4(B) of this Order.

B. TIME FRAME. Defendant shall notify Plaintiffs, as part of the publication of data required herein, of the data collected identifying barriers to access in existing sidewalks and curb ramps within the subject area, beginning six (6) months from the date of this order, and shall continue to do so quarterly thereafter until the gathering of such data has been completed. Defendant shall also notify Plaintiffs of the planned schedule for barrier removal within the subject area within twelve (12) months from the date of this order. Said schedule shall ensure that all barriers to be identified within the subject area are removed, as soon as practicable, in accordance with this agreement, and within seven (7) years from the date of this order. Plaintiffs' representatives shall be provided reasonable access to the subject properties to verify completion of the above-referenced work in

accordance with Defendant's schedule.

C. NON-COMPLIANCE. In the event the alterations and modifications required hereby are not timely completed in all respects, the Plaintiffs shall be entitled to seek an award for injunctive relief from the Court. The parties agree that if the Defendant has timely commenced the modifications required hereby, and has proceeded with the completion thereof in good faith and with due diligence, but has been delayed in the completion thereof due to acts of God, *force majeure*, or events beyond the control of Defendant (such as inability to obtain building or zoning permits, failure of the county inspectors to make inspections, contractor defaults, work stoppages, etc.), and should the Defendant notify the Plaintiffs of such with appropriate backup documentation prior to the expiration of the time periods agreed to herein, the time periods for completion established hereby shall be extended appropriately.

D. If any action or proceeding is commenced with regard to the subject matter of this Stipulation for Settlement, then the prevailing party in such action or proceeding shall be entitled to have its reasonable attorney's fees and costs incurred in said action or proceeding promptly reimbursed by the non-prevailing party.

7. **ATTORNEY'S FEES, EXPERT WITNESS FEES AND LITIGATION EXPENSES.** The Defendant shall pay the Plaintiffs' counsel, Schwartz Zweben, LLP the sum of \$42,500 upon entry of this order, representing all reasonable attorney's fees, including costs of litigation and expert's fees incurred by the Plaintiffs.

8. **PARTIES BOUND.** This Consent Decree shall be binding upon and inure to the benefit of the parties hereto and their respective officers, directors, agents, successors and assigns. The parties shall perform their obligations under this Consent Decree in good faith.

9. **ADMISSIBILITY OF CONSENT DECREE.** The parties have entered into this Consent Decree with the express understanding that it is the product of settlement negotiations. The Court expressly finds that the parties participated in these negotiations and have executed this Consent Decree in good faith.

10. **WRITTEN NOTICE.** Each notice ("Notice") provided for under this Consent Decree must comply with the requirements of this Section. Each Notice shall be in writing and sent by depositing it with a nationally recognized overnight courier service which obtains receipts (such as Federal Express or UPS Next Day Air), addressed to the appropriate party (and marked to a particular

individual's attention, if so indicated) as hereinafter provided. Each Notice shall be effective upon being so deposited, but the time period in which a response to any notice must be given or any action taken with respect thereto shall commence to run from the date of receipt of the Notice by the addressee thereof, as evidenced by the return receipt. Rejection or other refusal by the addressee to accept or the inability to deliver because of a changed address of which no Notice was given shall be deemed to be the receipt of the Notice sent. Any party shall have the right from time to time to change the address or individual's attention to which notices to it shall be sent by giving to the other party at least ten (10) days prior notice thereof. The parties' addresses for providing Notices hereunder shall be as follows:

Plaintiff:

c/o Edward I. Zwilling, Esq.
Schwartz Zweben, LLP
600 Vestavia Parkway, Suite 251
Birmingham, Alabama 35216

Defendant:

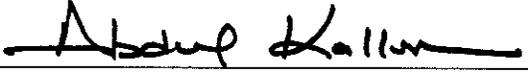
c/o Fredric L. Fullerton, II, Esq.
Assistant City Attorney
City of Birmingham – Law Department
710 North 20th Street, Suite 600
Birmingham, Alabama 35203

IN WITNESS WHEREOF, the parties have hereunto signed their names

on the day and year written below.

JUDGMENT IS HEREBY ORDERED in accordance with the foregoing
Consent Decree.

DONE this 3rd day of June, 2010.



ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE