

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JIMMY ASHLEY,

PLAINTIFF

CASE NO: 3:18-CV-00228-KGB

CITY OF JONESBORO, ARKANSAS

DEFENDANT

STIPULATION FOR SETTLEMENT

IT IS HEREBY stipulated and agreed by and between Plaintiff, Jimmy Ashley, (hereinafter sometimes referred to as “Plaintiff”) and Defendant, City of Jonesboro, (hereinafter sometimes referred to as “Defendant” or the "City") as follows:

WHEREAS, Plaintiff filed this action against Defendant for its alleged violations of Title II of the Americans with Disabilities Act, 42 U.S.C. Section 12131, *et seq.* (“ADA”), pursuant to which Plaintiff sought a permanent injunction and attorney’s fees, expenses and costs;

WHEREAS, Defendant denies any wrongdoing, denies any intentional violation of the ADA, and denies discriminating against people with disabilities;

WHEREAS, subject to the terms set forth herein, Plaintiff and Defendant have agreed to finally resolve any and all claims and disputes by and between them; and

WHEREAS, the aforementioned parties desire to avoid further expense, time, effort and uncertainty in regard to this action.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and undertakings contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties, the parties hereto, intending to be legally bound hereby, agree to the following terms and conditions as full and complete settlement of this action:

I. ALTERATIONS AND IMPROVEMENTS. The parties agree that the Defendant shall cause the following alterations and improvements to City sidewalks, parking and curb ramps throughout the City of Jonesboro.

A. CITY SIDEWALKS, CURB RAMPS AND PARKING

i. Solicitation of Accessibility Information/Complaints.

- a. The City will implement a process for soliciting and receiving input from persons with disabilities regarding the accessibility of its sidewalks, curb ramps and parking.
- b. The City shall give priority to complaints of its citizens regarding barriers to access¹ in sidewalks, curb ramps and parking and shall investigate to determine the nature and extent of any alleged barriers to access within 30 days of receiving such a complaint and shall report back to the complainant with its findings within this same period of time. To the extent that barriers to access are identified by the City in connection with such a complaint, the City shall remove the barriers to access to the greatest extent technically feasible as soon as practicable, in accordance with the transition plan adopted by the City.

ii. Collection of Accessibility Data Concerning Sidewalks, Curb Ramps and Accessible Parking.

Defendant shall begin within three (3) months from the date of this agreement collecting data concerning the accessibility of its existing sidewalks, curb ramps and parking, which are owned or maintained by the City of Jonesboro. This data shall be gathered for the sole purpose of determining whether existing sidewalks, curb ramps and parking comply with §§208, 302, 303, 307, 402, 403, 405, 406, and 502 of the Standards. 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 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 consist of both the Title III Regulations at 28 CFR part 36, subpart D; and the 2004 ADAAG at 36 CFR part 1191, appendices B and D and are jointly referred to as the "Standards."

- a. Sidewalk Data. Defendant shall seek to identify the following categories of issues of the type referenced in §§302, 303, 307, 402, 403 of the Standards, 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 ADA 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 §§302, 303, 307, 402, 403 of the Standards, 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.
- b. Curb Ramp Data. Defendant shall seek to identify the following categories of issues of the type referenced in §§405 and 406 of the Standards, 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.).
- c. Parking Data. Defendant shall seek to identify the following categories of issues of the type referenced in §§208 and 502 of the Standards, including but not limited to: the location and number of accessible parking spaces provided, the existence and size of adjacent striped access aisles where striped parking is provided in a manner where such access aisles can be provided (other than parking on city streets parallel to city sidewalks), the nature and placement of signage designating such parking spaces, the ground

slope at designated accessible parking spaces and the accessible route to and from such designated accessible parking spaces.

- d. **Categorization of Data.** Upon gathering the data described above, the City shall determine whether the barrier to access 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 alternatives to barrier removal are appropriate and available to provide program access.
- iii. **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 36 months after publication.
- iv. **Barrier Removal.** Within six (6) months from the date of this agreement, 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, provided that the City shall spend no less than \$250,000 annually toward this goal until all such barriers have been removed that can be removed without undue burden or fundamental alteration of any program, service or activity of the City. 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.

- v. **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, which, by way of example would likely determine the areas around Municipal buildings and the central 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. Further, where sidewalks on one side of a street have been made accessible while sidewalks on the opposite side have not, that street shall not be considered fully accessible until sidewalks on both sides have had barriers to access removed.
- vi. **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 altered² 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.
- vii. **Responsible Official.** The City has designated Dewayne Douglas to be the City's ADA Coordinator and the official responsible for implementation of this Agreement.
- viii. **Satisfaction of Foregoing Requirements.** Should Defendant retain Tcherneshoff Consulting, Inc. for an audit of the accessibility of the City of Jonesboro with reference to the requirements of the ADA, publish that audit in accordance with Paragraph I(A)(iii), above, and follow the

² 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.

recommendations made in such audit along such reasonable time frame that would result from the budget listed in Paragraph I(A)(iv), above, Defendant shall be deemed to have complied with Section I of this Stipulation for Settlement.

II. JURISDICTION.

A. The parties hereto agree that this Stipulation for Settlement and its construction is governed by Arkansas Law, and any suit arising as a result of this Stipulation for Settlement shall be filed in the U.S. District Court for the Eastern District of Arkansas, Jonesboro Division in, Arkansas.

i. The Plaintiff makes no representations or guarantees regarding the quality of any alterations, improvements, modifications, or changes of any kind whatsoever, as to whether the aforementioned comply with the Arkansas state building construction standards, applicable county zoning board regulations, or any other governing body whatsoever.

III. ENFORCEMENT CONSIDERATIONS.

A. NO UNDUE BURDEN. The parties hereto acknowledge that the alterations and modifications agreed to by the Plaintiff, and as set forth in this Stipulation for Settlement, consist of what the parties believe to be required pursuant to an for the purposes of Title II of the ADA in that the said alterations and modifications do not require the fundamental alteration of any program or service and do not constitute an undue financial or administrative burden.

B. TIME FRAME. Defendant agrees to complete all outstanding alterations and modifications to City sidewalks, curb ramps and parking and shall budget and spend no less than \$250,000 annually until such time as all such barriers have been removed that would not cause the City to incur undue burden or fundamental alteration of any program, service or activity of the City .

C. NON-COMPLIANCE. In the event the alterations and modifications required hereby are not timely completed in all respects, the Plaintiff 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 Plaintiff of such 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.

IV. ATTORNEY'S FEES AND COSTS. The Defendant shall pay the Plaintiff's counsel, Law Office of Edward I. Zwilling, the sum of \$12,500 within ten days of the Plaintiff's execution of this Agreement, representing all reasonable attorney's fees, including costs of litigation and expert's fees incurred by the Plaintiff.

V. FAILURE TO ENFORCE. Failure by any one of the parties to enforce this entire Stipulation for Settlement or any of its provisions with regard to any deadline or any other provision contained herein shall not be construed as a waiver by that party of any right to do so.

VI. DISCLOSURE.

- A.** The signing and execution of this Stipulation for Settlement shall also constitute an agreement by the Defendant and the Plaintiff and any of their parents, subsidiaries, officers, assigns, representatives, and agents thereof that this is a confidential agreement.
- B.** The parties agree that this Stipulation for Settlement shall not be filed with the Court. Executed originals shall remain in the possession of the parties. The Plaintiff shall file the original with the Court only for enforcement purposes. The parties shall request the dismissal of this matter with prejudice, subject to the Court retaining jurisdiction for enforcement purposes.

VII. TIME IS OF THE ESSENCE. The parties further agree that time is of the essence in all respects regarding this Stipulation of Settlement.

VIII. TAX CREDITS / DEDUCTION. The Defendant acknowledges that it may be entitled to disabled access tax credits and/or deductions under 26 USCS §§ 38,44 and 46, and other

sections of the Internal Revenue Code, for the architectural modifications and barrier removal performed pursuant to this Stipulation for Settlement.

IX. AUTHORITY AND POWER OF DEFENDANT. The Defendant stipulates and represents that it has the power and authority to execute and deliver this Stipulation for Settlement and to perform its obligations hereunder.

X. REFERENCES. As used herein, the term “Standards” refers to the 2010 ADA Standards consisting of both the Title III Regulations at 28 CFR part 36, subpart D; and the 2004 ADAAG at 36 CFR part 1191, appendices B and D. Unless otherwise defined in this Agreement, words and phrases used in this Agreement take the meaning provided in the Standards if defined therein.

XI. AUTHORITY TO EXECUTE. Each party represents that each person executing this Stipulation for Settlement on its behalf has been authorized to sign on behalf of the respective party and to bind it to the terms of this Stipulation of Settlement.

XII. COUNTERPARTS. The parties agree that this Stipulation for Settlement and any and all other documents in connection with the settlement of this matter may be executed in counterparts, and in facsimile form, which shall be deemed the equivalent of an original, each of which shall be deemed an original but all of which taken together shall constitute but one and the same instrument.

XIII. ENTIRE AGREEMENT. This Stipulation for Settlement, including the codes and the drawings referenced herein, constitute the entire agreement among the parties on the matters raised herein. No other statement, promise, or agreement, either written or oral, made by either party or agents of either party not contained in this written Stipulation for Settlement, shall be enforceable. If a court of competent jurisdiction concludes that any part of this Stipulation for Settlement is unenforceable, such portion shall be severed from this Stipulation for Settlement, and all other provisions shall remain enforceable.

XIV. VOLUNTARY EXECUTION. The parties hereby represent and acknowledge that this Stipulation for Settlement is given and executed voluntarily, and is not based upon any representation by any of the parties to another party as to the merits, legal liability, or value of any claim of the parties or any matters related thereto.

XV. ACKNOWLEDGEMENT. The parties acknowledge they have been afforded an opportunity to consider the terms and conditions of this Stipulation for Settlement, that they have

read and understand the terms and conditions herein, and that they have retained counsel and have been provided with the opportunity to consult with their respective counsel prior to their execution of the Stipulation for Settlement.

XVI. WRITTEN NOTICE. Each notice (“Notice”) provided for under this Stipulation for Settlement 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:

Edward I. Zwilling, Esq.
Law Office of Edward I. Zwilling, LLC
4000 Eagle Point Corporate Dr.
Birmingham, Alabama, 35242
Telephone: (205) 822-2701
Email: edwardzwilling@zwillinglaw.com

Defendant:

C. Burt Newell, Esq.
P.O. Box 1620
Hot Springs, AR 71902
Telephone: (501) 624-7555
Facsimile: (501) 624-7575
Email: aperma@hotspringslaw.net

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IN WITNESS WHEREOF, the parties have hereunto signed their names on the day and year written below.

On Behalf of Plaintiff:

On Behalf of Defendant:

By: _____
Jimmy Ashley

By: _____
CITY OF JONESBORO

Dated: _____

Dated: _____

By: _____
Edward I. Zwillling,
Counsel for Plaintiff

By: _____
Burt Newell,
Counsel for Defendant

Dated: _____

Dated: _____