

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

BARRIER BUSTERS; SHONA EAKIN;)	Civil Action No.: 02-203E
MICHAEL EAKIN; MARY ANN PARSNIK;)	
and CAROLYN CREHAN, on behalf of)	
themselves and all others similarly)	
situated,)	Judge Paradise Baxter
)	
Plaintiffs,)	
v.)	
)	
CITY OF ERIE, PENNSYLVANIA,)	
)	
Defendant.)	
)	
)	

**FOURTH STIPULATED ORDER AMONG PLAINTIFFS AND
DEFENDANT CITY OF ERIE**

I. BACKGROUND

On February 11, 2003, the first consent decree was entered in this case, [Doc. 14], pursuant to which Defendant, City of Erie ("Erie") agreed to install curb ramps, which comply with the American With Disabilities Act, and its implementing regulations, at intersections during all street resurfacing projects. On August 18, 2003, the parties filed their Second Consent Decree, which confirmed that curb ramps were to be installed wherever Erie altered or resurfaced an intersection. [Doc. 31].

Beginning with the first Consent Decree, and as revised by subsequent Consent Decrees and Stipulated Orders, Erie is required to file yearly reports that identify each intersection where milling, paving or other alteration occurred in the

prior year. See e.g. Partial Consent Decree ¶2 [Doc. 14]; Second Consent Decree and Partial Settlement, ¶4, [Doc. 31]. See also, April 19, 2007 Settlement Agreement and Order in the PennDOT/Erie Lawsuit, (06-cv-78) at ¶ 5 [Docs. 32 and 33] (Erie required to report where milling, paving or other alteration occurred at any intersection of Erie and PennDOT streets, roads and highways).

In 2010, Plaintiffs discovered that in prior years, Erie's Bureau of Streets had been milling, paving or otherwise altering intersections throughout Erie, but had not reported some of these intersections as required by the Consent Decrees and Stipulated Orders. Through additional investigations and negotiations, the parties agreed that some of this unreported paving work had triggered the obligation to install curb ramps. The parties then set out to establish a process to identify the locations of all previously unreported paving and the status of the installation of required ramps at each such intersection.

In September 2011, the Court entered the first Stipulated Order. [Documents 42 and 44], which, among other things, set forth a procedure for Erie to report to Plaintiffs the extent and the locations of milling, paving or alteration of street performed by Erie's Bureau of Streets during years 2011 going forward. The Stipulated Order also obligated Erie to prepare listings of the locations of the work performed by the Bureau of Streets in prior years.

In August, 2012, the parties negotiated a Second Stipulated Order and attached thereto a listing prepared by Erie of the milling and paving performed by the Bureau of Streets during the years 2002-2004 and 2006-2011. See *Document 50*. Erie has no records of its paving during 2005. This Stipulated Order also obligated Erie to prepare sketches of each affected intersection so as to illustrate whether the milling and paving had included the intersection, and to indicate whether each intersection had compliant curb ramps. In this way, the parties hoped to identify those curb ramps that needed to be installed and to then negotiate a reasonable time table to remediate the past violations.

II CURB RAMPS AT ISSUE HEREIN

As a result of this review and investigation of the previously unreported paving that occurred from 2002 through 2011, the parties identified two relevant classifications of Bureau of Streets paving which the Plaintiffs asserted constituted an alteration that had triggered the obligation to install curb ramps. One consisted of those intersections where the street surface was asphalt immediately before the start of the subject work and where milling was performed to remove the old asphalt and where new asphalt then was applied. Erie agrees that such milling and paving constituted an alteration which had required the installation of curb ramps at the affected corners. Erie agrees to retrofit these

intersections by installing curb ramps. These intersections shall be referred to herein as "**Asphalt Intersections**".

The second classification consisted of intersections where the street surface was concrete/cement immediately before the start of the subject work. At these intersections, a thin layer of asphalt had been applied over the concrete. Erie disputes Plaintiffs' claim that this work was an "alteration" triggering the obligation to install ADA-compliant curb ramps. Rather, Erie contends that such work was not an alteration and that it did not trigger the obligation to install curb ramps. Erie disputes any legal obligation to retrofit these intersections by installing curb ramps. Erie agrees, however, that there is no dispute that, since July 2013, curb ramps shall be installed when these intersections are altered by paving. These intersections have been labeled "**Concrete Intersections**".

In June, 2013, the U.S. Department of Justice and the U.S. Department of Transportation issued a Joint Technical Assistance Guidance, which confirmed that the application of a thin layer of asphalt constitutes an alteration which triggers the obligation to install curb ramps. Erie has confirmed that, respecting Concrete Intersections, it has followed this Guidance since July 2013 and has installed curb ramps as needed at Concrete Intersections that are paved with an asphalt overlay. In May, 2015, the parties filed the Fifth Consent Decree which

expressly adopted the Joint Technical Assistance Guidance as providing the controlling definitions of alteration and routine maintenance. [*Document 70*].

The parties have now reached an agreement regarding the retrofitting of the Asphalt Intersections with curb ramps which should have been installed at the time of the paving and the parties have reached a partial agreement respecting the Concrete Intersections.

Therefore, Plaintiffs and Erie, having met, negotiated and consented, and this Court, having reviewed the terms of this Fourth Stipulated Order, and having found it just, **IT IS HEREBY ORDERED:**

III AGREEMENT

Prior Orders Remain in Effect. All terms and conditions set forth in the all prior Consent Decrees and/or in all prior Stipulated Orders entered in this lawsuit shall remain in full force and effect, and are unchanged by this Fourth Stipulated Order, except as expressly set forth herein.

A. INVENTORY OF RAMPS AT ISSUE HEREIN

Prior to the discovery that Erie's annual reports had not included all of the Bureau of Streets' paving, Erie did not maintain records that indicated whether any of its paving intruded into or covered an intersection. Rather, the records

only contained a general reference to the affected streets. In 2012, Plaintiffs used a map prepared by **plaintiffs** which identified some 617 intersections that were identified by these records, to visit a small sampling of these intersections. Plaintiffs prepared a listing of these intersections and identified separately which appeared to be Asphalt Intersections and which appeared to be Concrete Intersections.

Erie then used the same map, as well as other available records, to visit, list, and sketch all of the remaining 617 intersections which were not identified on Plaintiffs' list. Erie's list did not identify which intersections were Asphalt Intersections and which were Concrete Intersections. It is assumed that Erie's list does contain some number of Concrete Intersections. The Concrete Intersections which had been identified by Plaintiffs' 2012 list were not included in Erie's list. Erie's list did, however, adopt and incorporate all of the Asphalt Intersections that had been included in Plaintiffs' list of sampled intersections. Erie's list is attached hereto as Exhibit 1 and incorporated herein by reference.

Erie has visited the Concrete Intersections that are identified in Plaintiffs' 2012 sample list and has identified which of those intersections now have compliant curb ramps at each corner and which do not. This listing is attached hereto as Exhibit 2 and incorporated herein by reference. Erie has confirmed that, as of the end of 2016, this list shows that there were approximately 175 curb

ramps from the Plaintiffs' sampling which have not been installed at Concrete Intersections.

Exhibit 1 contains the inventory of all known Asphalt Intersections. The inventory of all known Concrete Intersections is contained in the combined listings of Exhibit 1 and Exhibit 2.

B. REMEDIATION OF ALL ASPHALT INTERSECTIONS

1. Erie represents that, through the end of 2017, there are approximately no more than 711 missing curb ramps at the Asphalt Intersections set forth on Exhibit 1. Some of these 711 ramps may be located at Concrete Intersections. Erie agrees that, starting in 2019, it shall retrofit the Asphalt Intersections by installing the missing curb ramps listed on Exhibit 1. This retrofitting for Asphalt Intersections shall be done at the rate of no fewer than 125 curb ramps per calendar year until all of such curb ramps located at Asphalt Intersections identified on Exhibit 1 have been installed. Erie and Plaintiffs calculate that, at this rate, all such missing curb ramps at the Asphalt Intersections will be retrofitted no later than the end of 2024

3. Erie agrees that if Exhibit 1 is found to have understated the number of the missing Asphalt Intersection curb ramps, it will notify Plaintiffs'

counsel within **10** business days and enter into good-faith negotiations to install those curb ramps that had not been included in Exhibit 1 within the shortest period of time practicable.

4. When determining the intersections to perform this retrofitting installation of curb ramps, Erie will use Exhibit 1 as a reference document to identify which Asphalt Intersections are to receive curb ramps as required by Section III(B)(1) above. During that review process, Erie will make specific note of those intersections listed in Exhibit 1 which it believes are Concrete Intersections. This information will be reported by Erie in its annual report, as described by Section IV(A)(2)(a) below.

C. PARTIAL REMEDIATION OF SOME CONCRETE INTERSECTIONS

1. Erie maintains the legal position that, prior to July 2013, it had no obligation to install curb ramps at the Concrete Intersections. Plaintiffs disagree with this legal argument. Except to the extent set forth herein, Erie has not agreed to remediate Concrete Intersections. The legal issue of Erie's obligation in this regard is expressly preserved for potential future litigation.

2. Erie agrees to install no fewer than 125 additional curb ramps at Concrete Intersections, as identified on Exhibit 1 or Exhibit 2, by the end of 2025, being the year after the projected completion of the Asphalt Intersections as described in Section III(B)(1) above. However, if Erie completes the Asphalt Intersections sooner than 2024, then the retrofitting work at Concrete Intersections shall commence immediately upon the completion of the Asphalt Intersections. In any event, the 125 curb ramps at Concrete Intersections shall be installed no later than the end of 2025.

3 This Fourth Stipulated Order is structured to provide Erie with the maximum flexibility in determining which Concrete Intersections will be remediated in any year. But, the parties also recognize that during the life of this Order, Plaintiffs may desire to have particular intersections or curb ramps remediated on an expedited basis by special request. This section deals with the procedures for those situations.

Plaintiffs' counsel may notify via email Erie's Assistant Solicitor of particular ramps at Concrete Intersections that Plaintiffs want repaired on an expedited basis. Within ten (10) business days of receiving such email, Erie will notify Plaintiffs' Counsel in writing whether or not the request will be accepted. Requests may be rejected for good cause only. If the request is rejected, Erie will explain the reason(s) for the rejection of the request. If the request is accepted,

Erie will state the date(s) on which Erie will install the requested ramps. The parties shall allow at least an additional 30 days to resolve any disputes under this section. If the parties, through Counsel, cannot agree, any party may file an appropriate motion or otherwise request judicial intervention in all unresolved disputes.

4. This agreement concerning some of the Concrete Intersections does not settle, nor resolve, the legal issue of whether the Decrees and Stipulated Orders previously entered in this case obligated Erie to install curb ramps at all Concrete Intersections when the paving was first performed or whether Erie has an obligation to remediate all of these intersections. The parties' right and ability to litigate this legal issue shall survive this Fourth Consent Decree. Rather, Erie has agreed to install 125 of these curb ramps solely to address and remedy the fact that Erie had failed to maintain any records of its Bureau of Streets paving for the year 2005.

IV. Annual Report

A. In each of its Annual Reports, going forward, Erie shall include, in a separate section or schedule the following information:

1. Asphalt Intersections Listed on Exhibit 1

a. Retrofitted Curb Ramps: The number and location of each such curb ramp that it and/or its contractor(s) installed in the prior year.

2. Concrete Intersections

a. Intersections identified on Ex. 1: Erie agrees to note on Exhibit 1 the Concrete Intersections Erie has identified as such during the review process described in Section III(B)(4) above. This listing shall state the total number of all Concrete Intersections which have been identified as Concrete Intersections during the review process on Exhibit 1 to date. This report also shall identify the number and location of each curb ramp that Erie and/or its contractor(s) installed (pursuant to III(C)(3)) in the prior year with respect to these identified Concrete Intersections. The identification of these concrete intersections will assist the parties in the assessment of whether further negotiations or litigation is warranted in order to address the total number of Concrete Intersections that are not remediated by ongoing paving and the retrofitting required by this Stipulated Order.

b. Retrofitted Curb Ramps: A listing of the names of Concrete Intersections, as taken from Exhibit 1 or Exhibit 2, where Erie and/or its contractor(s) retrofitted the intersection by installing curb ramps during the reporting year in accordance with Section III(C)(3) above. This listing shall also state the total number of curb ramps that have been retrofitted at Concrete Intersections to date.

V. Procedure to Reach Agreement and to Resolve Disputes.

A. The parties through Counsel shall work together in good faith to attempt to negotiate any disputes or issues that arise regarding the work to be done under this Stipulated Order. 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.

B. If Erie believes that modifications or temporary relief from its obligations are required by changes of conditions, changes in schedule, available funding or emergencies, Erie will report, within 30 business days, all such issues via email to Plaintiffs' Counsel. The parties will then meet and confer to attempt to reach a resolution of all such issues. If the parties, through Counsel, cannot agree, any party may file an appropriate motion or otherwise request judicial intervention in all unresolved disputes.

VI. 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 the City of Erie for the time period of November 3, 2015 through August 22, 2018. The City shall pay these amounts to Heberle & Finnegan, PLLC, and to the Elderkin Firm within thirty days after receiving approval by City Council. The City shall not delay, but shall immediately submit a request for City

Council approval upon its receipt of Plaintiffs' billings. By agreeing upon this payment, the City of 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.

VII 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 Fourth Stipulated Order, as well as all existing Consent Decrees and Stipulated Orders among Plaintiffs and the City of Erie.

Read and Approved on this 21st day of September, 2018 by:

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