

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

PAUL PECUNAS, SHONA EAKIN, )  
MARK ZAHAR and VOICES FOR )  
INDEPENDENCE, INC. (VFI), on behalf )  
of themselves and all other similarly situated, )  
Plaintiffs )

v. )

COMMONWEALTH OF )  
PENNSYLVANIA DEPARTMENT OF )  
TRANSPORTATION, ALLEN D. BIEHER, )  
P.E., in his official capacity as Secretary of )  
Transportation of the Commonwealth of )  
Pennsylvania, MILLCREEK TOWNSHIP, )  
PA, )  
Defendants )

Civil Action No. 1:11-CV-00016  
Hon. Sean J. McLaughlin

ELECTRONICALLY FILED

**MOTION TO APPROVE CONSENT DECREE AND PARTIAL SETTLEMENT  
AMONG DEFENDANT MILLCREEK TOWNSHIP, PA AND PLAINTIFFS**

Defendant MILLCREEK TOWNSHIP, PA, by and through its attorneys, MacDonald,  
Illig, Jones & Britton LLP, and plaintiffs PAUL PECUNAS, SHONA EAKIN, MARK ZAHAR  
and VOICES FOR INDEPENDENCE, INC. (VFI), by and through their attorneys, Heberle &  
Finnegan, Ltd. and Elderkin, Martin, Kelly & Messina, file this Motion to Approve Consent  
Decree and Partial Settlement Among Defendant Millcreek Township, PA and Plaintiffs and  
state as follows:

1. This civil action involves claims by plaintiffs Paul Pecunas, Shona Eakin, Mark Zahar and Voices for Independence, Inc. (VFI) (hereinafter "Plaintiffs") against defendants the Commonwealth of Pennsylvania Department of Transportation (hereinafter "PennDOT"), Allen D. Biehler in his official capacity as Secretary of Transportation of the Commonwealth of Pennsylvania, and Millcreek Township, PA (hereinafter "Millcreek") for alleged violations of Title II of the Americans With Disabilities Act, and Section 504 of the Rehabilitation Act of 1973.

2. On September 28, 2011, defendant Millcreek and Plaintiffs agreed to a Consent Decree and Partial Settlement with respect to some, but not all, of the claims set forth in the Complaint filed by Plaintiffs. A true and correct copy of the Consent Decree and Partial Settlement Among Defendant Millcreek Township, PA and Plaintiffs is attached hereto as Exhibit A.

3. Defendant Millcreek and Plaintiffs now jointly seek this Honorable Court's approval of the agreed upon Consent Decree and Partial Settlement Among Defendant Millcreek Township, PA and Plaintiffs.

WHEREFORE, defendant Millcreek and Plaintiffs respectfully request this Honorable Court approve, order and enter the Consent Decree and Partial Settlement Among Defendant Millcreek Township, PA and Plaintiffs in the form attached hereto.

Respectfully submitted,

/s/ Mark J. Shaw

Mark J. Shaw

Pa. Bar I.D. No. 50763

Marissa Savastana Watts

Pa. Bar I.D. No. 91201

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Attorneys for Defendant,  
Millcreek Township, PA

sav/1263618

**CERTIFICATE OF SERVICE**

I hereby certify that on October 4 2011, the foregoing Motion to Approve Consent Decree and Partial Settlement Among Defendant Millcreek Township, PA and Plaintiffs was filed electronically with the Clerk of Court, using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's ECF system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

\_\_\_\_\_  
/s/ Mark J. Shaw

Mark J. Shaw

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**CONSENT DECREE AND PARTIAL SETTLEMENT  
AMONG DEFENDANT MILLCREEK TOWNSHIP, PA AND PLAINTIFFS**

WHEREAS Plaintiffs filed this lawsuit against Millcreek Township, Pennsylvania ("Millcreek") alleging certain violations of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973; and,

WHEREAS the Plaintiffs and Millcreek entered into significant settlement negotiations and have reached a partial resolution of Plaintiffs' claims;

THEREFORE, the Plaintiffs and Millcreek agree and the Court hereby enters the following Consent Decree and Partial Settlement.

**I. Future Construction or Alteration**

During the calendar year 2011 and thereafter:

A. Millcreek shall ensure that newly constructed or altered streets, roads and highways shall contain curb ramps or other sloped areas at any intersections having curb ramps or other barriers to entry from a street level pedestrian walkway. 28 C.F.R. §§ 35.151(a)(1) and (b)(1).

B. Millcreek shall ensure that newly constructed or altered street level pedestrian walkways shall contain curb ramps or other sloped areas at intersections to streets, roads, and highways. 28 C.F.R. § 35.151(a)(1) and (b)(1).

C. Millcreek shall ensure that each such curb ramp or other sloped area newly constructed by, on behalf of, or for the use of Millcreek shall be designed and constructed in such manner that the curb ramp or other sloped area is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(a)(1).

D. Millcreek shall ensure that each such curb ramp or other sloped area altered by, on behalf of, or for the use of Millcreek in a manner that affects or could affect the usability by individuals of the curb ramp or other sloped area shall, to the maximum extent feasible, be altered in such manner that the curb ramp or other sloped area is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(b)(1).

E. Millcreek shall ensure that when curb ramps or other sloped areas must be modified under Paragraphs A or B of this Section, any parallel curb ramp or other sloped area on that same corner is also readily accessible to and usable by individuals with disabilities.

F. For purposes of this Consent Decree, any curb ramps and/or blended transitions constructed or modified during the 2011 construction season shall comply with the 2005 draft Public Right-of-Way Accessibility Guidelines ("PROWAG"). Following the 2011 construction season, the Plaintiffs and Millcreek agree that curb ramps and blended transitions located in the public right-of-way shall meet the measurements set forth in the 2011 PROWAG. Millcreek shall inspect and ensure that these requirements are met at the time of construction or alteration.

G. Millcreek shall not be responsible for ensuring that any new construction or alteration of streets, roads, highways or street level pedestrian walkways performed on private roads by private persons or entities comply with the ADA standards that would be triggered by such construction or alteration. However, Millcreek shall ensure compliance with the ADA standards that would be triggered by such construction or alteration when any such private street, road, highway or street level pedestrian walkway is either (a) dedicated to and accepted by Millcreek, or (b) otherwise conveyed or transferred to Millcreek. Nothing in this Consent Decree affects Millcreek's rights, claims and/or defenses related to any new construction or alteration of streets, roads, highways or street level pedestrian walkways performed by the Pennsylvania Department of Transportation ("PennDOT"). This paragraph does not eliminate or otherwise affect Millcreek's obligations under Paragraph I.A.

**II. Process for Change of Interim Accessibility Standards**

The Plaintiffs and Millcreek recognize that in the future, the USDOJ, FHWA or PennDOT may promulgate new, legally binding accessibility standards or guidelines for pedestrian routes in the public right-of-way. If, in the future, either party believes that this has occurred in full or in any part, that party shall so notify counsel for all other parties via email and via certified mail, and include a detailed statement of what changes the party believes have occurred, all reasons the party believes the standard or guidelines must apply, and include the document(s) and guidance relied upon. The parties shall allow at least fifteen (15) days to agree upon any modification. If the parties agree, then they shall cooperate to file a Second Consent Decree with the agreed upon changes. If the parties cannot agree, then any party shall submit a Motion to the Court asking the Court to resolve the dispute. All determinations disputed shall be included in such Motion. The Motion and any response shall be handled in accordance with the Federal Rules of Civil Procedure, including any applicable local rules. These parties expressly agree that the Court shall have jurisdiction to resolve these disputes.

**III. Reports to the Court and to Plaintiffs' Counsel**

A. On or before January 31st of each year during the life of this Consent Decree, as more specifically set forth in the termination clause set forth at Section V.D. below, Millcreek shall file a written report with the Court and with Plaintiffs' counsel, listing each street, road and highway intersection or portion thereof that was constructed, altered or resurfaced during the previous calendar year by, on behalf of, or for the use of Millcreek, and stating where any new



curb ramps or blended transitions have been installed as a part of these projects. The report shall also list each newly constructed or altered street level pedestrian walkway that was constructed during the previous calendar year by, on behalf of, or for the use of Millcreek at any intersections, with streets, roads and highways, and state whether any curb ramps or blended transitions have been installed as part of the projects. The pedestrian walkway list shall include those walkways constructed or altered at intersections of streets, roads and highways by private persons or entities pursuant to Millcreek Ordinance or other rule. Each report will contain a sworn certification that Millcreek has inspected each such project including any pedestrian crossing, pedestrian walkway section, curb ramp/blended transition and corner in each listing. The written report shall contain all accurate measurements necessary to determine if those projects have met all standards set out in Section I, above. Millcreek shall list all of the work in the written report, and shall segregate the different categories of work under separate headings.

B. The Plaintiffs and Millcreek agree that any work performed beyond merely filling potholes will be included by Millcreek in these written reports. By listing the work performed and the locations of that work, Millcreek does not thereby admit that the listed work is an "alteration" rather than "routine maintenance," and Plaintiffs do not waive any claims regarding the status of listed work. The written report is merely to permit Plaintiffs to learn the locations of all work in Millcreek beyond merely filling potholes, and to facilitate discussions between Plaintiffs and Millcreek about what coverage by federal law, if any, is implicated.

**IV. Potential Exceptions for "Technical Infeasibility" or "Structural Impracticability"**

If, during the course of new construction or alteration during calendar year 2011 and thereafter, in the rare circumstance that Millcreek believes that any particular intersection, curb ramp, pedestrian crossing or pedestrian walkway portion prohibits construction or alteration in full compliance with the standards set forth in Section I above, Millcreek shall notify Plaintiffs' counsel in writing via email and via certified mail. This written notification shall list which engineer(s) has reviewed the intersection, crossing, walkway or curb ramp, the location of each, and a statement of which standard(s) allegedly cannot be met and all alleged reasons why not, and how much of a deviation from the standard(s) is contemplated.<sup>1</sup> The parties shall allow at least fifteen (15) days from the postmark of the written notification to attempt to resolve the matter.

If the Plaintiffs and Millcreek are unable to resolve the matter, then either party shall submit a Motion to the Court asking the Court to resolve the dispute. All determinations disputed shall be included in said Motion. The Motion and any response thereto shall be filed and disposed of in accordance with the applicable Federal Rules of Civil Procedure, including any applicable local rules. The Plaintiffs and Millcreek expressly agree that the Court shall have jurisdiction to resolve these disputes.

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<sup>1</sup> Special attention shall be given to the measurements of the direct slope and the cross-slope of the walkway, crossing, curb ramp or ramp, and the juncture of the pedestrian crossing with the ramp and the ramp with the pedestrian walkway, and the level landing at the top and bottom of each ramp.

**V. Listing of Projects Undertaken After January 1992**

A. On or before October 15, 2011, Millcreek will file with the Court and provide via email to Plaintiffs' Counsel a written report listing all locations of all newly constructed or altered streets, roads, highways or street level pedestrian walkways by, on behalf of, or for the use of Millcreek between January 1992 through 2010, stating by year when each item was constructed or altered. This listing shall identify each aforesaid location that does not meet the current ADA/PROWAG 2011 standards and measurements, and, if they do not, the ways in which Millcreek believes that they do not. Millcreek shall also state whether or not it intends to replace any listed portion or to leave it in place. The listing will also state the locations where there are no curb ramps and/or pedestrian walkways at these intersections. This listing shall also include a signed sworn certification that Millcreek has researched its records and that the listing is true and correct. Millcreek shall list all of the work in the written report, and shall segregate the different categories of work under separate headings.

B. The Plaintiffs and Millcreek shall meet and confer as to the list prepared in accordance with Paragraph A above, and attempt to agree to a timetable under which portions shall be retrofitted, if any. If the parties are not able to agree upon the contents of the listing, or to the timetable for retrofitting, then any party shall submit a Motion to the Court asking the Court to resolve the dispute. All determinations disputed shall be included in such Motion. The Motion and any response shall be handled in accordance with the applicable Federal Rules of Civil Procedure, including any applicable local rules. The Plaintiffs and Millcreek expressly agree that the Court shall have jurisdiction to resolve these disputes.

C. The Plaintiffs and Millcreek agree that any work performed beyond merely filling potholes will be included by Millcreek in the written reports. By listing the work performed and the locations of that work, Millcreek does not thereby admit that the listed work is an "alteration" rather than "routine maintenance," and Plaintiffs do not waive any claims regarding the status of listed work. The written report is merely to permit Plaintiffs to learn the locations of all work in Millcreek beyond merely filling potholes, and to facilitate discussions between Plaintiffs and Millcreek about what coverage by federal law, if any, is implicated.

D. If Millcreek concludes that all of the retrofit work it is required to perform pursuant to Paragraphs A and B of this Section V has been completed, it may submit a written notification to Plaintiffs counsel, via email, informing them of the completion of the work at any time following Millcreek's submission of its last annual report covering such work. Upon receipt of such written notice, Plaintiffs shall have 120 days to inform Millcreek, in writing, if they agree or disagree with Millcreek's conclusion. If Plaintiffs agree with Millcreek's conclusion and/or do not respond to Millcreek's written notice within 120 days, this Consent Decree shall terminate upon the expiration of the 120 day time period. If Plaintiffs disagree with Millcreek's conclusion, they must submit to Millcreek, prior to the expiration of the 120 day time period, a detailed written explanation of the items that need to be completed in order to satisfy Millcreek's obligation under this Consent Decree. If Millcreek disagrees with Plaintiffs' position, it may file a motion to terminate this Consent Decree with the court; otherwise, it shall complete the work identified by Plaintiffs and submit a new notice at the completion of said work.

**VI. Attorneys Fees and Costs**

Within fifteen (15) days of the entry of this Order, Millcreek shall pay \$20,478.47 to Heberle & Finnegan, PLLC and \$6,801.50 to the Elderkin Firm. These amounts will be payment in full for all fees and costs claimable by Plaintiffs in this matter from the beginning of this matter through July 29, 2011. By paying these fees and/or costs, Millcreek in no way admits liability for any future payments, and Plaintiffs do not waive any claims for payments for future fees and costs that may be incurred.

**VII. Consideration for this Consent Decree**

The parties understand that this Consent Decree is not intended as a resolution of the entire lawsuit, but rather only as to a part of it. The Plaintiffs and Millcreek, by entering into this Consent Decree, expressly agree that in exchange for the successful completion of each of the terms of the Consent Decree, Plaintiffs shall forebear from seeking preliminary injunctive relief for these issues.

**VIII. Retention of Jurisdiction**

The Plaintiffs and Millcreek agree that, and the Court expressly Orders, the Court shall retain jurisdiction to enforce any and all of the terms of this Consent Decree.

**Read on This 4th Day of October, 2011 and Approved for Form by:**

/s/ Mark J. Shaw

Mark J. Shaw  
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Attorneys for All Plaintiffs

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**ORDER**

All parties having agreed, and the Court having reviewed it and found it equitable, IT IS  
HEREBY ORDERED that this Consent Decree and Partial Settlement Among Defendant  
Millcreek Township, PA and Plaintiffs is ORDERED AND ENTERED this \_\_\_\_\_ day of  
October, 2011. The Court will retain jurisdiction to enforce all terms of this Consent Decree.

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JUDGE SEAN J. McLAUGHLIN  
UNITED STATES DISTRICT COURT