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11 UNITED STATES DISTRICT COURT  
12 EASTERN DISTRICT OF CALIFORNIA

13 GARY NYSTROM on behalf of himself, and  
14 on behalf of all others similarly situated,

15 Plaintiffs,

16 v.

17 CITY OF VACAVILLE and DALE  
18 PFEIFFER, Director of the Department of  
19 Public Works of the City of Vacaville, or his  
20 successor, in his Official Capacity,

21 Defendants.

Case No. CIV S-040330 MCE-PAN

**SETTLEMENT AGREEMENT**

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1 I. RECITALS

2 1. Plaintiff Gary Nystrom is a person with a disability within the meaning of  
3 applicable state and federal law who regularly uses the Pedestrian Rights of Way in the City of  
4 Vacaville.

5 2. Mr. Nystrom brought this action, known as *Nystrom v. City of Vacaville, et. al.*,  
6 Case No. S-04-330 MCE PAN, in the United States District Court for the Eastern District of  
7 California on February 17, 2004 alleging that Defendant City of Vacaville and Defendant Dale  
8 Pfeiffer, acting in his official capacity as the Director of the Department of Public Works for the  
9 City of Vacaville (collectively "City"), violated Title II of the Americans with Disabilities Act,  
10 42 U.S.C. *et seq.* ("ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 1254(1),  
11 ("Section 504"), and various California statutes requiring access for persons with disabilities by  
12 failing to install curb cuts and otherwise provide access to streets and sidewalks under  
13 jurisdiction of the City. The City denies all allegations. The Parties recognize that the City has  
14 been installing curb ramps in all new development since 1974 and that the City has installed curb  
15 ramps in response to citizen complaints for approximately ten years.

16 3. The Parties now desire to resolve their differences and disputes by settling the suit  
17 in such a manner as to:

18 a. Provide Program Access to Pedestrian Rights of Way in Vacaville for  
19 qualified individuals with disabilities, pursuant to existing federal and state law;

20 b. Provide access as set forth below to all portions of the Pedestrian Rights of  
21 Way that constitute new construction or alteration;

22 c. Assure that neither the Named Plaintiff nor the Class nor any Class  
23 Member will attempt to enforce, and Defendants will not thereby be subject to, conflicting  
24 standards regarding compliance with Title II of the ADA, Section 504, and California access  
25 laws concerning access to Pedestrian Rights of Way for persons with Mobility and/or Vision  
26 Disabilities;  
27  
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1           d.       Assure that neither the Named Plaintiff nor the Class, nor any Class  
2 Member shall hereafter assert or claim that Defendants are required to make additional and/or  
3 different modifications to its Pedestrian Rights of Way or that they are required to follow  
4 different standards beyond what is agreed to herein in order to comply with the existing  
5 provisions of Title II of the ADA, Section 504, or California access laws concerning: (1)  
6 Providing Program Access to qualified individuals with disabilities along existing Pedestrian  
7 Rights of Way and (2) Providing access in areas of new construction and/or alteration;

8           e.       Avoid the uncertainties and costs of further litigation in this matter for all  
9 Parties.  
10

11 II.    DEFINITIONS

12           As used in this Agreement, the following terms shall have the meaning ascribed to them  
13 in this Section, which are consistent with the provisions of existing federal and state law,  
14 including the regulations promulgated thereunder. Except to the extent expressly stated to the  
15 contrary, any term not expressly defined in this Section or elsewhere in this Agreement that has  
16 an expressly defined meaning in either the ADA or the regulations promulgated thereunder  
17 (“Regulations”) shall have the meaning ascribed to it by the ADA or the Regulations, in that  
18 order of preference. All other terms shall be interpreted according to their plain and ordinary  
19 meaning.

20           A.    ADA/ADAAG

21           “ADA” means and refers to the Americans with Disabilities Act as contained at 42  
22 U.S.C. § 12101 et seq. “ADAAG” means and refers to the Americans with Disabilities Act  
23 Access Guidelines, codified at Appendix A to 28 Code of Federal Regulations part 36 and at  
24 Appendix A to 49 Code of Federal Regulations part 37. “ADAAG Standards” means and refers  
25 to physical conditions that meet the new construction and/or alterations standards set forth in  
26 ADAAG.

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1           B.     Class or Class Members

2           “Class” or “Class Members” means and refers to the class as defined in the Parties’ Joint  
3 Motion for Court Preliminary Approval of Class Action Settlement. The class is defined as: all  
4 persons with Mobility and/or Vision Disabilities who seek full and equal access pertaining to  
5 curb cuts and sidewalks in the City of Vacaville’s Pedestrian Rights of Way. This includes  
6 visitors as well as residents of the City of Vacaville.

7  
8           C.     Class Counsel

9           “Class Counsel” means and refers to the law firm of Disability Rights Advocates.

10          D.     Compliance Period

11          “Compliance Period” means and refers to the period of time for which this Agreement  
12 will be in effect. The Parties agree that the Agreement shall become effective upon Final  
13 Approval, and remain in effect for up to 30 years. The City may petition the Court to dissolve  
14 the Agreement at any time upon a showing that it provides Program Access to Pedestrian Rights  
15 of Way or upon a showing that it has met or exceeded the monetary obligations specified in this  
16 Agreement. Alternatively, the Agreement will remain in effect until it dissolves automatically  
17 30 years after Final Approval.

18          E.     Compliant Curb Ramp

19          “Compliant Curb Ramp” means and refers to a curb ramp that is constructed to comply  
20 with state and/or federal law (whichever provides the higher access standard) in place at the time  
21 of construction. In the case of a location where it is Structurally Impracticable or Technically  
22 Infeasible to build a fully compliant curb ramp, or where construction of a fully compliant curb  
23 ramp would constitute a Fundamental Alteration of a service, program, or activity of the City of  
24 Vacaville or an Undue Burden on the City of Vacaville, a curb ramp that complies with access  
25 standards to the maximum extent feasible will constitute a Compliant Curb Ramp as long as the  
26 requirements set forth in this Agreement for justifying the reasons for the City to avoid full  
27 compliance are met.  
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F. Curb Ramp

“Curb Ramp” is used interchangeably with “curb cut.”

G. Defendants

“Defendants” means and refers to the City of Vacaville and Dale Pfeiffer or his successor, acting in his or her official capacity as the Director of the Department of Public Works for the City of Vacaville.

H. Detectable Warnings

“Detectable Warnings” means and refers to truncated domes which provide a tactile surface at the transition between the curb and the street, assisting pedestrians with Vision Disabilities in determining when they enter the street.

I. Fairness Hearing

“Fairness Hearing” means and refers to the hearing described in § III.E., below.

J. Final Approval

“Final Approval” means and refers to the date when the Court issues an order granting final approval of this Settlement Agreement in Case No. S-04-330 MCE PAN.

K. Fundamental Alteration

“Fundamental Alteration” means and refers to an action that, if taken by the City of Vacaville, would result in fundamental alteration in the nature of the service, program or activity of Pedestrian Rights of Way in the City of Vacaville. If the City claims that any action otherwise required by this Agreement would constitute a Fundamental Alteration, the City shall have to demonstrate that such alteration would result, and the decision that an action would constitute a Fundamental Alteration must be made by the Director of the Department of Public Works or his or her designee after considering all funds available for such work, and must be accompanied by a written statement of the reasons for reaching that conclusion.

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1 L. Mobility Disability

2 “Mobility Disability” means and refers, with respect to an individual, to any physical or  
3 mental impairment or condition that substantially limits an individual’s ability to move his or her  
4 body or a portion of his or her body and includes, but is not limited to, orthopedic and neuro-  
5 motor disabilities and any other impairment or condition that limits an individual’s ability to  
6 walk, maneuver around objects, ascend or descend steps or slopes, and operate controls. An  
7 individual with a Mobility Disability may use a wheelchair or motorized scooter for mobility, or  
8 may be Semi-Ambulatory.  
9

10 M. Named Plaintiff

11 “Named Plaintiff” means and refers to Gary Nystrom

12 N. Objection

13 “Objection” means and refers to any written objection submitted by any Class Member as  
14 described in § III.C., below.

15 O. Parties

16 “Parties” means and refers to the City of Vacaville, Dale Pfeiffer, or his successor, acting  
17 in his or her official capacity as the Director of the Department of Public Works for the City of  
18 Vacaville, Gary Nystrom, and all class members.

19 P. Pedestrian Rights of Way

20 “Pedestrian Rights of Way” means and refers to all sidewalks over which the City of  
21 Vacaville has responsibility or authority as well as all Curb Ramps and crosswalks serving such  
22 sidewalks and any other pathways used by pedestrians along public rights of way, including  
23 pedestrian pathways through public parking lots.  
24

25 Q. Preliminary Approval

26 “Preliminary Approval” means and refers to the preliminary approval by the Court in  
27 Case No. S-04-330 MCE PAN of the terms of this Settlement Agreement which shall occur prior  
28 to any notice being provided in accordance with § III.C., below.

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R. Released Claims/Released Parties

“Released Claims” and “Released Parties” mean and refer to those claims and Parties described in § VIII, below.

S. Settlement Agreement

“Settlement Agreement” or “Agreement” means and refers to this document.

T. Statutory Defenses

“Statutory Defenses” means and refers to the City’s right to assert under this Agreement that removal of any barrier or installation of a Compliant Curb Ramp is not required because such barrier removal or curb ramp installation would be Technically Infeasible, or Structurally Impracticable, or that it would constitute an Undue Burden or Fundamental Alteration.

U. Structurally Impracticable

Structurally Impracticable means and refers to circumstances in which the unique characteristics of terrain prevent the incorporation of accessibility features. If it is structurally impracticable to provide full access at any location along pedestrian rights of way, the City shall comply with access requirements to the extent that it is not structurally impracticable to do so. (See ADAAG § 4.1.1(5)(a)).

V. Technically Infeasible

“Technically Infeasible” means, with respect to an alteration of a building, facility or Pedestrian Right of Way that it has little likelihood of being accomplished because existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility (See ADAAG § 4.1.6(1)(j)).

W. Third Party Entity

"Third-Party Entity" means an entity other than the City of Vacaville that controls certain barriers or elements of barriers in a Pedestrian Rights of Way. Transit agencies and local utilities are examples of Third Party Entities.

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X. Title 24

“Title 24” means and refers to the regulations set forth at Title 24 of the California Code of Regulations.

Y. Undue Burden

“Undue Burden” means and refers to an action that, if taken by the City of Vacaville, would result in an undue financial and administrative burden. In order to demonstrate that removal of a barrier would constitute an Undue Burden, the decision must be made by the Director of the Department of Public Works or his or her designee after considering all resources available from the Advisory Committee Fund, as defined at § IV.B., below, and any other source of funding identified in this Agreement available for removal of sidewalk barriers, and must be accompanied by a written statement of the reasons for reaching that conclusion. In preparing such a statement, the Director or designee may consider the usability of the existing facilities.

III. APPROVAL

A. Joint Approval Action

Within 60 days following the Vacaville City Council’s approval of this Agreement, the Parties shall jointly move the Court for an Order certifying a Settlement Class, granting Preliminary Approval to this Agreement, and setting a hearing for Final Approval, allowing for notice as set by the Court.

B. Notice to the Class

The City shall issue a Settlement Notice in the form attached hereto as Exhibit A, advising the Class of the terms of the proposed Settlement Agreement and their right to object to the proposed Settlement Agreement, within 30 days after Preliminary Approval. This notice shall be published in the legal notices section of the Vacaville Reporter and posted on the internet web site of the City of Vacaville. In addition, Class Counsel may post the notice in its internet website and post the notice in internet forums targeted at people with disabilities.

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C. Objections

Any Class Member may object to the proposed Settlement Agreement by filing with the Clerk of the Court a written objection (“Objection”) filed or postmarked no later than a date to be set by the Court in this case after Preliminary Approval of the Settlement Agreement. Only such objecting Class Members shall have the right, if they seek it in their Objection, to present objections orally at the Fairness Hearing.

D. No Opt-Out Right for Class Members

Because this settlement resolves only class claims for declaratory and injunctive relief, as well as claims for damages by the named plaintiff, and it does not provide for damages for any individual Class Member, nor does it release any claims an individual Class Member may have for damages, no Class Member may opt out of the terms of this Settlement Agreement.

E. Fairness Hearing

The Court shall hold a hearing to establish the fairness of the Settlement Agreement and to decide whether there shall be Final Approval of the Settlement Agreement. This hearing will take place at a date to be set by the Court, allowing for a period of notice to the Class as the Court may direct.

IV. INJUNCTIVE RELIEF

A. ADA Advisory Committee

The City of Vacaville has established an ADA Advisory Committee (“Advisory Committee”) comprised of representatives from City government and Vacaville residents. The Committee presently meets at least once a month to discuss issues related to disability and access. If the ADA Advisory Committee is disbanded or becomes inactive at any time during the life of this Agreement, the responsibilities of the ADA Advisory Committee under this Agreement, as set forth below, will be assigned to its successor, if any, or to the Director of the Department of Public Works.

/ / /

1           B.     Advisory Committee Fund

2           The City will dedicate the equivalent of 5% of its annual gas tax revenue (Sections 2105  
3 and 2106) or a minimum of \$50,000 (whichever is greater), to a fund used exclusively to install  
4 Complaint Curb Ramps or remove barriers in the Pedestrian Rights of Way (including sidewalks  
5 and pedestrian pathways in public parking lots). This fund will be known as the “Advisory  
6 Committee Fund.” All work described in this Agreement shall be paid for through this fund with  
7 the exception of work done in conjunction with street overlays and reconstruction (*see* § IV.E.,  
8 below), work done using dedicated funding (*see* § IV.F., below), and work affecting barriers  
9 under the control of third party entities (*see* § IV.C.1.e., below). Projects using the money from  
10 this fund will be selected by the City’s ADA Advisory Committee with reference to the general  
11 guidelines set forth in this Agreement and with approval of the Director of the Department of  
12 Public Works. The selection of projects is only subject to challenge under the Dispute  
13 Resolution Process set forth in § VI., below, if Class Counsel has a good faith belief that the  
14 Advisory Committee and the Director of the Department of Public Works have abused their  
15 discretion to select projects in accordance with these guidelines.

16           C.     Advisory Committee: Responsibilities Re: Pedestrian Rights of Way

17           The ADA Advisory Committee is charged with specific responsibilities under this  
18 Agreement related to barrier removal and access along the City’s Pedestrian Rights of Way. For  
19 the life of this Agreement, the ADA Advisory Committee or its successor pursuant to § IV.A.,  
20 above, shall have ongoing responsibility for the following:

21                   1.     Selection and Prioritization of Barrier Removal Projects

22           The Advisory Committee shall make recommendations regarding barrier removal  
23 projects to be prioritized and funded from the Advisory Committee Fund annually. The  
24 recommendations of the Advisory Committee shall be submitted to the Director of the  
25 Department of Public Works for review and approval. The Director of the Department of Public  
26 Works shall have final authority over the approval and authorization of projects; however the  
27 Director will not unreasonably disregard the recommendations of the Advisory Committee.

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*a. Barriers to be Addressed*

The Advisory Committee Fund may be used for the following projects: (1) Installing Compliant Curb Ramps, including Detectable Warnings (at intersections where there are no curb ramps or where existing curb ramps do not meet current access standards); (2) Providing accessible crosswalks (by providing appropriate contrasting striping, developing or maintaining a policy concerning audible pedestrian signals, providing accessible pedestrian crossing controls, and removing any abrupt changes in level affecting the path of travel across the street; crosswalk access does not require any effort to remove slopes or cross slopes consistent with the slope of the street for vehicle traffic and/or drainage); (3) Removing obstacles in the Pedestrian Rights of Way that narrow the pedestrian pathway to less than 32 inches; (4) Removing abrupt changes of level, whether caused by tree roots or any other deterioration or displacement of the surface of the Pedestrian Rights of Way; (5) Removing or providing Detectable Warnings for overhanging obstacles below 80 inches above the pedestrian rights of way that are not detectible to a blind pedestrian using a cane; and (6) removing excessive cross slopes perpendicular to the primary direction of travel along the pedestrian rights of way, whether caused by driveways crossing the Pedestrian Right of Way or by any other reason. This obligation does not require the City to initiate eminent domain proceedings against any residential property owner in order to address any barrier; *see* § IV.C.1.d.(2), below. If any eminent domain proceedings are initiated against any commercial property owner in order to address any barrier, the City's costs for such action shall come from the Advisory Committee Fund.

*b. General Prioritization Standards*

The following general principles shall be used by the ADA Advisory Committee and the Director of the Department of Public Works to prioritize projects to be funded through the Advisory Committee Fund. Requests for installation of a Compliant Curb Ramp or removal of a specific barrier or barriers from a Class Member shall have the highest priority. After requests, priority will be given to Pedestrian Rights of Way serving (1) state and local government offices and facilities; (2) important transportation corridors; (3) places of public accommodation such as commercial and business zones; (4) facilities containing employers; and (5) other areas such as

1 residential neighborhoods and undeveloped regions of the City. In all planned projects,  
2 consideration will also be given to the severity of existing barriers and overall efficiency of  
3 project work. The Advisory Committee and the Director of the Department of Public Works  
4 have discretion to authorize the removal of barriers in lower priority categories before removing  
5 barriers in higher priority categories if they deem such prioritization to be a more effective or  
6 efficient use of barrier removal resources.

7 *c. Annual Selection Process*

8 Every year, the Advisory Committee shall select and prioritize a list of barrier removal  
9 projects no later than 60 days after the beginning of the new fiscal year. This list will be  
10 provided to the Director of the Department of Public Works, who will approve a final list no later  
11 than 90 days after the beginning of the new fiscal year. The list of barriers approved by the  
12 Director of the Department of Public Works will be included in the yearly "Access Report" (*see*  
13 § V.A.). The list of barrier removal projects may be revised by the Director of the Department of  
14 Public Works, in consultation with the ADA Advisory Committee, during the course of the fiscal  
15 year.

16 *d. Limitations on Barrier Removal*

17 (1) Under no circumstances will the City be obligated to remove any barrier if removal  
18 of such barrier would create an Undue Burden or a Fundamental Alteration, or if removal of such  
19 barrier would be Technically Infeasible or Structurally Impracticable. To the extent that the City  
20 determines that it would be an Undue Burden or Fundamental Alteration to remove a particular  
21 barrier, or that removal of a particular barrier would be Technically Infeasible or Structurally  
22 Impracticable, it must include such a determination in its regular reports as set forth in § V.A.,  
23 below.

24 (2) Under no circumstances will the City be obligated to initiate eminent domain  
25 proceedings against a residential property owner in order to address any barrier.

26 *e. Barriers Under Control of Third Party Entities*

27 Certain barriers in the Pedestrian Right of Way involve elements under the control of  
28 entities other than the City of Vacaville. The Parties acknowledge that the City has no right or

1 obligation to remove such barriers unilaterally. The Parties agree to work cooperatively to seek  
2 funding or participation in barrier removal work from such third party entities, which may  
3 include transit agencies, local utilities, or other entities that maintain equipment in the Pedestrian  
4 Rights of Way. Any contribution of money for barrier removal work by third party entities or  
5 any work done by such third party entities to remove barriers will be in addition to the work done  
6 based on the other obligations set forth in this Agreement. Money from the Advisory Committee  
7 Fund may be appropriated to supplement work performed under this section at the discretion of  
8 the Advisory Committee and the Director of Public Works, as set forth § IV.C.1.c., above.

9 *f. Work Completed Before Agreement is Finalized*

10 During the 2005/2006 Fiscal Year, the City conducted barrier removal work in  
11 accordance with the general principles set forth in this Agreement, despite the fact that the  
12 Agreement was not finalized. The City allocated approximately \$50,000 for work to remove  
13 barriers, in addition to the construction of Compliant Curb Ramps at all intersections where  
14 street overlays were completed. In addition, the City allocated approximately \$20,000 for the  
15 removal of certain barriers identified by the Named Plaintiff in this action, including installation  
16 of Compliant Curb Ramps at the intersection of Tulare and Marshall (at two corners), Marshall  
17 and Windward Court (at two corners), and Tulare and Klamath (at two corners) and remediation  
18 of the asphalt lip at the two corners of Raleigh Drive and Alamo Drive.

19 In light of this work that was done before the Agreement was finalized, the Parties agree  
20 that the City may meet its obligation under the Agreement for Fiscal Years 06/07 and 07/08 by  
21 dedicating the equivalent of 4% of its annual gas tax revenue (Sections 2105 and 2106) or a  
22 minimum of \$40,000 (whichever is greater), to the Advisory Committee Fund.

23 The Parties also agree that, at minimum, \$20,000 of the money in the Advisory  
24 Committee Fund during FY 06/07 will be used to address the remaining barriers identified by the  
25 Named Plaintiff in the Complaint. All barriers identified by the Named Plaintiff in the  
26 Complaint that are not addressed through the Advisory Committee Fund during FY 06/07 will be  
27 treated as class member complaints and addressed through the prioritization process set forth in  
28 § IV.C.1.b, above.



1                   2.     Leveraging Additional Funding Sources and City Programs

2                   The Advisory Committee shall confer with the City’s Title II Coordinator a minimum of  
3 one time per year to assess how to best leverage additional City funds, if any, and/or additional  
4 City Programs, if any, that can be used to install Compliant Curb Cuts or remove barriers along  
5 the City’s Pedestrian Rights of Way.

6                   3.     Community Outreach Program

7                   The Advisory Committee shall develop and oversee the City’s Community Outreach  
8 Program. The Community Outreach Program shall be designed to seek input from the public  
9 regarding the City’s ongoing barrier removal efforts. As part of its Community Outreach  
10 Program, the ADA Advisory Committee will hold annual community meetings for the first three  
11 years of the Compliance Period to discuss the City’s Transition Plan and to help further identify  
12 new and existing physical barriers to access along the City’s Pedestrian Rights of Way. After the  
13 first three years of the Compliance Period, the ADA Advisory Committee may hold additional  
14 community meetings at its discretion, but in no instance shall it go more than five years without  
15 holding such a community meeting.

16                  D.     Additional Funding

17                  If any new transportation funding source for street maintenance is created during the life  
18 of this Agreement (through a ballot measure or otherwise), 5% of this additional revenue source  
19 or the equivalent will also be dedicated to the Advisory Committee Fund.

20                  E.     Street Overlays and Reconstruction

21                  Each time the City overlays or reconstructs a street, it will ensure that Compliant Curb  
22 Ramps are installed at each intersection as part of the overlay project. This requirement does not  
23 pertain to slurry seals, cape seals, or base failure repairs. This work will be in addition to the  
24 work supported by the Advisory Committee Fund.

25                  F.     Dedicated Funding

26                  If the City obtains dedicated funding for any additional street overlays or reconstruction,  
27 it will ensure that Compliant Curb Ramps are installed at each intersection as part of the overlay  
28 or reconstruction project. If the City obtains dedicated funding for redevelopment work that

1 includes complete removal and reconstruction of a section of Pedestrian Right of Way, the City  
2 will ensure that the reconstructed sidewalk is accessible, subject to all available defenses. This  
3 work will be in addition to the work supported by the Advisory Committee Fund.

4 G. City Monitoring of New Permitted Development and Alterations

5 The City will monitor all permitted construction work approved after the Effective Date  
6 of this Agreement affecting the Pedestrian Rights of Way to ensure that it conforms to the  
7 requirements set forth in this Agreement. In any location where an access feature required under  
8 the terms of this Agreement does not fully conform to access standards, and where the City  
9 claims that full compliance is not required due to any Statutory Defense, the City's explanation  
10 of its determination that full access is not required will be included and explained in the next  
11 Annual Report.

12 H. City Monitoring of Permitted Work to Existing Driveways

13 The City will monitor all permitted work for existing driveways. The City will not  
14 approve any permit to modify an existing driveway that would create an unreasonable cross-  
15 slope or worsen an existing cross-slope within the path of travel along Pedestrian Rights of Way.

16 I. Sidewalk Maintenance Program

17 Under Vacaville Municipal Code Chapter 12.30, property owners are currently required  
18 to maintain their sidewalks in such a way that they do not impede public access, pose a safety  
19 hazard, endanger persons or property, or interfere with public convenience. The City maintains a  
20 Sidewalk Maintenance Program which provides private property owners a sidewalk and  
21 driveway inspection in the front of their property, free of charge, by a City employee. If repairs  
22 are required, the property owner can either do the work, hire a licensed contractor or request that  
23 the City do the repairs and then bill the private property owner. When private property owners  
24 fail to fix problem sidewalks after being notified by the City, the City may make required repairs  
25 and place a lien on the property owner's lot or lots to recoup costs, if necessary. The Parties  
26 anticipate that the City's ongoing use of this program will result in the removal of certain abrupt  
27  
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1 changes in level on sidewalks. The City commits to maintain this program at the current level of  
2 services during the life of this Agreement to the extent that it remains lawful to do so.

3 J. Preventative Efforts to Deter Movable Barriers

4 Subject to its discretionary authority under the provisions of California Government Code  
5 § 818.2, the City will take reasonable steps to prevent or deter the placement of movable barriers  
6 on sidewalks, which may, but need not include conducting public information campaigns  
7 through mailers, providing community information, and utilizing other avenues of  
8 communication recommended by the Advisory Committee. The Advisory Committee may  
9 consult with the City's Code Compliance officers to increase public awareness of issues related  
10 to access along the City's Pedestrian Rights of Way. The Advisory Committee may, at its  
11 discretion, recommend use of Advisory Committee Funds to promote increased awareness of  
12 disability access issues within the community.

13 K. Slurry Seal Requirement

14 The City will include in any slurry sealing work or cape sealing work it performs a  
15 requirement to look for excessive build up which can create an inaccessible "lip" in the curb  
16 ramp area and grind down any such lips subject to the City's claim that such work is subject to  
17 any Statutory Defenses.

18 L. Annual Exhaustion of Advisory Committee Fund

19 The City contemplates that the entire amount of the Advisory Committee Fund will be  
20 expended annually. Any funds not used in any given fiscal year(s) will be carried over into the  
21 succeeding year(s). Any expenditure(s) that exceed the amount of money in the Fund in a given  
22 fiscal year(s) will be credited in the succeeding fiscal year(s). In the event that the City allocates  
23 funds in excess of the annual obligation to the Advisory Committee Fund in any given year, such  
24 excess funds will be credited toward its future obligations in each succeeding fiscal year.  
25 However, in no year shall the City allocate less than \$25,000 to the Advisory Committee Fund.  
26 If the Agreement is terminated early based on a petition by the City that it has otherwise met its  
27 financial obligations (*see* § I.D., above), this annual minimum allocation requirement shall also  
28 cease.

1 V. REPORTS AND MONITORING

2 A. Reports

3 At the conclusion of each fiscal year until the end of the Compliance Period, the City  
4 shall provide a report (“Annual Report”) to Class Counsel describing the actual work done to  
5 implement this Agreement during the previous twelve months and a prospective plan of projects  
6 the City plans on undertaking to improve access to Pedestrian Rights of Way in the upcoming  
7 year. The Annual Report will be completed within one hundred and twenty (120) days from the  
8 end of the fiscal year and will include:

- 9 1. A summary or listing of all written complaints or requests for removal of particular  
10 barriers received since the prior report, including information specifying whether the City  
11 has taken action to remove the barrier.
- 12 2. Summaries of work done to ensure access and/or remove access barriers in conjunction  
13 with asphalt overlay projects, projects completed with Dedicated Funds (as described in §  
14 IV.F, above), and projects completed with the Advisory Committee Fund.
- 15 3. A list of all barriers, if any, for which the City asserts that it has a Statutory Defense  
16 excusing installation of a Compliant Curb Ramp or removal of an access barrier. If the  
17 City asserts that it has a Statutory Defense that limits its ability to remove a barrier or to  
18 install a Curb Ramp that meets all current standards, the City will include in the report a  
19 written statement by the Director of the Department of Public Works (or his or her  
20 designee) providing the reasons for reaching that conclusion. To the extent that the City  
21 claims that installation of a fully compliant Curb Ramp or removal of an existing barrier  
22 would be an Undue Burden, the written statement will include his or her consideration of  
23 all resources available from the Advisory Committee Fund and any other source of  
24 funding set forth in this Agreement as available for the removal of access barriers.
- 25 4. Information regarding removal of barriers along Pedestrian Rights of Way through the  
26 Sidewalk Maintenance Program of the City’s Public Works Department.

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- 1 5. Information describing efforts made by the City or Advisory Committee to leverage
- 2 additional programs or funding sources to install Compliant Curb Ramps or remove
- 3 access barriers in the Pedestrian Rights of Way.
- 4 6. Information regarding efforts at Community Outreach, and any action being taken as a
- 5 result of such community outreach.
- 6 7. Information documenting all barrier removal efforts accomplished in conjunction with
- 7 Third Parties (such as utility companies).
- 8 8. A prospective plan of projects for the upcoming year based on the priority
- 9 recommendations of the City's ADA Advisory Committee; and approved by the Director
- 10 of Public Works or his/her designee.
- 11 9. A Monitoring Report, as described below, for the first three years of the Compliance
- 12 Period.

13 B. Monitoring Process

14 The City of Vacaville will utilize a Registered Professional Civil Engineer who is either  
15 employed by the Public Works Department or designated by the Director of Public Works ("The  
16 Engineer") to monitor the City's compliance with this Agreement for a period of three years  
17 from the date of execution. The Engineer will annually inspect 8-10% of the locations within the  
18 Pedestrian Rights of Way at which barriers have been removed to ensure that such barrier  
19 removal is completed properly within acceptable tolerances. Such inspections will determine  
20 whether there are remaining barriers at sites that were identified as having all barriers removed,  
21 or whether barrier removal work was completed properly. The Engineer will annually produce a  
22 report ("Monitoring Report") containing his or her findings to the City and to Class Counsel.  
23 The Monitoring Report may be prepared in conjunction with or as part of the Annual Report at  
24 the discretion of the Director of Public Works.

25 Following the production of each Monitoring Report, the City will have 60 days to  
26 remedy or develop a plan to remedy any identified remaining barriers or else determine that there  
27 is a dispute regarding such barriers at any specific location. If the City asserts that there is a  
28 dispute regarding any barrier, it may assert any Statutory Defense as part of the Dispute

1 Resolution Process. If possible, responsibility for remedying any identified remaining barriers  
2 will be directed to the contractor who completed the work. If (1) the work was funded through  
3 the Advisory Committee Fund; (2) the work is no longer under warranty with the contractor, and  
4 (3) the work would need to be completed by that contractor rather than by members of the City's  
5 Department of Public Works, the barrier will be treated as a barrier identified by a Class Member  
6 for purposes of prioritization and removal. If the work was funded through a source other than  
7 the Advisory Committee Fund, the City will be responsible for removing the remaining barriers  
8 through funds other than the Advisory Committee Funds or through use of City employees to  
9 perform the work.

10 Following the production of each Monitoring Report, Class Counsel will have 60 days to  
11 assert that the Monitoring Report raises concerns about any broad systemic issues regarding  
12 barrier removal. If Class Counsel asserts that such issues are identified through the Monitoring  
13 Report, Class Counsel will bring such issues to the attention of the City and identify a plan to  
14 remedy such issues.

15 At the end of the 60 day period, counsel will meet and confer to determine what  
16 additional steps, if any, are necessary to address issues raised in the Monitoring Report. If the  
17 Parties do not agree whether additional steps are necessary, or if the Parties do not agree what  
18 additional steps should be taken, the dispute will be resolved through the Dispute Resolution  
19 Procedure set forth in § VI.C., below.

20 C. Extension of Monitoring Period

21 Within 120 days after the receipt of the third Monitoring Report, Class Counsel may file  
22 a motion with the Court for an extension of the monitoring period and the continuing production  
23 of additional Monitoring Reports upon a showing of good cause.

24 D. Monitoring Fees

25 The City will pay Class Counsel reasonable attorneys' fees and costs up to an annual cap  
26 of \$1,000 for the duration of the Monitoring Period (three years plus any extension that may be  
27 granted pursuant to § V.C, above) for work performed to oversee the reporting and monitoring  
28 efforts as set forth in this Agreement. Within 90 days after receipt of each Annual Report and

1 Monitoring Report (when provided), Class Counsel will submit all time records showing fees  
2 and costs incurred in reviewing the Annual Report and Monitoring Report and informally  
3 addressing any issues raised by such reports outside of the Dispute Resolution Process. The  
4 Parties will attempt to reach agreement on payment of monitoring fees. If the Parties cannot  
5 reach agreement, either Party may invoke the Dispute Resolution Process.

6 VI. DISPUTE RESOLUTION

7 Should a dispute over the implementation of this Agreement arise, the Parties agree that  
8 the following Dispute Resolution Procedure will be the exclusive procedure for addressing such  
9 disputes. In any dispute raised under this procedure, the Class shall be represented by Class  
10 Counsel.

11 A. Jurisdiction

12 The Court will retain jurisdiction to enforce the terms of this Settlement Agreement for  
13 the duration of the Compliance Period. The Court may delegate its authority to a Magistrate  
14 Judge.

15 B. Scope of Dispute Resolution Process

16 Class Counsel or the City may initiate the Dispute Resolution Process regarding any issue  
17 addressed in this Agreement based on a good faith belief that the other Party is failing to comply  
18 with the terms of the Agreement. With regard to the selection and prioritization of projects using  
19 the Advisory Committee Fund, Class Counsel may assert that the City is in violation of the  
20 Agreement based only on reasonable evidence and a good faith belief that the City has abused its  
21 discretion.

22 C. Dispute Resolution Procedure

23 Except as otherwise set forth herein, all disputes concerning compliance with this  
24 Agreement shall be resolved as follows:

25 1. Counsel for the Parties will first meet and confer in order to attempt to resolve the  
26 dispute directly.

27 2. If the Parties cannot resolve a dispute directly they may engage a private mediator  
28 to mediate the dispute. If the Parties cannot agree on a mediator or if they cannot agree on the

1 allocation of fees and costs for mediation, they may ask the Court to appoint a mediator or they  
2 may proceed directly to step three, below.

3 3. If the Parties cannot reach agreement on terms for mediation or if mediation is  
4 unsuccessful, Counsel for either Party can bring a motion to enforce the Settlement Agreement.

5 D. Fees and Costs for Dispute Resolution

6 Except as set forth herein, fees and costs incurred in the resolution of any disputes will be  
7 awarded in accordance with *Christianberg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

8 However, in any dispute based on concerns raised by a complaining Class Member regarding the  
9 selection and prioritization of projects funded by the Advisory Committee Fund, if such a dispute  
10 is resolved through a motion to the Court, fees and costs incurred in the resolution of the dispute  
11 will be awarded to the prevailing Party. For purposes of such a dispute, the complaining Class  
12 Member who asserts that the City has abused its discretion in selecting and prioritizing projects  
13 funded by the Advisory Committee Fund will be treated as a Party to the dispute.

14 VII. DAMAGES, ATTORNEYS' FEES AND COSTS

15 A. Damages

16 No later than 120 days after Final Approval by the Court of this Settlement Agreement,  
17 the City shall pay Named Plaintiff Gary Nystrom the total sum of \$4,000 in compensation for his  
18 individual damages claim under applicable federal and state access laws, including California  
19 Civil Code §§ 51 and 54. The City can satisfy this obligation by delivering a check to Class  
20 Counsel. No monetary payments shall be made to Class Members and no claims for damages by  
21 the Class or any Class Member except the Named Plaintiff shall be released.

22 B. Attorneys' Fees and Costs

23 Within 30 days after execution of this Agreement by the Parties, Class Counsel will  
24 provide the City with documents showing all fees and costs incurred during the merits phase of  
25 this proceeding (i.e. all fees and costs incurred as of that date). The parties will negotiate to  
26 determine if they can agree on a total amount of fees and costs owed for such merits work. If the  
27 parties cannot agree on that total amount, the parties agree to proceed to mediation on this issue.  
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1 If the parties cannot agree on a mediator, they will request from JAMS a list of three proposed  
2 mediators selected by JAMS, and each party may reject one proposed mediator.

3 If the Parties cannot agree on fees and costs for merits work prior to the Fairness Hearing,  
4 either Party can withdraw from the Agreement. If the Parties reach an agreement on fees and  
5 costs for merits work, Class Counsel will file a fee motion with the Court, as required by Rule  
6 23(h) of the Federal Rules of Civil Procedure for the amount agreed upon by the Parties, and the  
7 City will not oppose such fee motion.  
8

9 Within 30 days following Final Approval of the Agreement, Class Counsel will provide  
10 the City with additional documents showing all additional fees and costs for work done during  
11 the settlement approval process. The Parties will again negotiate and mediate, if necessary, in  
12 the manner described in the preceding paragraph, to determine if they can agree on a total  
13 amount of fees and costs owed for such work. If the Parties reach an agreement on fees and  
14 costs for work during the settlement approval process, Class Counsel will file a fee motion with  
15 the Court, as required by Rule 23(h) of the Federal Rules of Civil Procedure for the amount  
16 agreed upon by the Parties, and the City will not oppose such fee motion. If the Parties cannot  
17 reach agreement within 90 days after negotiations begin, Class Counsel will file a motion for all  
18 recoverable fees and costs for work during the settlement approval process, and the City  
19 maintains all rights to oppose said motion.  
20

21 The two fee motions described in this section may be combined and jointly presented to  
22 the Court.

## 23 VIII. RELEASES

### 24 A. Named Plaintiff and Class Release of Injunctive Relief Claims

25 Except as otherwise provided in this Agreement, Named Plaintiff Gary Nystrom and  
26 Class Members, for themselves, their successors and their assigns, hereby release and forever  
27 discharge Defendants and their successors, assigns, officers, directors, and past and present  
28

1 agents, attorneys, employees, independent contractors, and owners (“Released Parties”) from any  
2 and all claims for declaratory or injunctive relief that were, or could have been, raised in this  
3 action under any or all applicable law relating to the accessibility of Pedestrian Rights of Way,  
4 including, but not limited to, the Americans with Disabilities Act, the Rehabilitation Act of 1973,  
5 §§ 51 and 54 of the California Civil Code, and §§ 4450 and 11135 of the California Government  
6 Code for the duration of the Compliance Period.

7  
8 B. Named Plaintiff’s Release of Damages Claims

9 Except as otherwise provided in this Settlement Agreement, and subject to the payment  
10 of funds as described in § V(A), above, and in consideration of such payments, Named Plaintiff  
11 Gary Nystrom hereby releases and forever discharges the Released Parties from any and all  
12 claims, demands, causes of action, obligations, damages and liabilities that have arisen at any  
13 time up through the end of the Compliance Period that were or could be asserted in this Action  
14 concerning access to Pedestrian Rights of Way in the City of Vacaville, whether based on  
15 statute, regulation, contract, tort or other legal or equitable theory of recovery whatsoever, and  
16 whether known or unknown, however, this release shall not preclude any tort claim associated  
17 with any physical injury that might be suffered at any time following execution of this  
18 Agreement due to existing access barriers in the Pedestrian Rights of Way. Named Plaintiff also  
19 waives California Civil Code § 1542, which provides in pertinent part:  
20

21 A general release does not extend to claims which the creditor does not know  
22 or suspect to exist in his or her favor at the time of executing the release, which if  
known by him or her must have materially affected his or her settlement with the debtor.

23 C. No Release of Named Plaintiff’s Future Tort Damages

24 Nothing in this Settlement Agreement shall be interpreted as a release by Named Plaintiff  
25 of any tort claim associated with any physical injury that might be suffered in the future due to  
26 existing access barriers in the Pedestrian Rights of Way.

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1 D. No Release of Class Tort Damages

2 Nothing in this Settlement Agreement shall be interpreted as a release of any claims for  
3 tort damages by the Class and/or any Class Member except the Named Plaintiff.

4 IX. MISCELLANEOUS

5 A. Point Person

6 The City shall designate a “point person” who shall be responsible for coordinating and  
7 providing all reports required by this Agreement. The Point Person will also have authority to  
8 collect information concerning Defendants’ obligations and actions regarding compliance with  
9 this Agreement and to respond to requests for information or other documents as provided in this  
10 Settlement Agreement.

11 B. Dismissal

12 Within 30 days following Final Approval, Class Counsel shall file a signed form of  
13 request for dismissal with prejudice, except that the Court will retain jurisdiction to enforce the  
14 settlement as set forth in § VI.A., above.

15 C. Entire Agreement

16 This Settlement Agreement contains the entire agreement between the Parties regarding  
17 access to Pedestrian Rights of Way in the City of Vacaville. No modifications or limits will be  
18 binding on the Parties unless expressly provided for in this Agreement or made by writing signed  
19 by all Parties. This Agreement expresses the complete and final understanding with respect to  
20 the subject matter of this Agreement. The Parties hereto understand and agree that the terms of  
21 this Agreement supersede any prior discussions, understandings, or agreements between them  
22 related to the subject matter hereof.

23 D. Counterparts

24 This Agreement may be executed in counterparts, each of which will be considered an  
25 original, but all of which, when taken together, will constitute one and the same instrument.  
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E. Interpretation

The language of this Agreement will be construed as a whole according to its fair meaning, and not strictly for or against any of the Parties. The headings in this Agreement are solely for convenience and will not be considered in its interpretation. Where required by context, the plural includes the singular and the singular includes the plural. This Agreement is the product of negotiation and joint drafting so that any ambiguity will not be construed against any Party.

F. Severability

In the event any portion of this Agreement is deemed to be unenforceable, or is in conflict with applicable law, the remainder of this Agreement will be enforced and will remain in full force and effect.

AGREED TO IN FORM:

FOR THE PLAINTIFFS:  
DISABILITY RIGHTS ADVOCATES

FOR THE DEFENDANTS  
BERTRAND, FOX & ELLIOT

\_\_\_\_\_  
Melissa W. Kasnitz                      Date  
Attorneys for Plaintiffs

\_\_\_\_\_  
Eugene B. Elliot                      Date  
Attorneys for Defendants

By: \_\_\_\_\_  
Gary Nystrom                      Date  
Plaintiff

By: \_\_\_\_\_  
Mayor Leonard J. Augustine      Date  
City of Vacaville

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