

Agenda Item Summary

1. ACTION REQUESTED/PURPOSE: Approve proposed stipulation for settlement attached hereto marked Exhibit "A" with Plaintiffs in case of Dana Lamb, et al. v. Lee County, case No. 2:05-CV-246-FtM-33SPC, United States District Court, Middle District of Florida.

2. WHAT ACTION ACCOMPLISHES: Settles all claims in the case.

3. MANAGEMENT RECOMMENDATION: Approve proposed settlement agreement.

4. Departmental Category: 12 – County Attorney <b>A12C</b>		5. Meeting Date: August 1, 2006
6. Agenda:	7. Requirement/Purpose: (specify)	8. Request Initiated:
<input type="checkbox"/> Consent	<input type="checkbox"/> Statute	Commissioner _____
<input checked="" type="checkbox"/> Administrative	<input type="checkbox"/> Ordinance	Department <u>County Attorney</u>
<input type="checkbox"/> Appeals	<input type="checkbox"/> Admin. Code	Division <u>Litigation</u>
<input type="checkbox"/> Public	<input checked="" type="checkbox"/> Other	By: <u>John S. Turner, Assistant</u> <u>County Attorney</u>
<input type="checkbox"/> Walk-On		

9. Background: The Plaintiffs initiated a claim under the Americans with Disabilities Act ("ADA") against Lee County claiming numerous violations of applicable regulations at various public parks owned and operated by Lee County. Lee County denied the allegations and the case has proceeded to the discovery stage. Based upon the recommendations of Lee County's expert retained for this litigation, Larry Schneider, AIA, the parties have entered into a proposed stipulation for settlement, a copy of which is attached. The stipulation sets forth a time table for remediation of all defects and violations of ADA guidelines and recommendations. The attorney fees for Plaintiffs' counsel have not been resolved and will be subject to further discussion or court action.

10. Review for Scheduling:

Department Director	Purchasing or Contracts	Human Resources	Other	County Attorney	Budget Services				County Manager/P.W. Director
					Analyst	Risk	Grants	Mgr.	
				<i>J. Turner</i>	<i>7/10</i>	<i>7/10/06</i>	<i>7/10/06</i>	<i>7/12/06</i>	<i>H.S. 7/14/06</i>

11. Commission Action:

- Approved
- Deferred
- Denied
- Other

CO. ATTY.  
FORWARDED  
TO CH. BERTIN  
7/7/06

RECEIVED BY  
COUNTY ADMIN: *ZIC*  
7/7/06 4:10 PM  
COUNTY ADMIN  
FORWARDED TO  
*SP*  
7/14/06  
*SP*

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FT. MYERS DIVISION**

DANA LAMB, TONY LUCIBELLO  
and ACCESS NOW, INC., a Florida  
not for profit corporation,

Plaintiffs,

v.

CASE NO.: 2:05-cv-246-FtM-33SPC

LEE COUNTY, a political subdivision  
of the State of Florida,

Defendant.

\_\_\_\_\_ /

**STIPULATION FOR SETTLEMENT**

**IT IS HEREBY** stipulated and agreed by and between Plaintiffs, DANA LAMB and TONY LUCIBELLO, individuals and ACCESS NOW, INC., a Florida not for profit corporation, (hereinafter referred to as “Plaintiffs”) and Defendant, LEE COUNTY, a political subdivision of the State of Florida, (hereinafter sometimes referred to as “Defendant”) as follows:

**WHEREAS**, Plaintiffs filed this action against the Defendant for its alleged violations of Title II of the Americans With Disabilities Act, (“ADA”), 42 U.S.C. §12131-12134, and its implementing regulation, 28 C.F.R. Part 35 (“ADA”);

**WHEREAS**, the Defendant does not admit, and expressly denies, a violation of any federal, state, or local statute (including but not limited to the ADA), and state, county or municipal fire safety or building code, or any other wrongdoing or liability whatsoever;

**WHEREAS**, subject to the terms set forth herein, Plaintiffs 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 action:

I. **ALTERATIONS AND IMPROVEMENTS.** The Defendant agrees to make the following modifications and alterations to its programs, services and facilities at the **Alva Community Park, 21471 North River Road, Alva, Florida; Pine Island Park, 5675 Sesame Drive, Bokeelia, Florida; Hancock Community Park, 2211 Hancock Bridge Parkway, North Fort Myers, Florida; Lehigh Acres Community Park North, 1400 West 5<sup>th</sup> Street, Lehigh Acres, Florida; Bay Oaks Community Park/Recreation Center, 2731 Oak Street, Fort Myers Beach, Florida; Brooks Community Park, 50 South Road, Fort Myers, Florida; Harlem Heights community Park, 7340 Concourse Drive, Fort Myers, Florida; Judd Community Park, 1297 Driftwood, North Fort Myers, Florida; Milton Burke Community Park, 6500 South Pointe Blvd., Fort Myers, Florida; Matlacha Community Park/Center, 4577 Pine Island Road NW, Matlacha, Florida and North Fort Myers Community Park, 2021 N. Tamiami Trail, North Fort Myers, Florida, (hereinafter referred to as the "PARKS").**

**A. PHYSICAL CHANGES TO PROGRAMS, SERVICES AND FACILITIES AT THE PARKS.**

- i. So that individuals with disabilities can fully, safely and equally enjoy the PARKS' services, programs, facilities and activities, the Defendant agrees to make the modifications and alterations to the PARKS' services, programs, facilities and activities and remove all of the barriers to access to the programs, services, facilities and activities at the PARKS, as more fully and specifically described and detailed in the initial expert report of Defendant's expert Larry M. Schneider AIA and the "Response comments" report of Defendant's expert Larry M. Schneider, AIA, and the correspondence from Plaintiff's counsel to defense counsel dated June 16, 2006 and incorporated herein by reference and attached hereto as composite Exhibits "A", "B", and "C".
  
- ii. The physical modifications and alterations and removal of the barriers to access to the programs, services, facilities and activities at the PARKS, will be removed in compliance with 28 C.F.R. §35.151 and Appendix A to 28 C.F.R. part 36 (hereinafter referred to as the "ADAAG") 7-1-94 Edition, and/or ANSI a117.1 - 1998 and agree that the specific modifications detailed in this Agreement shall constitute full compliance with ADAAG. The ADAAG and/or ANSIA117.1 - 1998 dimensions, pursuant to Section 3.2, are subject to conventional building industry tolerances for field conditions. All references to figures in the paragraphs above refer to those that accompany the ADAAG.

Completion of the modifications detailed above pursuant to the ADAAG shall be considered in full compliance with the ADA, to the extent the parties agree is readily achievable and technically feasible.

**B. ADDITIONAL PROVISIONS.**

- i. After the execution of this Agreement, consistent with 28 C.F.R. §35.133(a), the Defendant shall maintain the accessibility of the programs, activities, services, facilities, and equipment at its facilities and shall take whatever actions are necessary (such as routine testing of accessibility equipment and routine accessibility audits of its programs and facilities) to do so. This provision does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. 28 C.F.R. §35.133(b).

**II. JURISDICTION.**

- A. The parties hereto agree that this Stipulation for Settlement, and its construction is governed by Florida Law, and any suit arising as a result of this Stipulation for Settlement shall be filed in the original court in the U.S. District Court for the Middle District of Florida - Fort Myers Division or, if that Court refuses to accept jurisdiction, in a Court of Competent jurisdiction in and for Lee County, Florida.
  - i. The Plaintiffs make 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 Florida State building construction standards, Lee County Zoning Board regulations, or any other governing body whatsoever.

### **III. ENFORCEMENT CONSIDERATIONS.**

#### **A. UNDUE BURDEN.**

The parties hereto acknowledge that the alterations and modifications agreed to by the Plaintiffs, and as set forth in this Stipulation for Settlement, consist of what the parties believe will not constitute an undue burden pursuant and for the purposes of Title II of the ADA.

#### **B. TRANSITION PLAN.**

The parties hereto acknowledge that the work plan and "Response Comments" report outlined under Section I.(A).(i.) will be considered the transition plan memorializing the work necessary to bring the Parks into compliance with the applicable requirements of the ADA Accessibility Guidelines for Buildings and Facilities - July 1, 1994.

#### **C. TIME FRAME.**

Defendant agrees to complete all alterations and modifications within the PARKS by January 1, 2008. The Defendant shall notify Plaintiffs upon completion of the work. Plaintiffs' representatives shall be provided reasonable access to the PARKS to verify completion of the above referred-to work.

#### **D. NON-COMPLIANCE.**

The parties agree that if the Defendant has timely commenced the modifications required hereby, and have proceeded with the completion thereof in good faith

and with due diligence, but have 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.), the time periods for completion established hereby shall be extended appropriately should the Defendant provide Plaintiffs with written notice of same with appropriate back-up documentation prior to the agreed upon completion date herein.

**E.** 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 parties shall negotiate in good faith for fifteen (15) days following the execution of the Stipulation for Settlement. Should the parties be unable to resolve the attorneys' fees and costs issue within this timeframe, then the Plaintiffs shall apply to the Court for their attorney's fees, including costs of litigation and expert's fees incurred by the Plaintiffs.

**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.**

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 Plaintiffs shall file the original with the Court only for enforcement purposes. The parties shall file a proposed consent decree with the Court enumerating the agreed upon modifications and finding that once said modifications and alterations have been completed by the Defendant that the PARKS are in compliance with the requirements of Title II of the ADA to the extent it does not create an undue burden. In connection with said consent decree, 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. 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.

**IX. CONTINUING OBLIGATION.**

It is the intention of the parties that, if the properties at issue in this action are sold or transferred prior to the completion of all the obligations set forth herein, any purchaser or successor in interest shall be required to undertake all of the obligations as set forth herein.

**X. REFERENCES.**

Words and phrases used in this Agreement that have definitions provided in the ADAAG or 28 C.F.R. §36.104 shall be construed as defined in the ADAAG or 28 C.F.R. §36.104, as applicable.

**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, each of which shall be deemed an original but all of which taken together shall constitute but one and the same instrument. The parties further agree that a facsimile copy of a party's signature shall be deemed equivalent to an original.

**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. ACKNOWLEDGMENT.**

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. Each party represents and warrants that they have had the opportunity to have this Agreement reviewed by counsel and be advised by counsel as to the rights and obligations of each party and to modify this Agreement as necessary. As a result, this Agreement shall not be construed or interpreted more strictly against one party than another on the grounds that this Agreement or any draft thereof was prepared by either party.

**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 Notice hereunder shall be as follows:

**Plaintiff:** Stephan Nitz, Esq.  
Schwartz Zweben & Slingbaum, LLP  
3876 Sheridan Street  
Hollywood, Florida 33021

**Defendant:** Lee County Board of County Commissioners  
c/o John S. Turner  
Lee County Attorney's Office  
P. O. Box 398  
Ft. Myers, Florida 33902-0398

#### **XVII. RELEASE.**

Plaintiffs hereby release Defendant pursuant to Title II of the ADA regarding the PARKS (and any other federal, state, or local law governing physical access features for persons with disabilities as public accommodations) such as the claims that were asserted, or could have been asserted, in the above captioned action. This release shall in no way limit Plaintiffs' or the Court's ability to monitor and enforce Defendant's compliance with the terms of this Settlement Agreement and in the event the alterations and modifications required hereby are not timely completed in all respects, the Plaintiffs shall be entitled to seek an award for injunctive relief from the Court.

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

**On behalf of Plaintiffs:**

By: \_\_\_\_\_  
DANA LAMB

By: \_\_\_\_\_  
TONY LUCIBELLO

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
ACCESS NOW, INC.

Dated: \_\_\_\_\_

**On behalf of Defendant:**

By: \_\_\_\_\_  
LEE COUNTY

Dated: \_\_\_\_\_