

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WAYNE GILMORE	*	CIVIL CASE NO. 2:17-cv-4176
	*	
Plaintiff,	*	SECTION "F"(2)
	*	
VERSUS	*	
	*	
AUDUBON NATURE INSTITUTE, INC.*	*	MAGISTRATE JUDGE
	*	JOSEPH C. WILINSON, JR.
Defendant.	*	

CONSENT ORDER

THIS CONSENT ORDER is entered into by WAYNE GILMORE, (“Plaintiff”), on the one hand, and AUDUBON NATURE INSTITUTE, INC., (“Defendant”) on the other hand, hereinafter collectively the “Parties,” and entered by the Court.

IT IS HEREBY stipulated and agreed by and between the Plaintiff and Defendant as follows; and the Court so finds:

WHEREAS, the Plaintiff filed this action against Defendant for alleged violations of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.* (“Title III” of the “ADA”) pursuant to which the Plaintiff sought a permanent injunction, attorneys’ and expert’s fees, expenses and costs;

WHEREAS, 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 or municipal fire safety or building code, or any other wrongdoing or liability whatsoever;

WHEREAS, Plaintiff and Defendant have agreed to a resolution of this action regarding the injunctive relief claims;

WHEREAS, the Parties desire to avoid further expense, time, effort and uncertainty in regards to this action;

WHEREAS, this Agreement concerns the facility known as the Audubon Zoo, operated by Defendant, which is located at 6500 Magazine Street, New Orleans Louisiana (the “Property”); and

WHEREAS, it is the intent of the Parties to improve access to the Property for persons with disabilities, taking into consideration the age of the Property and Defendant’s limited resources, consistent with the ADA Accessibility Guidelines for Buildings and Facilities (“ADAAG”);

NOW, THEREFORE, in consideration of the promises 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 agree, and the Court **ORDERS**, the following terms and conditions in full and complete resolution of this action:

ADA ACCESSIBILITY AND BARRIER REMOVAL

1. The above recitals constitute part of this Consent Order. Plaintiff alleges in the Complaint filed in this action that certain physical barriers to access exist at the Property that restrict and/or limit his access to the Property. In response to the allegations contained in Plaintiff’s Complaint and all other allegations brought or which could have been brought in this action with respect to this Property, the Court **Orders** Defendant to cause the barrier removal, alterations, and modifications set forth in this Order be made to the Property and **Finds** that such barrier removal, alterations, and modifications are in full satisfaction of Defendant’s injunctive obligations under the ADA. More specifically, Defendant is Ordered to perform the barrier removal, alterations, and modifications as set forth below:

- A. Where provided, at least one of each type of sales counter and service counter will be lowered to a level no greater than thirty six (36") inches from the floor;
- B. Where dining surfaces are provided for the consumption of food or drink, at least 5% of the seating spaces and standing spaces at the dining surfaces will be made compliant with Section 902 and signage will be provided directing patrons to accessible tables and seating spaces.
- C. With respect to the restrooms at the Flamingo Cafe, the clear width of the accessible urinal will be increased from 24.5" to 30";
- D. With respect to the restrooms at the Flamingo Cafe, the mirrors located above the countertops will be lowered from the current height of 41" above the finish floor, to the required height of 40" above the finish floor.
- E. With respect to the Photo Service Counter, at least one of the photo service counters dispersed throughout the facility will be lowered to 36", in compliance with 904.4. Signage will be placed throughout the facility directing patrons to the accessible Photo Service Counter;
- F. With respect to Shell's Wildlife Stage, handrails will be installed on both sides of the ramp surface.
- G. With respect to the Concrete Sidewalk near the Orangutan exhibit, handrails will be installed on both sides of the ramp surface.

H. With respect to the Men's toilet room at the Cool Zone, P-Trap and cold-water ADA type pipe wrapping protectors will be installed around the currently exposed sink pipes;

I. With respect to the Men's toilet room at the Cool Zone, the mirrors will be lowered from 41" above the finish floor to 40" above the finish floor;

J. With respect to the accessible toilet stall in the Men's toilet room at the Cool Zone, the sidewall grab bar will be extended such that it begins 12" from the rear wall and extends a minimum of 54" from the rear wall as opposed to its current length of 48" from the rear wall;

K. With respect to the accessible toilet stall in the Men's toilet room at the Cool Zone, the toilet flush controls of the accessible toilet stall will be altered such that the flush controls are either automatic or transferred to the side of the water closet;

L. With respect to the exit of the carousel, the exit gate will be widened from 31" to a minimum of 32";

M. With respect to the door openings and exits at the bird sanctuary, the door leaves will be altered to ensure that one leaf is accessible with a clear width of 32";

N. With respect to the Men's toilet room at the Swamp Restaurant, at least one accessible stall will be provided;

- O. With respect to the Wooden Bridge near Monkey Hill, handrails will be installed on both sides of the ramp surface;
- P. With respect to the men's toilet room in the Zoofari Café, the stool beneath the lavatory will be removed;
- Q. With respect to accessible stall in the men's toilet room in the Zoofari Café, the coat hooks will be lowered from 59" above the finish floor to 48" above the finish floor;
- R. With respect to accessible stall in the men's toilet room in the Zoofari Café, the toilet paper dispenser will be repositioned below the sidewall grab bar;
- S. With respect to the men's toilet room near the Sea Lion exhibit, P-Trap and cold-water ADA type pipe wrapping protectors will be installed around the currently exposed sink pipes;
- T. Place a sign near the steps at the South entrance that states that disabled patrons can call a number for assistance to the facility's entrance.
- U. Negate/smooth out all vertical changes in level to provide a smooth transition in the pavement per Heybeck Report Items 11 - 13, 16, 19, 33, 45, 60, 67, 69, 94.
- V. With respect to the Wooden Bridge just past the elephant statue, handrails will be installed on both sides of the ramp surface per Heybeck Report Item 15.

W. Repair the wooden sidewalk in the Bamboo Village to ensure cross slopes do not exceed 1:48 per Heybeck Report Item 18.

X. Repair the sidewalk approach to the Aviary to ensure the cross slope does not exceed 1:48 per Heybeck Report Item 30.

Y. With respect to the Wooden Bridge approaching the South American Pampas, handrails will be installed on both sides of the ramp surface per Heybeck Report Item 42.

Z. With respect to the wooden walkway through the Louisiana Swamp, repair the walking surface to provide cross slopes not to exceed 1:48 per Heybeck Report Item 43.

AA. With respect to the pea gravel walkway throughout the Louisiana Swamp area, Audubon will place signage throughout the swamp trail providing a telephone number that patrons may call to request assistance as needed.

BB. With respect to the ramp to the Breux store, handrails will be installed on both sides of the ramp surface per Heybeck Report Item 47.

CC. With respect to the ramp to the Swamp Train Depot, replace the ramp to ensure running slopes not to exceed 8.3% per Heybeck Report Item 57.

DD. With respect to the wooden walkway at the African Painted Dog, repair the walking surface to provide cross slopes not to exceed 1:48 per Heybeck Report Item 63.

EE. With respect to the wooden walkway at the African Painted Dog, handrails will be installed on both sides of the ramp surface per Heybeck Report Item 65.

FF. With respect to the walkway to the Red River Hog, handrails will be installed on both sides of the ramp surface per Heybeck Report Item 72.

GG. With respect to the walkway to the Sea Lion Exhibit, handrails will be installed on both sides of the ramp surface per Heybeck Report Item 83.

HH. With respect to the ramps throughout the Sea Lion Exhibit, Audubon will make one entrance/exit route fully accessible and install appropriate signage directing patrons to the accessible route.

II. In the parking lot, ensure that all disabled use parking spaces provide an adjacent access aisle per Heybeck Report Item 99.

JJ. In the parking lot, ensure that all disabled use parking spaces provide accessible signage per Heybeck Report Item 101.

KK. In the parking lot, Audubon will relocate any designated disabled use parking spaces to level areas and ensure an accessible route to the entrance that contains a maximum slope of 1:48 or 2%.

2. All modifications to be undertaken pursuant to this Consent Order shall be completed within thirty six (36) months of the date this Consent Order is fully executed and ordered by the Court. The Parties hereto acknowledge and stipulate, and the Court finds, that the barrier removal, alterations and modifications in this Consent Order constitute, pursuant to and for the purposes of Title III of the ADA, its implementing regulations, and Standards, that which

are readily achievable and technically feasible measures for the removal of existing architectural barriers to access at the Property.

3. The barrier removal, alterations and modifications required hereby shall be completed in all respects within the time frame set forth in Paragraph 2. The time period for completion by Defendant shall be subject 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 city/county inspectors to make inspections, contractor defaults or work stoppages. In the event of such unforeseen circumstances, the time period for completion of the barrier removal, alterations and modifications provided in Paragraph 1 will be extended by the number of days reasonably attributable to such delay-causing event, as long as Defendant provide written notice by certified or registered mail or by facsimile to Plaintiff's counsel (see paragraph 16 below) of the delay, the specific reasons therefore, the estimate time for completion and makes a good faith effort to effect implementation as soon as reasonably possible thereafter.

RIGHT OF INSPECTION

4. Upon the completion of the accessibility requirements and barrier removal requirements set forth in Paragraph 1, Defendant shall provide written notice by certified or registered mail or by facsimile to Plaintiff's counsel (see paragraph 16 below) of such completion and shall afford Plaintiff and Plaintiff's representatives reasonable access to the Property to verify completion of the work required hereby. Nothing herein shall be construed to restrict or limit Plaintiff and/or his representatives from otherwise visiting or accessing the Property. Defendant's failure to provide timely notice to the Plaintiff as required in this paragraph shall not represent a material breach of this Consent Order, but neither shall it preclude

Plaintiff and/or Plaintiff's representatives from verifying the completion of the work required by this Consent Order.

ENFORCEMENT PROVISIONS

5. While Defendant does not admit to any wrongdoing in this action, the parties agree that Plaintiff is the prevailing party to this action. The parties further agree and the Court hereby retains jurisdiction over this matter for the purposes of enforcement of the terms and conditions of this Consent Order and to determine the reasonable amount of Plaintiff's attorneys' fees, costs and litigation expenses to be reimbursed by Defendant. This Court's retention of jurisdiction over this matter for the purposes described above is a pre-condition to the parties' agreement hereto.

6. In the event of a material breach of the terms contained herein, the aggrieved party shall be entitled to obtain injunctive or other relief in this Court as stated in this Consent Order. Notwithstanding the foregoing, this provision shall not prevent the Parties from seeking legal recourse under federal or state law for a material breach of the terms herein.

7. This Consent Order shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and/or assigns, including any successor owners, operators, lessors or lessees of the Property. In any transfer of interest or ownership of the Property, Defendant shall notify such person taking interest or ownership of this Consent Order.

8. In any action to enforce this Consent Order, the prevailing party shall be entitled to their reasonable fees, expenses and costs in accordance with 42 U.S.C. §12205 and applicable law. In the event the modifications are not completed timely in all respects, Defendant shall pay all additional attorneys' fees, expert's fees, costs and litigation expenses incurred subsequent to the execution of this Consent Order in accordance with 42 U.S.C. § 12205 and applicable law.

PLAINTIFF'S FEES, COSTS AND LITIGATION EXPENSES

9. To date, the parties have been unable to resolve the Plaintiff's claims for attorneys' fees, costs, and litigation expenses. Consequently, the Parties request that the Court retain jurisdiction over these claims. The parties intend to continue to use their best efforts to resolve this issue prior to moving for the Court's assistance. However, if the matter is not resolved, the parties agree that Plaintiff shall submit the issues of attorneys' fees, costs and litigation expenses to the Court for determination upon motion within sixty (60) days of the approval of this Consent Order by the Court. The Parties further agree that this Consent Order is contingent upon the Court retaining jurisdiction over this Consent Order for the purposes discussed herein.

RELEASE OF CLAIMS

10. Plaintiff, by his signature below, hereby releases Defendant (and Defendant's parent companies, subsidiaries, divisions, affiliates, related companies, predecessors, successors, heirs, executors, administrators, assigns, shareholders, directors, officers, employees, agents, attorneys, and lessors of and lessees at the Property) from any and all claims, causes, damages, demands, liabilities, equities and any and all other claims, whether known or unknown, from the beginning of the world to the date of this Consent Order regarding the Property, including any and all claims pursuant to Title III of the ADA (and any other federal, state or local law governing physical access features for persons with disabilities at public accommodations) such as the claims that were asserted, or could have been asserted, in the above-captioned action, *provided that*, this release shall in no way limit Plaintiff's or the Court's ability to monitor and enforce Defendant's compliance with the terms of this Consent Order or any claims for prevailing party attorneys' fees, costs and litigation expenses.

Defendant by its authorized signature below, hereby releases, acquits, remises and forever discharges Plaintiff from any and all claims, causes, damages, demands, liabilities, equities and any and all other claims, whether known or unknown, from the beginning of the world to the date of this Consent Order, relating in any way to this litigation or to the Audubon Zoo Property.

These releases do not limit either party's ability to enforce the other party's compliance with the terms of this Consent Order.

11. Within ten (10) days of the date this Consent Order is entered by the Court, the Parties shall move to dismiss this action with prejudice. However, said dismissal shall be contingent upon the Court's retention of jurisdiction to enforce this Consent Order and to determine prevailing party attorneys' fees, costs and litigation expenses.

SEVERABILITY

12. This Consent Order cannot be modified, amended or revoked except by the express written consent of all Parties and order of the Court.

WAIVER

13. The failure of any party to assert any of its rights hereunder shall not constitute a waiver of such rights.

EXECUTION

14. The Parties have read and understood this Consent Order, have had the opportunity to discuss same with legal counsel, and have voluntarily agreed to sign the Consent Order and agree to be bound thereby and as Ordered by the Court.

15. Each person executing this Consent Order on each party's behalf has been duly authorized to sign on behalf of the respective party and to bind each to the terms of the Consent Order.

NOTICE

16. Any notice, correspondence, payment or other communication contemplated by or connected with this Consent Order shall be directed as follows:

- (a) If to Defendant
- Aaron N. Maples
Kinney, Ellinghausen,
Richard & DeShazo
1250 Poydras Street, Suite 2450
New Orleans, Louisiana 70113
504.524.0206 (work)
504.525.6216 (fax)
amaples@kinneylaw.com
- (b) If to Plaintiff:
- Louis Mussman
Georgianne Sims Ku
Ku & Mussman, P.A.
18501 Pines Blvd. Ste. 209-A
Pembroke Pines, Florida 33029
Tel: (305) 891-1322
Fax: (305) 891-4512
louis@kumussman.com

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

Wayne Gilmore,
Plaintiff

By: Wayne Gilmore Date: 9-17-18
Signature

AUDUBON NATURE INSTITUTE, INC.,
Defendant

By: [Signature] Date: 3/29/18
Signature

William H. Kurtz / SR. EUP + CHIEF OF STAFF
Print name and title

It is SO ORDERED.

Joseph C. Wilinson, Jr.
JOSEPH C. WILINSON, JR.
UNITED STATES MAGISTRATE JUDGE

May 2nd 2018
DATE