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

RHJ MEDICAL CENTER, INC., on its own behalf and on behalf of its patients,	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 3:09-cv-131
v.	)	JUDGE KIM R. GIBSON
CITY OF DUBOIS,	)	
Defendant.	)	

ORDER

AND NOW, this 17th day of August 2012, the Court having made the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** as follows:

1. Pursuant to 42 U.S.C. § 1983, judgment shall be entered in favor of Plaintiff and against Defendant in the amount of $132,801.64 for damages to Plaintiff as a result of Defendant's violation of its equal protection rights.
2. The Court declares Ordinance 1720 unconstitutional under the Equal Protection Clause, same ordinance being null and void and having no effect.
3. Plaintiff is entitled to reasonable attorney's fees as to its equal protection claim related to Ordinance 1720. Plaintiff's Motion for Attorney's Fees and Expenses and Brief in Support is due **September 5, 2012**. Defendant's response is due **September 25, 2012**
4. Judgment shall be entered in favor of Defendant as to all of Plaintiff's remaining claims.

BY THE COURT:

KIM R. GIBSON,
UNITED STATES DISTRICT JUDGE

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CITY OF DUBOIS,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND

The above-captioned case is brought under the United States Constitution; 42 U.S.C. § 1983; the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. Plaintiff is RHJ Medical Center, Inc. ("RHJ"), on its own behalf and on behalf of its patients. Defendant is the City of DuBois, Pennsylvania (the "City"). Plaintiff claims that Defendant illegally refused to issue Plaintiff occupancy and use permits for a methadone treatment facility within city limits, and subsequently drafted and passed a statute specifically designed to prevent Plaintiff's business from opening at Plaintiff's desired location. Because of Defendant's actions, Plaintiff claims that it sustained significant monetary losses and its patients were unable to obtain proper care. Consequently, Plaintiff requests compensatory damages, declaratory relief, and reasonable attorney's fees.

Plaintiff originally brought suit against Defendant in this Court on May 14, 2009. Doc. No. 1. Defendant filed its Answer on June 18, 2009. Doc. No. 5. Defendant subsequently filed a Motion for Judgment on the Pleadings and a Motion for a More Definite Statement on December 23, 2009, which Plaintiff opposed. Doc Nos. 25, 33. The Court denied these motions

on December 7, 2010. *RHJ Medical Center, Inc. v. City of Dubois*, 754 F.Supp.2d 723 (2010) ("*RHJ I*"). Thereafter, on October 27, 2011, Plaintiff moved for partial summary judgment with respect to Defendant's liability under the Americans with Disabilities Act and the Rehabilitation Act. Doc. No. 56. Defendant then filed its own Motion for Partial Summary Judgment regarding Plaintiff's equal protection, substantive due process, and Rehabilitation Act claims. Doc. No 62. The Court denied both of these motions on January 5, 2012. Doc. No. 83. A bench trial was held as to all claims on February 21, 22, 23, 24 and 29, and March 9, 2012. On July 27, 2012, Plaintiff filed Proposed Findings of Fact and Conclusions of Law (Doc. No. 104). Defendant filed its own Proposed Findings of Fact (Doc. No. 103) and Conclusions of Law (Doc. No. 102) that same day. On August 6, 2012, each party filed a Response to the other party's Proposed Findings (Doc. Nos. 105 and 106).

II. JURISDICTION AND VENUE

Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1343(a). Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the suit occurred in this district.

III. FINDINGS OF FACT

Plaintiff RHJ Medical Center, Inc. is a family-run methadone treatment business requiring licensing by the Pennsylvania Department of Health, Division of Drug and Alcohol Licensure, the Substance Abuse and Mental Services Administration, and the United States Drug Enforcement Agency. Doc. No. 93 at 35, 162-3. RHJ has facilities in Hunker and Vandergrift, Pennsylvania. The company's primary mission is to prevent opiate addiction by employing methadone maintenance treatment, which fills the same receptors in the brain as opiates do without causing the patient to "get high." Id. at 37, 162. This often allows "severely opiate-

addicted" patients to rebuild relationships and resume normal lives. Id. at 37-8. RHJ is owned and operated by Kathy Jones, Kerry Czikesz, Keith Jones, and Dennis Jones. Id. at 35. Kathy Jones has served as RHJ's CEO and sponsor since 2001. Id. Kerry Czikesz is a part owner and the project director for RHJ's aforementioned facilities, where she is responsible for staffing, administration, patient care, and licensing. Id. at 160-1. Keith Jones is a part owner and is responsible for financial and technical aspects of the business. Doc. No. 94 at 90. Finally, while having no direct role in RHJ's day-to-day operations, Dennis Jones was an original investor and owns both buildings out of which RHJ operates. Id. at 4, 28-9.

In early 2006, while already operating its methadone treatment facility in Hunker, PA, RHJ decided to open a new one in the City of DuBois, which has approximately 8,000 residents and spans approximately three and a half square miles. Doc. No. 93 at 39-40; Doc. No. 95 at 20. To find a suitable location for its site, RHJ retained Joseph Varacallo, a professional real estate developer, property manager and commercial broker in the area. Doc. No. 96 at 172-3. Varacallo, who is one of the largest commercial property owners in the city, first suggested a property near a school and soccer fields, but RHJ rejected that offer because it was reluctant to locate a facility close to a residential area. Id. at 176-7. Varacallo then showed RHJ's representatives an office property at 994 Beaver Drive, located in downtown DuBois in the city's Transitional Zoning District. Id. at 179. Both Keith Jones and Dennis Jones testified that the property was a very good prospective location, with Keith Jones noting the location's accessibility to a major highway and the fact that it was not near a residential area, which the facility attempts to avoid due to early operating hours. Doc. No. 94 at 7, 91. Accordingly, in March 2006, RHJ executed a ten year lease for the property at 994 Beaver Drive, with a right of renewal for another ten years. Id. at 91-2. The lease included a provision that allowed RHJ to

cancel within 120 days of May 1, 2006, for a limited penalty of $12,000. Pl. Ex. 4 at 10; Doc. No. 96 at 244. On May 1, 2006, RHJ took occupancy of the building, which provided approximately 4,000 square feet of space.

There seems to have been some confusion as to whether RHJ fulfilled city requirements regarding occupancy and zoning during this preliminary period. Varacallo had assured Keith Jones that medical facilities were properly zoned within the transitional district, and RHJ's representatives trusted Varacallo's assurances. Doc. No. 93 at 107; Doc. No. 96 at 179. At trial, Varacallo testified that in discussing the matter with Keith Jones, he had relied on his retained architect, KTH Architects, which regularly advises him on matters relating to the Pennsylvania Uniform Construction Code and any relevant zoning codes. Doc. No. 96 at 226-8. However, the letter of confirmation sent by KTH Architects' Vice-President Jerome Bankovich, Jr. to Varacallo on May 3, 2006 made no specific mention of zoning regulations. Id. at 236; Ex. 5. Instead, Bankovich indicated that he had reviewed the "occupancy classification" of 994 Beaver Drive in light of the Pennsylvania Department of Labor and Industry Fire and Panic Regulations. Ex. 5. Bankovich found that because medical offices and clinics were allowed within the building's existing occupancy classification, there was no need by Varacallo or his clients to make additional submissions to the Pennsylvania Department of Labor and Industry for a new certificate of occupancy. Id. In making this determination, Bankovich appears to have relied on a conversation he had with Bill Kulbacki, Building Code Official for Guardian Inspections, Inc., which the City had hired to enforce the Pennsylvania Building Code. Doc. No. 98 at 17-8. Kulbacki later claimed that his conversation with Bankovich encompassed only the existing occupancy permit, and not the City's separate zoning regulations. Id. at 20. Kulbacki further testified that neither he nor Guardian Inspections had enforcement authority with regard to the

City's zoning code. Id. at 14-15. Accordingly, he referred Bankovich to city officials for questions about zoning regulations. Id. at 20.

After signing the lease, RHJ made additional arrangements in preparation for opening the facility. The most important of these efforts was securing a referral agreement at a local hospital, which is required by state law for methadone clinics. Doc. No. 93 at 44. To this end, Kathy Jones and Kerri Czikesz both testified that they made numerous attempts to secure such an agreement with the DuBois Regional Medical Center (DRMC), the largest hospital in the immediate area. RHJ's efforts included correspondence, phone calls, and in-person visits. Id. at 44, 150. However, RHJ's representatives claim they never received a response from DRMC personnel, so they instead pursued and obtained referral agreements from two other hospitals.[1] Id. at 45, 175-6. RHJ also entered into referral agreements with numerous social service agencies in the city. Id. at 45, 49. In addition, RHJ submitted an application to Pennsylvania's Department of Health to obtain licensing for the facility. Kerri Czikesz testified that she oversaw this effort, and included with the application a Certificate of Occupancy for 994 Beaver Drive, issued by the state Department of Labor and Industry. Id. at 201-2. However, Czikesz conducted no investigations to determine whether RHJ was in compliance with other city regulations. Id. at 203. Both the U.S. Drug Enforcement Agency and the Pennsylvania Department of Health inspected the facility in September 2006, and issued appropriate authorizations to RHJ to operate in that location. Ex. 8. On September 20, 2006, RHJ received a

[1] The Court was convinced that Kathy Jones and Kerri Czikesz made some effort during this period to secure a referral agreement from DRMC, but the thoroughness of this effort was not clearly demonstrated at trial. Both Jones and Czikesz provided vague testimony as to who they spoke and/or corresponded with at the hospital. Doc. No. 93 at 151-5, 222-6. Further, Raymond Graeca, the President of DRMC at the time, reviewed and signed the hospital's referral agreements, and he neither spoke with RHJ representatives nor reviewed any proposed referral agreements regarding RHJ's methadone clinic. Doc. No. 98 at 126-9. Quite simply, there is not enough evidence in the record to support the professed belief of RHJ's representatives that the hospital wanted nothing to do with them. Doc. No. 94 at 111.

provisional license from the state Department of Health to treat up to 105 patients. Doc. No. 93 at 211. Finally, RHJ incurred additional expenses, including hiring a physician, a nurse, and a counselor. Id. at 59, 181-4.

At some point during this period, RHJ's contentious relationship with the City began. All of RHJ's representatives testified that during the period when RHJ evaluated and chose the City of DuBois as a location for a potential methadone clinic, they did not contact city officials, including members of the City Council and the mayor, to inform them of RHJ's intentions. Doc. No. 93 at 40, 220; Doc. No. 94 at 30, 139. It was Kathy Jones' belief that there was no need for such contact, assuming that RHJ followed all applicable city rules, regulations and codes. Doc. No. 93 at 41.[2] Among the laws that RHJ was subject to at the time was Section 621 of the Pennsylvania Municipalities Planning Code, which prohibited methadone facilities within 500 feet of numerous locations, including public parks, unless the local government specifically approved an occupancy permit.[3] Although RHJ officials were aware of the existence of Section 621, they did not believe that the location at 994 Beaver Drive qualified under the statute, based in part on research done by Keith Jones and Dennis Jones sometime around September 2006.[4] Id. at 43, 115; Doc. No. 94 at 44-5, 119, 137-8. At issue was the Beaver Meadow Walkway, a mile and a half long trail that runs less than fifty feet away from 994 Beaver Drive. However,

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[2] Dennis Jones testified that RHJ officials were told by Varacallo that there was no need to go before City Council to open the facility. Doc. No. 94 at 40. While the Court accepts this testimony, Jones' testimony that "the state" also told him that there was no need for contact with City Council is dubious, as Jones could not identify the state official or agency with whom he spoke. Id.

[3] Section 621 was passed in 1999, and stated that "a methadone treatment facility shall not be established or operated within 500 feet of an existing school, public playground, public park, residential housing area, child-care facility, church, meetinghouse or other actual place of regularly stated religious worship established prior to the proposed methadone treatment facility" unless "by majority vote, the governing body for the municipality in which the proposed methadone treatment facility is to be located votes in favor of the issuance of an occupancy permit." 53 P.S. § 10621.

[4] The Court was not persuaded by Plaintiff's representatives' assertions at trial that "the state" told Plaintiff that the Beaver Meadow Walkway was not a park. See Doc. No. 93 at 55; Doc. No. 94 at 123. No written documentation of such a legal opinion was admitted into evidence.

the efficacy of this research was not clearly established at trial, as neither Dennis Jones nor Keith Jones satisfactorily explained how the documents they researched had conclusively demonstrated that the Beaver Meadow Walkway was not a park. Doc. No. 94 at 46. Nor did Dennis Jones or Keith Jones contact other parties – including city officials – who could have provided information as to whether a park existed within 500 feet of 994 Beaver Drive. Doc. No. 94 at 45-7, 137. Kathy Jones believed that had the location presented a problem with regard to Section 621, the state Department of Health would have notified RHJ. Doc. No. 93 at 57.

Despite this lack of direct contact, city officials nevertheless became aware of the pending opening of the clinic at 994 Beaver Drive. At some point late that summer, the City's Mayor, John "Herm" Suplizio, who had served in that position since 2000, contacted Kathy Jones and invited her to come to a City Council meeting to introduce RHJ's business. Doc. No. 95 at 18, 34. Following that invitation, Suplizio participated in an online radio interview with Samuel Ettaro of Citizen's Advocate talk show concerning the potential methadone facility. Doc. No. 93 at 49-50; Doc. No. 94 at 194; Ex. No. 33.[5] During the course of the interview, despite agreeing that the city had a drug problem, Suplizio noted that "we hear and we read things about these methadone clinics in other areas, and we don't like them, you know what I mean?" Ex. 33 at 2. When the host of the program, referring to drug addicts, offhandedly

[5] Both at trial and in its Proposed Findings, Defendant objected to the admission into evidence of the audio recording and the transcript of Suplizio's radio interview. See Doc. No. 102 at 26; Doc. No. 93 at 4-11; Doc. No. 94 at 171-201. In doing so, Defendant relies on *U.S. v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975), which set forth seven factors to be proved by clear and convincing evidence before an audio recording may be admitted into evidence. However, as the Court noted during trial, *Starks* involved a criminal proceeding in which the government proposed using audiotape evidence to incriminate a criminal defendant. Such proceedings naturally involve a more stringent standard for admission of evidence given the liberty interests involved. Further, as this Court noted in *U.S. v. Flood*, 2007 WL 1314612 at 10-12 (W.D.Pa. May 4, 2007), it remains unclear what aspects of the Third Circuit's *Starks* decision remain in effect following the implementation of the Federal Rules of Evidence, and specifically Rule 901. Based on Suplizio's recollection of the interview and his identification of his voice on the audio recording played at trial, the Court admitted the audio recording into evidence. Doc. No. 94 at 201. The Court finds no subsequent reason to overturn that decision.

commented that "I understand that you gotta throw your garbage somewhere", Suplizio agreed with him. Id. Suplizio added that he had told Kathy Jones that RHJ's DuBois clinic had "two strikes" against it, and further noted his concerns that the proposed facility was too close to a public park and that RHJ's representatives had not properly educated DuBois citizens about it.[6] Id at 5. After the host asked him whether he would see the opening of a methadone clinic as problematic, Suplizio responded "Yeah, I would have a problem."[7] Id at 7-8. However, Suplizio emphasized that he had encouraged Jones to come to the next City Council meeting to educate the public about RHJ, and he concluded the interview by saying that the community needed "to pull together and get them in the spot they need to be in." Id at 9.

According to Kathy Jones, after she was made aware of Suplizio's radio interview, she called him and invited both him and the members of City Council to tour the facility and ask any questions they might have. Doc. No. 93 at 50. Suplizio confirmed this invitation in his testimony. Doc. No. 95 at 39. Suplizio often took such tours of local businesses, and was occasionally joined by other members of City Council. Doc. No. 94 at 207. However, when Suplizio visited the facility in September 2006, he was unaccompanied. According to Suplizio, his intention in touring the facility was to foster new relationships within the business community. Doc. No. 95 at 41. He denied making any specific preparations for the tour, and stated that he did not consult city officials beforehand about building or zoning permits. Id. Nor did he discuss the Municipalities Planning Code with City Solicitor Toni Cherry. Id. at 42. Suplizio also testified that prior to his visit, he had no knowledge of medically-assisted drug treatment or methadone treatment facilities in general. Id. at 40-1.

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[6] Suplizio later testified that the "two strikes" comment referred to the proposed facility's proximity to a public park and concerns about traffic and parking. Doc. No. 94 at 203.

[7] To be sure, at trial, Suplizio testified that he was not opposed to a methadone treatment facility "as long as it was in the right, proper space..." Doc. No. 94 at 206. However, his comments during the radio interview belie this testimony.

RHJ was represented at the meeting by Kathy Jones, Kerri Czikesz, Dennis Jones, and Keith Jones. Both sides agree that Suplizio came alone, that there was at least initially a modicum of cordiality between the parties, and that Suplizio was to a certain extent impressed with the facility. Doc. No. 93 at 51, 184-5; Doc. No. 94 at 10; Doc. No. 95 at 42-3. There seems to have been no discussion of the possible proximity of a public park; Dennis Jones and Keith Jones testified that there was no mention of Section 621 and that they did not share with Suplizio the results of their research on the issue. Doc. No. 94 at 48-9, 137-8. Suplizio confirmed that he never brought up the public park issue during the tour. Id. at 209.

However, these consistencies aside, a vastly different portrayal was provided at trial as to the tone of the meeting and other specific comments made. RHJ's representatives agreed that Suplizio indicated that the City needed a drug treatment facility but did not want RHJ opening one. They also alleged that Suplizio stated that the City had "unlimited funds" to prevent RHJ from opening its facility. Doc. No. 93 at 51, 184-5; Doc. No. 94 at 10-11. However, Suplizio specifically denied making such statements.[8] Doc. No. 95 at 43-5. Suplizio also claimed that the meeting was pleasant and that zoning and building permits were not discussed during the tour. Id. at 42-3.

On September 24, 2006, RHJ ran an ad in the local newspaper, the Courier Express, informing the public that RHJ was a "medically assisted treatment facility which will be using several pharmacological therapies." Doc. No. 93 at 83. However, no mention was made as to the address of RHJ's prospective facility. Id. At some point during this period, Kathy Jones

[8] The Court is skeptical as to the veracity of both sides' accounts of the September 2006 tour of the facility. It is notable that Kathy Jones, Kerri Czikesz, and Dennis Jones generally did not mention Suplizio's alleged comments in their prior deposition testimony. Doc. No. 93 at 120-2, 217-8; Doc. No. 94 at 36-43. Regarding Suplizio, when asked by counsel whether he ever told Plaintiff's representatives "we need you, but we don't like you," he responded "I don't talk that way, so I know I didn't say that." Doc. No. 95 at 44. However, Suplizio's earlier comments during the radio program suggest his opposition to RHJ's business locating in DuBois in advance of his tour of the facility.

agreed on behalf of RHJ to attend the City Council's October 9, 2006 meeting. Id. at 88-9. Prior to that meeting, Jones faxed a letter to Suplizio notifying him of this decision and indicating that she would simply read a prepared statement at the meeting and not take any questions. Id. at 89. Jones made this decision on the advice of RHJ's attorneys at the time. Id. On the day of the meeting, Suplizio contacted City Solicitor Toni Cherry and informed her that Kathy Jones would attend the meeting and discuss the methadone facility. Doc. No. 95 at 208. Cherry, who has served as City Solicitor since 1990, testified that this was the first time she had heard of RHJ. Id. Cherry also testified that prior to the meeting, a member of the media contacted her to ask whether she had heard of Section 621, and suggested that she read it. Id. at 140, 212. After reading the relevant language, Cherry became convinced that the statute affected whether RHJ could properly locate at 994 Beaver Drive. Id. at 211-3.

The October 9 City Council meeting was attended by Suplizio, Cherry, City Controller Diane Bernardo, and City Council members Randy Schmidt, Gary Gilbert, John Micks, and William Boyle.[9] Ex. 7. Jones read a statement and told the audience that she would not take questions but was willing to answer inquiries through telephone calls or e-mails. Id.; Doc. No. 94 at 121. Jones' prepared statement did not include information about Plaintiff's status as a methadone treatment facility, its location, or when it would open. Doc. No. 93 at 90; Ex. 7. Cherry then asked Jones for the address of the proposed facility. When Jones responded that it would be located at 994 Beaver Drive, Cherry asked Jones if she was aware that the facility was not allowed within 500 feet of a public park, which the City believed it was unless Jones had written documentation proving otherwise. Jones responded that RHJ was in compliance and had been licensed by the Pennsylvania Department of Health, and would respond in writing with the

[9] As Suplizio testified, the City of DuBois City Council is comprised of four council members and the mayor. Doc. No. 95 at 20.

appropriate documentation. Ex. 7. However, Cherry testified that Jones never provided any such documentation as to the park. Doc. No. 95 at 213; Doc. No. 96 at 18-9.

On the following day, October 10, 2006, Suplizio contacted Kathy Jones and encouraged her to participate in a question and answer session to respond to concerns from the community. Doc. No. 95 at 58. During that conversation, Jones indicated to Suplizio that she had an "informant" who had told her that the mayor and City Council were conspiring to prevent RHJ from opening its facility. Doc. No. 93 at 85; Doc. No. 95 at 61. In response, Suplizio drafted and sent a letter to Jones dated the following day. Ex. 11. In the letter, Suplizio asked Jones to identify her informant and reminded her to provide the documentation requested by Cherry at the City Council meeting. Suplizio also enclosed a copy of the full minutes of the meeting. Id.; Doc. No. 95 at 61. Jones never directly responded to the letter or provided Suplizio with the informant's identity. Doc. No. 93 at 86-7. However, on October 16, 2006, she faxed Suplizio copies of certifications from the U.S. Department of Health and Human Services, the U.S. Drug Enforcement Agency, and the Pennsylvania Department of Health. Ex. 7. At trial, Suplizio confirmed that he received these certifications. Doc. No. 95 at 62.

On or about the same day, RHJ began treating its first patients at the 994 Beaver Drive facility. Doc. No. 93 at 54-5. At this point, RHJ had not asked the City's permission to do so and did not believe it was required to by law, due to its certifications from the DEA and the Commonwealth of Pennsylvania. Id. at 55. Nor did any of RHJ's representatives contact city officials to inform them that the facility was now open. Doc. No. 93 at 104; Doc. No. 95 at 215. It is unclear precisely when city officials became aware that RHJ's facility was open and treating patients, but on October 20, 2006, the City Council met again and unanimously authorized

Cherry to send a letter to RHJ to advise that it was within 500 feet of a public park and that it needed to follow all relevant city procedures. Ex. 9.

On October 23, 2006, Cherry drafted and sent the letter to RHJ care of Kathy Jones. Id. Jones acknowledged at trial that Plaintiff received the letter. Doc. No. 93 at 52-3. In the letter, Cherry invoked Section 621 and reiterated that RHJ's facility was within 35 feet of the Beaver Meadow Walkway, and enclosed documents purporting to show that walkway was a public park.[10] Cherry also included Section 703, Chapter 27, Part 7 of the City's zoning code, regarding the need for a Certificate of Use to be issued by the City's zoning officer whenever a structural alteration or change of use occurs. Ex. 9. Such a certificate was necessary because the property had not housed a methadone facility prior to RHJ's tenancy. Cherry further instructed RHJ not to open the facility until it received a Certificate of Use and requested permission from City Council to locate the facility at 994 Beaver Drive. Id. Finally, Cherry warned RHJ that should it open the facility without first securing City Council's permission and obtaining a Certificate of Use, her office would "take whatever enforcement action is permitted under our ordinances and also under the Pennsylvania Municipalities Planning Code." Id. Cherry testified that she never received either a direct reply to the October 23, 2006 letter, or any specific refutations of the legal positions taken by the City therein. Doc. No. 95 at 18. For her part, Kathy Jones testified that RHJ did not believe it needed the City's permission to open a methadone facility. RHJ also disagreed with the City's contention that the Beaver Meadow Walkway was a park. Doc. No. 93 at 53-5.

[10] These documents included City Ordinance 1288, establishing hours of operation for the walkway; a letter from the Pennsylvania Department of Conservation and Natural Resources to the mayor of DuBois regarding a grant for renovation of the park; and a follow-up letter from the Pennsylvania Department of Conservation and Natural Resources congratulating the city for the use of the grant. Ex. 9.

Both Suplizio and Cherry claimed that, within a few days after the October 23 letter was sent by Cherry, city officials became aware that RHJ was treating patients at 994 Beaver Drive. Doc. No. 95 at 65, 215. On October 25, 2006, Cherry received a call from Suplizio informing her that RHJ had opened the facility and was treating patients. Doc. No. 96 at 7. Consequently, the City decided to file suit in the Clearfield County Court of Common Pleas, pursuant to Section 621, in an attempt to enjoin Plaintiff from operating its methadone facility. Doc. No. 95 at 66; Doc. No. 96 at 6-7, 148. Cherry testified that the City was required to file the suit to enforce its zoning code, laws, regulations, and Section 621 of the Municipalities Planning Code. Doc. No. 96 at 149. On the evening of October 26, Cherry served Kathy Jones (on behalf of RHJ), via fax, the complaint the City intended to file. Doc. No. 95 at 214-5. Cherry's correspondence revealed that suit would be filed the following day, October 27, at 8:30 a.m. Id. Kathy Jones testified that prior to the fax being sent, no one from the city had contacted RHJ to discuss what would happen to RHJ's patients or offer the opportunity to place them in other methadone treatment facilities. Doc. No. 93 at 57-8. However, the Commonwealth of Pennsylvania eventually made alternate arrangements for a nearby clinic to accept and treat RHJ's patients. Id. at 58. Because RHJ's facility was closed when the fax was sent, RHJ's representatives did not receive it until approximately 8:00 a.m. the following morning. Id. at 57; Doc. No. 94 at 11-12. As this was just a half hour prior to the injunction hearing, RHJ's representatives were unable to attend the hearing, and a preliminary injunction was entered. Doc. No. 94 at 11-12.

After a series of continuances requested by RHJ's attorneys at the time, presiding Judge Frederic J. Ammerman scheduled a hearing on the matter for December 7, 2006. Doc. No. 96 at 22-5. On December 5, RHJ's attorney Dusty Kirk wrote Cherry and informed her that on advice of counsel, RHJ was willing to apply to the City for a Certificate of Use and obtain all other

required approvals from the City before operating the methadone clinic at 994 Beaver Drive. Id. at 27; Ex. 12. In exchange, RHJ requested that the City ask Judge Ammerman to cancel the hearing scheduled for December 7. Ex. 12. RHJ then stipulated that the Beaver Meadow Walkway near 994 Beaver Drive was a public park pursuant to Section 621, and that RHJ was required to submit an appropriate request to the City for a Certificate of Use to operate on the property. Doc. No. 93 at 58-9. The stipulation was signed, *inter alia*, by Suplizio, Cherry, Kathy Jones, and Kerri Czikesz. Ex. 13. Cherry presented Judge Ammerman with the signed stipulation on December 7, 2006, and he entered an order to that effect that same day. Doc. No. 96 at 29; Ex. 13. The order required RHJ to obtain Certificate of Use for its facility from the City through a public hearing process. Ex. 13.

After entry of the injunction, RHJ's representatives focused their efforts on obtaining a Certificate of Use from the City. At this point, the trial record once again diverges between the versions of events offered by the respective parties. Dennis Jones claimed that when he and Keith Jones went to DuBois City Hall to obtain the necessary application, the zoning officer responded "we don't have any such document." Doc. No. 94 at 13. However, Keith Jones had not brought a copy of the December 7, 2006 injunction with him, which might have clarified the purpose of the inquiry. Id. at 145-6. Dennis Jones also confirmed that he did not show a copy of the injunction to the zoning officer. Id. at 58. Instead of providing Dennis Jones and Keith Jones with the form they believed they needed, the zoning officer gave them a "Zoning Hearing Board Conditional Use Hearing Application." Id. at 16-17; Ex. 16. The zoning officer further refused to call the City Solicitor, thus forcing Keith Jones to call her. Doc. No. 94 at 16-7. Keith Jones claimed that when he asked Cherry over the phone for a Certificate of Use application, she responded "you want a form, I'll give you a (goddamn) form..." and then hung up. Id. at 100.

Cherry confirmed receiving this call and that Keith Jones indicated that the zoning officer did not know what form Jones was requesting. Doc. No. 96 at 38. However, she denied making derogatory comments or hanging up. Instead, Cherry testified that she offered to modify the existing Certificate of Use form to account for the provisions of Section 621.[11] Id. at 38-9. Cherry also testified that this was the first time the City was asked to provide a Certificate of Use application requiring compliance with the provisions of Section 621. Id. at 40, 50-1.

On December 15, 2006, on behalf of RHJ, Dennis Jones faxed a letter to Suplizio and the other City Council members, formally requesting a Certificate of Use application. Doc. No. 14. On December 19, Cherry wrote to Dennis Jones, responding to his request and enclosing a case-specific application. Ex. 15. Cherry also attempted to counter Dennis and Keith Jones' impression that there was no formal application for a Certificate of Use in existence. Id.; Doc. No. 96 at 44; Doc. No. 95 at 152-3. The application form enclosed by Cherry in her December 19, 2006 correspondence requested information pertinent to compliance with Section 621. Ex. 15. It also asked the applicant to explain why "the operation of a treatment facility at such location is not detrimental to the health, safety, and general welfare of the residents of the City of DuBois and entity located within the 500-foot area." Id. Cherry later explained at trial that she

[11] It is the City's position that a new business seeking to obtain a Certificate of Use would do so pursuant to the City's zoning code, which RHJ had not done prior to opening in October 2006. See Doc. No. 98 at 14. At trial, Cherry claimed that the normal procedure (i.e., when Section 621 was not implicated) to obtain a Certificate of Use would be for a party to request an application form from the zoning officer, then complete and return it. At that point, the zoning officer would grant or deny the Certificate of Use. Doc. No. 96 at 45. Pursuant to the Municipalities Planning Code, after this determination is made, any appeal would be taken to the Zoning Hearing Board, with neither City Council nor the Solicitor having any determinative role. Id. at 46-7. Appeals from the Zoning Hearing Board are then heard by the Court of Common Pleas of Clearfield County. Id. However, it appears this procedure was not followed in RHJ's case because RHJ was asking for a Certificate of Use in connection with the provisions of Section 621. For its part RHJ maintains that no such form ever existed prior to Cherry's creation of the case-specific form. There was some evidence at trial to support this, including Varacallo's testimony that in his experience in the City, he has never had a tenant forced to apply for a Certificate of Use. Doc. No. 96 at 190-1.

added this language in consideration of the city's Subdivision and Land Ordinance, as well as to comply with Section 621. Doc. No. 96 at 50.

On January 4, 2007, RHJ formally submitted to the City its case-specific application for a Certificate of Use and request for a public hearing. Ex. 16. The application was enclosed with a letter to Suplizio and City Council, and included a completed version of the form provided by Cherry in her December 19, 2006 correspondence. Id. Dennis Jones testified that he filled out the application, but that the answers were based on Keith Jones' personal knowledge. Doc. No. 94 at 74. The application was signed by both Dennis Jones and Kathy Jones, who reviewed the application prior to signing it. Ex. 16; Doc. No. 93 at 146. Also enclosed with the application was a letter from Joe Varacallo in support of a Certificate of Use for the proposed facility. Ex. 16.

As required by Section 621 of the Municipalities Planning Code, the City Council scheduled a public hearing on Plaintiff's application for a Certificate of Use for April 23, 2007. Ex. 18; Doc. No. 96 at 59; Doc. No. 95 at 70. Cherry testified that during her time as City Solicitor, this was the only time the City held such a meeting pursuant to Section 621. Doc. No. 96 at 98. The hearing began at 6:00 p.m. and ended shortly before 7:20 p.m., at which point a City Council meeting, also open to the public, commenced. Ex. 18. A sign-in sheet for the public hearing contains 28 signatures, including Keith Jones, Kathy Jones, Kerri Czikesz, Dennis Jones, Joe Varacallo, and Paul Roemer, the physician hired by RHJ to staff the clinic. Doc. No. 17; Doc. No. 95 at 71. Members of the local media were also in attendance. Doc. No. 95 at 72-3. During the hearing, City Council members sat behind tables facing the public, who were seated at the same level approximately eight to ten feet away. Doc. No. 96 at 83.

Toni Cherry opened the hearing by describing RHJ's application and specifying that appropriate notice was sent to local landowners pursuant to Section 621, and published in the local media as required by law. In addition, Cherry entered into evidence various documents relevant to RHJ's application. Ex. 18 at 1-2. The Mayor then invited attendees to speak. Id. at 2. Representing RHJ, Keith Jones and Kathy Jones gave statements as to RHJ's qualifications, why it selected the site at 994 Beaver Drive, and statistics on the economic and social benefits of methadone treatment centers to a community. Id. at 2-3. At some point, Kathy Jones passed out booklets and other information regarding RHJ and its work. Doc. No. 93 at 59-60.

After RHJ's representatives spoke, Suplizio opened the hearing to questions and answers from the audience and City Council.[12] Ex. 18 at 3. Nancy Moore, a lifelong resident of the city and Chairman of the City's Planning Commission, inquired as to the staffing of the facility and security measures. Ex. 18 at 3-4. She later testified that she was concerned about security "[b]ecause drugs were involved." Doc. No. 98 at 86. Diane Bernardo, then City Controller, asked several questions about RHJ's other clinic locations, their general procedures in setting up those clinics, and the procedures RHJ followed in selecting and establishing the location at 994 Beaver Drive. Ex. 18 at 4-6.

After questions from a few other citizens, Keith Jones and Kathy Jones had a disagreement with Toni Cherry about whether the 994 Beaver Drive location was within 500 feet of a public park. Kathy Jones explained that "[w]e were advised by counsel at the time that we had to sign [the stipulation] so we went ahead and signed it. Do we really believe that it is a

[12] At trial and in its Proposed Findings of Fact, Plaintiff emphasizes a variety of potentially prejudicial remarks from members of the audience during the hearing. While some of these remarks came from city officials, others came from persons not part of the city government. Plaintiff did not prove at trial that any remarks from this latter group were influenced in any way by city officials, making them largely irrelevant to Plaintiff's case. Consequently, the vast majority of the remarks made by Tina Anand (an acquaintance of Cherry and wife of a doctor at DRMC, but not a member of the City's government) are not discussed at length here.

park? No..." Ex. 18 at 11. Cherry then referred Jones to a number of documents, including Judge Ammerman's December 7, 2006 order, which indicated that the Beaver Meadow Walkway was a public park. Id. She indicated that the only way that the facility could be located so close to a public park was for RHJ to show City Council "some overriding reason why they should ignore the legislative mandate..."[13] Id. Cherry then asked Kathy Jones, as part of the same "burden of proof", whether RHJ had performed a study to ascertain the facility's impact on local traffic conditions, and Jones responded that she had not. Id. at 11-12. Jones further replied by asking whether such a study was required and whether the city had done one, to which Cherry responded that the city had "traffic studies indicating that the pattern of traffic on Beaver Drive is highly congested and it is at maximum." Id. at 12. Cherry later testified that only two businesses had been previously required to conduct a traffic study. Doc. No. 95 at 175-6.

After the exchange between Jones and Cherry, Suplizio called on Ben Blakely, an attorney and now the Solicitor for the DuBois Zoning Board. Doc. No. 94 at 222-3. Blakely's comments focused mainly on traffic issues, the impact of the facility on property values, whether there was an actual need for the facility in the city, the condition of the patients being serviced by RHJ, and whether the facility might attract a "criminal element". Ex. 18 at 12-16. At one point, Blakely wondered, if RHJ's facilities were so good, "why is there such a stigma about methadone clinics and why are they being asked to stay out of cities?" Id. at 14. Kathy Jones and Roemer attempted to address Blakely's concerns by asserting that 1) methadone treatment centers have no detrimental effect on surrounding properties, 2) the facility did not accept court-ordered patients, 3) the facility is comparable to a doctor's office, and 4) there was a need for the facility in the community. After this exchange, Nancy Moore raised additional concerns

[13] At trial, Cherry could not point to any section in Section 621 containing an "overriding reason" requirement, but claimed that she interpreted it that way. Doc. No. 95 at 174-5.

regarding the City's zoning laws and the facility's proximity to a public park. Ex. 18 at 17. Moore also expressed the city's need to "protect our assets", with the park being one of its "primary assets." Id. She later testified that no member of City Council or other citizen asked her to attend the hearing. Doc. No. 98 at 84.

Suplizio's only substantive comment on the merits of the facility was to agree with a citizen's characterization that the facility was "smack dab in the middle" of town. Ex. 18 at 10. Other than Suplizio, the only member of City Council who spoke during the public hearing was Randy Schmidt, who has served since 2002. Doc. No. 98 at 32. A lifelong resident of the city, Schmidt has been Director of Transportation of the DuBois School District since 2006. He also serves as a volunteer with the local fire company. Id. at 30-2. Toward the end of the hearing, he asked questions about parking at the facility, the number of patients, and hours of operation. Id. at 42; Ex. 18 at 19-21. In response, Kathy Jones noted that 1) the facility's planned hours of operation were 5:30 a.m. until 11:15 a.m., 2) patients would spend between ten minutes to two hours at the facility per visit, and 3) the facility would have a 14-20 person staff when it reached a full capacity of 400 patients. Id. at 19-20. Finally, Joe Varacallo addressed Schmidt's question about parking, indicating that there were between 40 to 50 parking spaces available at the facility. Id. at 21. At trial, Schmidt testified that upon hearing Jones indicate that the facility would be handling 100-400 patients, he believed that available parking would not accommodate that number. Doc. No. 98 at 43. After a few additional remarks, the public hearing ended.

Witnesses for each party provided a vastly different account of the atmosphere at the public hearing. From RHJ's perspective, five witnesses described the atmosphere as tense and/or hostile. Kathy Jones indicated that the attendees "made me feel like a criminal." Doc. No. 93 at 60. Kerry Czikesz referred to the hearing as a "dog and pony show." Id. at 186. Dennis Jones

testified that it felt like "they had already decided what they were going to do." Doc. No. 94 at 21-2. Keith Jones characterized the hearing as "scripted" and "pre-planned." Doc. No. 94 at 102. Joe Varacallo described it as "not a pleasant experience" and "a little bit staged..." Doc. No. 96 at 193-4. In contrast, Toni Cherry testified that Suplizio was polite and made efforts to allow everyone to speak. Doc. No. 96 at 81-2. Cherry did not recall the tone of the meeting as being contentious or hostile. Id. at 78-9. City council member Randy Schmidt agreed with this characterization. Doc. No. 98 at 44. Suplizio also testified that the atmosphere at the public hearing was typical for any other meeting of its kind. Doc. No. 95 at 74. Putting the subjective impressions of the attendees aside, both parties agreed that certain indicia that might suggest hostility from citizens or the City Council were not present at all during the hearing, including pickets, anti-methadone treatment literature, or threats made to any of RHJ's representatives. Doc. No. 96 at 80, 248; Doc. No. 98 at 44; Doc. No. 94 at 75-9. And Kathy Jones admitted that RHJ's representatives were not interrupted by anyone at the meeting while they spoke. Doc. No. 93 at 61.

At no point during the April 23, 2007 City Council meeting, which followed the public hearing, was RHJ's application discussed. Ex. 18; Doc. No. 96 at 76-7. Instead, Suplizio indicated that a decision would be made at the May 14 City Council meeting as to whether the Certificate of Use would be granted, or if another meeting would be necessary. Ex. 18; Doc. No. 96 at 87. On May 14, 2007, at the regular City Council meeting, the Council unanimously voted to deny RHJ's application for a Certificate of Use and authorized Cherry to prepare a document containing Findings of Fact and Conclusions of Law in support of that decision. Ex. 38; Doc. No. 96 at 89-90. In preparing this document, Cherry consulted the transcript from the April 23 hearing and incorporated what she considered to be uncontradicted statements into her findings.

Doc. No. 96 at 92, 94, 96. Cherry also testified that she included evidence presented by RHJ. Id. at 97. The document was then unanimously adopted at the next City Council meeting, on May 29, 2007. Ex. 37; Doc. No. 96 at 91-2. Afterward, City Council directed Cherry to send a true and correct copy of the Findings to RHJ. Doc. No. 96 at 98. The following day, Cherry complied with this directive and mailed the City's Findings to RHJ, care of Dennis Jones. Id. at 99; Doc. No. 95 at 202.

The City's Findings first stated that the Beaver Meadow Walkway was a public park and was within 39 feet of RHJ's proposed methadone clinic at 994 Beaver Drive. Ex. 19 at 3-4. This was based largely on 1) a prior city ordinance that established the park's hours of operation, and 2) the fact that the City had received grants from the state of Pennsylvania for the improvement of the park. Id. at 4. The Findings then set forth a series of concerns specific to RHJ's application.[14] Among these were 1) RHJ's physician was not on site at all times; 2) there was no on-site security, forcing the facility to potentially rely on local police and fire services; 3) the facility's physician did not have privileges at DuBois Regional Medical Center; 4) there was no means of transporting patients if one overdosed at the facility; 5) the facility expected to treat approximately 100 patients per day; 6) RHJ did not perform a study to gauge the impact of its

[14] The Court heard testimony suggesting that some of these proffered reasons were either not relevant to the decision at hand, or not typically considered when evaluating new businesses in the City. Regarding the possibility of an overdose in the facility, Suplizio admitted he could point to no statistical evidence to that effect. Doc. No. 94 at 236-7. Both Suplizio and Randy Schmidt also admitted that the city does not typically require new businesses to have on-site security. Doc. No. 94 at 237; Doc. No. 98 at 57. Schmidt agreed that the City does not require businesses to have a physician on staff, Doc. No. 98 at 58, and Suplizio and Schmidt concurred that no other medical facilities in the City are required to provide their own transportation to the hospital. Doc. No. 94 at 239; Doc. No. 98 at 60. In addition, not all new businesses are required to perform traffic studies. Doc. No. 94 at 240-1. Finally, Joe Varacallo testified that in his experiences with commercial property in the city, he has never been asked to conduct a need assessment or a traffic study for a business, or have a business obtain on-site security. Doc. No. 96 at 197-8. Accordingly, the Court does not consider any of these proffered reasons as legitimate. Whether traffic volume itself, as opposed to the need for a traffic study, was a legitimate concern is addressed below.

patients on local traffic;[15] 7) RHJ did not perform a need assessment; 8) the local hospital had declined to be affiliated with the facility; and 9) RHJ had not provided sufficient information to demonstrate the facility would have adequate parking.[16] Id. at 4-5. Accordingly, the Findings concluded that RHJ provided no evidence 1) to justify the City's deviation from Section 621's mandate or 2) to establish that the "health, safety and general welfare" of the city's residents would be served by placing the facility at 994 Beaver Drive. Id. at 6.

After the City's rejection of RHJ's application for a Certificate of Use, RHJ had 30 days to appeal that decision to the Court of Common Pleas of Clearfield County. Doc. No. 95 at 203. On June 15, 2007, while RHJ's appeal time period was still open, the United States Court of Appeals for the Third Circuit ruled that Section 621 was facially discriminatory under the Americans with Disabilities Act and the Rehabilitation Act. *New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 305 (3d Cir. 2007). However, despite RHJ's representatives'

[15] At trial, the parties disputed whether RHJ's proposed methadone clinic would have an adverse impact on traffic in downtown DuBois and on Beaver Drive specifically. Beaver Drive is a two-lane highway approximately a mile and a half long. Doc. No. 98 at 35. Plaintiff's sole witness providing substantial testimony on this matter was Joe Varacallo, who claimed that he "never had a problem" with traffic in the area near 994 Beaver Drive, and that "there's not really any congestion there that's not normal traffic patterns for the city of DuBois." Doc. No. 96 at 181-2. In contrast, the City's witnesses, including Suplizio, Schmidt, and Cherry, all testified that Beaver Drive already contains a significant traffic problem, which would only be exacerbated by the potential inflow of patients to the methadone facility. Doc. No. 95 at 31-3, 79, 108, 116-7; Doc. No. 96 at 118-121; Doc. No. 98 at 69. Given Suplizio and Schmidt's experiences as volunteer firefighters and Schmidt's experience coordinating school bus traffic, the Court finds that the City likely had legitimate concerns about the facility's potential impact on local traffic. Doc. No. 98 at 32-4.

[16] Plaintiff's and Defendant's counsel also expended a great deal of time and effort at trial disputing whether or not sufficient parking existed at the facility. Plaintiff introduced evidence suggesting that parking would have been sufficient under the City's zoning code because the code's regulations were based on a formula employing square footage and number of employees, and under this formula the facility was in compliance. Ex. 20; Doc. No. 95 at 181-2; Doc. No. 98 at 63. For its part, Defendant focused on the fact that 1) only 44 parking spaces existed; 2) the parking at 994 Beaver Drive would be shared by two other properties; 3) the previous tenant at 994 Beaver Drive did not have the parking needs that the methadone facility would; and 4) based on their own experiences, city officials were greatly concerned that available parking would not fully accommodate the facility's needs. Doc. No. 95 at 79-80, 112, 243-4; Doc. No. 96 at 213, Doc. No. 98 at 43, 82. Based on the available evidence, the Court finds that it is unclear whether there was sufficient parking at the facility to accommodate RHJ's patients. However, given the circumstances, city officials' professed concern about parking availability was at least reasonable on its face.

awareness of that decision, RHJ did not appeal the City's denial. Doc. No. 93 at 129, 210; Doc. 95 at 203.

On June 25, Cherry discussed the *New Directions* decision at a City Council meeting. Ex. 35. Also in attendance at this meeting was Nancy Moore. Doc. No. 98 at 86. After listening to Cherry's report, Moore asked whether the City's laws – specifically the City's zoning code – should be reviewed or amended in light of the decision. Ex. 35; Doc. No. 98 at 87. In response, Cherry declared that "[t]imes change, circumstances change... It's time the Planning Commission took a look at these laws and talk about what constitutes a medical or therapy office. We need to explore our laws as things become more sophisticated." Ex. 35.

In light of the Third Circuit's decision in *New Directions*, Keith Jones testified that at some point in October 2007, RHJ's representatives approached city officials seeking a new Certificate of Use for 994 Beaver Drive. Jones also claimed that he was provided the same blank case-specific application that RHJ had filled out for its prior request. Doc. No. 94 at 107-8. At an October 22, 2007 City Council meeting, a motion presenting and scheduling the first reading of Council Bill 1813, which would amend zoning laws in the City, passed by a 4-0 vote. Ex. No. 24. On November 15, RHJ moved to dissolve the injunction entered by Judge Ammerman the previous December. Ex. No. 25. Shortly thereafter, at a November 21 City Council work session, Councilman Schmidt introduced Council Bill 1813 for its first reading, which after passage would become Ordinance 1720. Ex. 22; Ex. 24; Doc. No. 95 at 85. The bill was read again at the City Council meeting on November 27, 2007, and it passed that same day without objection. Ex. 22 at 5; Doc. No. 94 at 108-9. After the bill's passage, RHJ never appealed its enactment in the Clearfield County Court of Common Pleas, which would have been the appropriate procedure. Doc. No. 95 at 205-6.

The overall effect of Ordinance 1720 was to modify the City's zoning code, first passed in 1968. Doc. No. 96 at 101-2. This included changing the permitted uses within the City's Transitional, Commercial-Highway, and O-1 Office Zoning Districts. Ex. 22 at 1. These amendments were suggested and approved by the city's Planning Commission and then sent as a recommendation to City Council. Doc. No. 96 at 136; Doc. No. 98 at 91. Cherry could recall at least one Planning Commission meeting, on August 7, 2007, during which the possible amendments were discussed. Doc. No. 96 at 141. Nancy Moore explained that during this time period, the Planning Commission had been deliberating as to how to address issues posed by DRMC's expansion. Doc. No. 98 at 89. The Planning Commission routinely analyzes the City's zoning divisions and ordinances in light of state and other laws, and makes recommendations to City Council. Id. at 76.

A close reading of Ordinance 1720's plain language reveals that it specifically excluded methadone clinics and other drug treatment clinics from large areas of the City. Section 2 prohibits "methadone or drug treatment clinics or centers" from locating in the Transitional District, even though Section 1 allows "medical, psychological, therapy, dental, [and] orthodontic" offices in that same district. Ex. 22 at 1. As already noted, the property at 994 Beaver Drive was located in the Transitional District. Similarly, Section 3 prohibits "methadone treatment facilities and other drug treatment facilities of any kind" from the Commercial-Highway Zoning District. Id. Once again, "medical, psychological, therapy, dental, [and] orthodontic" facilities are specifically allowed in this district. Id. Besides methadone and drug treatment clinics, no other uses are specifically prohibited in the Transitional District or Commercial-Highway District by Ordinance 1720. Id. Finally, Section 4 provides that "[d]rug

treatment clinics or facilities including methadone treatment facilities or clinics" are permitted in the O-1 Office District, along with a variety of other medical and professional facilities. Id. at 2.

Numerous city officials testified that the purpose of Ordinance 1720 was not to exclude methadone clinics. Cherry claimed that its planning was not done with ill will toward anyone – including RHJ – and that there was no intention to single out methadone patients or treatment facilities. Doc. No. 96 at 127, 146-7. Nancy Moore indicated that the City was simply trying to ensure that such clinics would feel welcome and would have a place to locate within the City. Doc. No. 98 at 87-8. She later indicated that city officials "wanted to do something to provide for methadone clinics, specifically." Id. at 105-6. In addition, she linked the Ordinance to ongoing efforts to expand the DuBois Regional Medical Center, discussed in greater detail below. Id. at 93, 119. Cherry claimed that one of Ordinance 1720's goals was to encourage medical practices to locate in the O-1 Office District. Doc. No. 96 at 145. Suplizio agreed that the City was attempting to consolidate all medical facilities in and around DRMC's two campuses within the City, and that locating drug treatment facilities in those areas would have the benefit of making everything centrally located. Doc. No. 95 at 119-20.

The City also produced significant evidence that, as early as September 2005, it had already been in talks with the DuBois Regional Medical Center to widen certain streets proximate to hospital facilities and improve overall city infrastructure. Doc. No. 95 at 86-7; Doc. No. 98 at 135; Doc. No. 96 at 128. This was due to the hospital's need to expand and the importance of the hospital to the community. Doc. No. 96 at 124. Cherry claimed that it was this project, rather than any desire by the City to prevent the opening of a methadone clinic, that served as the impetus for Ordinance 1720. Id. at 122-3. The City's evidence of this included a September 20, 2005 letter from Cherry to Raymond Graeca, then President of the DuBois

Regional Medical Center, regarding the funding of the road project. Ex. 24. Graeca confirmed participating in these talks, as well as the hospital's decision to reimburse the City for funds expended. Doc. No. 98 at 134. Both Cherry and Suplizio testified as to the involvement of other state agencies in the project, including the Pennsylvania Department of Transportation. Doc. No. 95 at 86-7; Doc. No. 96 at 128-9. The total cost of the project was four to five million dollars. Doc. No. 98 at 135. Updating and modifying the city's zoning ordinances would allow DRMC to expand its facilities across two campuses, thus eliminating bureaucratic red tape and allowing the hospital to open new facilities. Doc. No. 96 at 105, 126-7; Doc. No. 98 at 90, 137. By all accounts, with regard to DRMC, these efforts were a success, improving traffic flow in the area and allowing for DRMC's expansion. Doc. No. 98 at 135.

However, despite this seemingly plausible explanation for Ordinance 1720, the Court found as unconvincing city representatives' dismissal of RHJ as a motivating factor for the final text of the ordinance. Moore claimed that prior to Ordinance 1720, methadone clinics were not allowed in the Transitional District, Doc. No. 98 at 85, 107, but no evidence was introduced to support this. Cherry made similar claims during her testimony. Doc. No. 96 at 127, 167. Incredibly, Moore claimed that Ordinance 1720 was necessary *because* of the invalidation of Section 621 – despite the fact that the Third Circuit's decision would have made it *easier*, not harder, for a methadone clinic to locate in the City of DuBois, and in any other municipality for that matter. Doc. No. 98 at 106. Further, even though city witnesses consistently testified that Ordinance 1720 was not meant to exclude a methadone facility, they could not explain why the specific language of the ordinance had that precise effect. Doc. No. 95 at 10, 120; Doc. No. 96 at 167. Nor could they explain why numerous other medical facilities were allowed in zoning districts from which methadone clinics were excluded. Doc. No. 95 at 12; Doc. No. 96 at 170.

As Varacallo testified, since the passage of Ordinance 1720, several medical treatment centers have opened in and around Beaver Drive. Doc. No. 96 at 203-4. Cherry and Suplizio both testified that traffic on Beaver Drive was a significant impetus in the passage of Ordinance 1720, but neither Suplizio nor Schmidt could explain how methadone or drug treatment clinics caused any particular traffic problems. Doc. No. 95 at 124; Doc. No. 98 at 67. Finally, with regard to the City's plans to facilitate the expansion of DRMC and relocate drug treatment clinics to that location, even Graeca, the former president of the hospital, noted that moving such clinics was not necessary to the expansion project. Doc. No. 98 at 142.

After passage of Ordinance 1720, RHJ once again focused on dissolving the injunction entered by Judge Ammerman the previous December. On December 17, 2007, the City opposed that motion, arguing, *inter alia*, that the *New Directions* decision was not controlling because methadone clinics were permitted in DuBois and that parking concerns were one of the City's significant concerns in denying RHJ a Certificate of Use. Ex. 26. In addition, the City argued that the court no longer had jurisdiction because RHJ had not taken an appeal from the City Council's decision. Id.; Doc. No. 95 at 200-1. Judge Ammerman held a hearing on the matter in January 2008, and on March 6, 2008, he lifted his December 2006 injunction. Ex. No. 34, Ex. No. 28.

However, despite the lifting of the injunction, by this point Ordinance 1720 was already in effect, thus preventing RHJ from locating at 994 Beaver Drive. Varacallo had already written Keith Jones on November 6, 2007 to indicate that another tenant was interested in leasing the property at 994 Beaver Drive. In that e-mail, Varacallo asked Jones to clarify RHJ's plans. Ex. 29. Varacallo later testified that he was giving RHJ the opportunity to walk away from the lease.

Doc. No. 96 at 253. On January 23, 2008, Varacallo once again contacted Jones to reiterate the potential interest in the property. Id. at 261.

RHJ's representatives took certain efforts to explore alternate sites in the area for its methadone clinic. The main requirements for such a site were that 1) it would offer approximately 4,000 square feet and 2) it would not be located near a residential area. Doc. No. 94 at 91. The company did not have the funds to purchase a building or finance new construction. Id. at 112. And pursuant to Ordinance 1720, any site within the City would have to be located in the O-1 Office District. At trial, RHJ introduced evidence that it considered three potential areas for relocation.[17] Id. at 24, 109. However, it claims that all three were unsuitable for a variety of reasons. The first potential site was heavily residential, which RHJ preferred to avoid, and was surrounded by woods. Id. at 25-6, 110-2; Doc. No. 96 at 201. The second site contained properties either too closely located to residential area or owned by DRMC, which RHJ believed did not wish to have any affiliation with its methadone clinic. Doc. No. 94 at 26-7, 110-2; Doc. No. 96 at 201-2. Varacallo added that there were no available properties at this site offering 4,000 square feet of space. Doc. No. 96 at 202. Finally, the third site in the O-1 Office District contained significant motor traffic, was near a residential area, and was proximate to DRMC. Doc. No. 94 at 27, 110-2; Doc. No. 96 at 202-3. Like the second site, Varacallo testified that there were no available properties in the third site offering 4,000 square feet of space. Doc. No. 96 at 203.

[17] The City argues that there were significantly more locations available to RHJ. To this end, it offered the testimony of Nancy Moore, who has significant experience with commercial and residential properties in DuBois and the surrounding area. Moore testified that there were at least six additional properties available to RHJ at this time. Doc. No. 98 at 93-98. However, as Plaintiff's counsel demonstrated during cross-examination of Moore, she was not fully aware of RHJ's needs for a property, what it was able to pay in monthly rent, and in some cases, whether the properties in question were even available at the time RHJ was looking to relocate, or whether there was enough parking to support the facility. Id. at 108-17. Accordingly, the Court considers none of Moore's testimony as persuasive when evaluating whether these additional properties should have been considered by RHJ.

In addition, Varacallo, who was working for RHJ on a commission basis and had a financial incentive to secure a new property for the methadone clinic, made efforts to locate sites outside city limits. Doc. No. 96 at 172-4, 199-200, 267-8. These efforts included contacting an official from nearby Sandy Township to determine whether it would be amenable to a methadone clinic operating there. Id. at 270. When the official told Varacallo there would be no problem, Varacallo related this information to Keith Jones. Id. at 271; Doc. No. 94 at 169. Varacallo was eventually able to identify a suitable property in Sandy Township owned by Jim Smith, with whom RHJ representatives met several time. Doc. No. 94 at 23-25, 82, 113; Doc. No. 95 at 139-30. However, Smith ultimately declined to lease this property to RHJ. Doc. No. 95 at 130-1, 133.

The Court was persuaded that RHJ was unable to lease the Sandy Township property owned by Smith, and that RHJ had concerns about some of the available properties in the O-1 Office District. However, evidence presented at trial clearly demonstrated that RHJ made no efforts whatsoever in late 2007 and during 2008 to ascertain whether leasing property owned by DRMC or proximate to the hospital's locations would have been plausible. Both Dennis Jones and Keith Jones testified that RHJ representatives made no efforts to contact the hospital about the possibility of leasing space. Doc. No. 94 at 85-6, 115-6. Such efforts would have been worthwhile, as Raymond Graeca, then President of the DuBois Regional Medical Center, testified that there was available space at the time on both DRMC's West and East campuses, for lease at market rates to medical providers. Doc. No. 98 at 129-132, 136-139. Both campuses were located in the O-1 Office District. In addition, Kathy Jones admitted that the area near the hospital was an excellent location for a methadone facility. Doc. No. 93 at 119. Graeca further testified that there would have been no reason for DRMC to refuse to lease to a treatment

facility. Doc. No. 98 at 130. And the Court has already noted that RHJ did not demonstrate at trial that DRMC refused to have any association with RHJ's methadone clinic.

With Ordinance 1720 in place, and with RHJ having failed to find a suitable site for relocation of its methadone facility, it abandoned its efforts to open such a facility in and around the City of DuBois and terminated its lease at 994 Beaver Drive in July 2008. RHJ representatives testified that based on their experiences with city officials, they do not believe that RHJ can successfully operate a methadone clinic in the City. Doc. No. 93 at 71-2, 187; Doc. No. 94 at 114.

IV. CONCLUSIONS OF LAW

In its Complaint, RHJ brings six claims as to the City's actions under Section 621 and Ordinance 1720. RHJ alleges that through its enforcement of Section 621 and its passage and enforcement of Ordinance 1720, the City violated 1) both RHJ's and its patients' rights under the Americans with Disabilities Act and the Rehabilitation Act; and 2) RHJ's equal protection and substantive due process rights under the 14th Amendment.

A. Standing under the ADA and the RA

As a preliminary matter, the Court must address Defendant's argument that Plaintiff has no standing to bring this suit under either the ADA or the RA. Doc. No. 102 at 4-13; Doc. No. 106 at 5-18. This issue has significant implications for this suit, as four of Plaintiff's six claims are brought pursuant to those Acts. Defendant asserts that Plaintiff did not present sufficient evidence at trial to demonstrate that Plaintiff was associated with persons having a disability, as that phrase is defined under the ADA and the RA. In response, Plaintiff insists that it does have standing to pursue both equitable relief on behalf of its patients as well as damages on its own

behalf, citing both to evidence in the record, relevant case law, and this Court's December 7, 2010 Memorandum and Order. Doc. No. 104 at 47-55; Doc. No. 105 at 6-9.

In Plaintiff's view, this issue can be resolved expeditiously. Plaintiff first directs the Court's attention to the Third Circuit decision in *New Directions*, which stated that "proprietors of a proposed methadone clinic have standing to seek relief both on their own behalf and on behalf of their clients under the ADA and Rehabilitation Act." *New Directions*, 490 F.3d at 300. The *New Directions* decision relies on the Third Circuit's previous determination in *Addiction Specialists, Inc. v. Township of Hampton* that a methadone clinic operator had standing to bring suit both on behalf of its clients, as well as itself, for violations of the ADA and RA. *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399, 405-8 (3d Cir. 2005). However, that case is easily distinguishable from the instant one, as the defendants in *Addiction Specialists* admitted that the methadone clinic's patients were disabled within the meaning of the ADA and RA. That is clearly not the case here, as Defendant specifically disputes whether Plaintiff's patients suffered from a disability. Further, as the Court noted in its previous decision on Defendant's Motion for Judgment on the Pleadings, the Third Circuit has not yet found that drug addiction constitutes a per se disability under the ADA and RA.[18] *RHJ I*, 754 F.Supp.2d at 755. Accordingly, for purpose of this decision, for which a complete factual record has been developed, the Court also declines to make such a finding. Instead, a fact-based inquiry, based solely on the evidence presented at trial, is required.

[18] To be sure, in its decision denying the City's Motion for Judgment on the Pleadings, the Court found, in light of the pleading requirements set forth by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that it was plausible that opioid addiction of the kind suffered by RHJ's patients constituted a disability *per se*, thus qualifying RHJ as having an association with disabled persons pursuant to the ADA and the RA. *RHJ I*, 754 F.Supp.2d at 761-2. However, as Defendant rightly notes, this finding was solely for the purpose of determining the merits of that motion, and *not* whether a standing argument could survive *at trial*. Doc. No. 106 at 10-11.

Both the ADA and the RA prohibit discrimination against qualified individuals with disabilities and their exclusion from certain services, programs, and activities. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).[19] In addition, the ADA's implementing regulation provides for third party standing by prohibiting the exclusion or denial from services, programs, or activities to an individual or entity known to have a relationship or association with another disabled individual. 28 C.F.R. § 35.130(g). As the Third Circuit has explained, "the ADA simply expands the Rehabilitation Act's prohibitions against discrimination into the private sector", and the judicial standards of the two Acts have been harmonized. *New Directions*, 490 F.3d at 301-2. Accordingly, we will review the issue of RHJ's standing under these two Acts in tandem.

As this Court previously noted in *RHJ I*, to establish standing under the ADA and RA, Plaintiff must demonstrate that the party with whom Plaintiff was associated was "disabled" as defined by the statute. As Section 12102 of the ADA explains, a person may be considered disabled if he or she 1) has a physical or mental impairment that substantially limits one or more life activities; 2) has a record of such an impairment; or 3) is being regarded as having such an impairment. 42 U.S.C. § 12102. In both its Proposed Findings and Brief in Response, RHJ claims that it has fulfilled the requirements for each of these definitions, and given its association with such individuals, has cleared the standing bar. In contrast, Defendant argues that Plaintiff has not introduced sufficient evidence as to any of these definitions, and therefore Plaintiff's standing argument must fail. The Court will address each of these arguments in turn, but first notes that, regarding the evidentiary record, Plaintiff did very little to explain to the Court

[19] The ADA mandates that "... no qualified person with a disability shall, by reason of such disability, be excluded from participation or be denied benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. The RA provides that "[n]o otherwise qualified person with a disability... shall solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

specifically how drug addiction is viewed within the context of the statute. With this in mind, the Court will review the evidence produced by Plaintiff to the extent it is relevant to ADA and RA standing.

1. Impairment that substantially limits major life activity

Plaintiff first argues that because drug addiction may be considered as an impairment under the ADA, its patients should be considered as disabled because they are severely opiate-addicted to the point that it impacts major life activities. Doc. No. 104 at 49. Major life activities may include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Plaintiff points to the testimony of Kathy Jones, who provided both general information about RHJ's patients, as well as her own insight as to her experiences in a previous marriage to a veteran suffering from drug addiction.[20] Plaintiff further notes that its patients must have a history of opioid addiction for a year before being admitted to its clinics. However, as Defendant rightly argues, any assessment of whether a disability substantially limits a major life activity must be done as an *individualized* inquiry, and is therefore fact-specific.[21] *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555, 566 (1999) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). Because RHJ has not provided the testimony of any of its patients, and has not furnished expert testimony to discuss the effects of

[20] RHJ also cites two additional sources, GUIDELINES FOR THE ACCREDITATION OF OPIOID TREATMENT PROGRAMS, and THE EFFECTIVENESS OF METHADONE MAINTENANCE TREATMENT. Doc. No. 104 at 50-1. However, neither of these sources was entered into evidence, and they will not be considered here.

[21] This need for this fact-specific inquiry was made clear by the district court in the *New Directions* case. As the court explained, under the ADA and RA, drug addicts may only be considered "disabled" if they are not "engaged in the illegal use of drugs" when the third party plaintiff "acts on the basis of [the plaintiffs' prior drug addiction]." *New Directions Treatment Services v. City of Reading*, 415 F.Supp.2d 501, 513-4 (E.D.Pa. 2005), overruled on other grounds by *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007). Of course, the only way a patient's drug use and/or addiction status can be ascertained is through individualized testimony or evidence.

opioid addiction generally, Defendant argues that Plaintiff cannot prove that any of its patients suffered from an impairment that substantially limits a major life activity.

The Court agrees. As Plaintiff itself notes in its Proposed Findings, the substantial impairment inquiry "revolves around comparing the conditions, manner, or duration under which the average person in the general population can perform the major life activity at issue with those under which an impaired plaintiff must perform." Doc. No. 104 at 50 (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3d Cir. 1999). The Court certainly accepts on its face Kathy Jones' testimony that RHJ treats opioid-addicted patients, many or all of whom are impaired in some way by their addiction. However, without more specific information about the circumstances faced by RHJ's individual patients, no comparisons with an average person can be made, nor was any evidence provided about an average person's baseline functions to make such a comparison. And even Jones admitted that RHJ's patients are all faced with different circumstances in coping with their addictions. Doc. No. 93 at 142-4. Nor are the cases cited by Plaintiff in its Proposed Findings availing, as all three of those decisions were partially based on evidence pertaining to *specific* patients of other facilities. See Doc. No. 104 at 51-2. Accordingly, Plaintiff has not demonstrated that any of its patients had an impairment that substantially limits major life activities.

2. Record of impairment

Plaintiff's next argument is that its patients had a record of impairment sufficient to classify them as disabled under the ADA. As defined by the statute, such an impaired individual has "a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 28 C.F.R. § 35.104(3). The reason for this alternate definition of a disability is to ensure that those who "may at present have no incapacity

at all", but nevertheless have suffered from a substantial impairment in the past, are protected by the statute. *RHJ I*, 754 F.Supp.2d at 752. In support of its position, Plaintiff cites much of the aforementioned evidence relevant to the "substantial impairment" inquiry, and further affirms that RHJ "only admits the 'severely opiate addicted' who cannot function sufficiently in crucial phases of their lives", and that all of these patients must have been suffering from an addiction for at least one year before obtaining treatment from RHJ. Doc. No. 104 at 52. For its part, Defendant once again counters that Plaintiff has failed to develop a sufficient factual record for its assertion, and absent specific information about patients, cannot establish that they had a record of impairment.

As with the previous inquiry, the Court must evaluate whether RHJ's patients had a substantial impairment under the ADA. But here it must consider whether that impairment was present at some other time not giving rise to this suit. Because such an inquiry concerns the specific records and circumstances of patients, it must also be supported with individualized testimony as to how the impairment was experienced *by the patient*. However, as already noted above, Plaintiff failed to present such evidence at trial. Nor is Plaintiff's statement availing that its patients must have been suffering from addiction from one year to obtain treatment at one of RHJ's clinics, as the fact of addiction does not answer the question of the degree of an individual patient's *impairment*. Accordingly, the Court finds that Plaintiff has not demonstrated that its patients had a record of impairment under the ADA or the RA.

3. Regarded as having an impairment

Finally, Plaintiff argues that its patients may be considered disabled under the ADA because they were regarded by DuBois city officials as having an impairment. To qualify under this section of the statute, an individual must a) have a physical or mental impairment that does

not substantially limit major life activities but that is treated by a public entity as constituting such a limitation; b) have a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or c) is treated by a public entity as having such an impairment. 28 C.F.R. § 35.104(4). In contrast to the particularized individual inquiry required by the first two definitions of disability under the ADA, the "regarded as" test requires the Court to examine not the actual disabilities of the impaired person, but rather "the reactions and perceptions of the persons interacting or working with him." *Buskirk v. Apollo Metals*, 307 F.3d 160, 167 (3d Cir. 2002) (citing *Kelly v. Drexel Univ.*, 94 F.3d 102, 108-9 (3d Cir. 1996). Plaintiff asserts that, given the mentalities of city officials and residents toward RHJ's clinic and drug addicts in general, its patients were regarded as having an impairment under the statute. In response, Defendant argues that no such generalized mentalities existed, and that even if they did, they had no bearing on whether Plaintiff's patients were in fact substantially impaired.

The Court has already reviewed the comments made by Mayor Suplizio, city officials, and other residents during the time period when RHJ was attempting to open and operate its methadone facility. The record is certainly sufficient to suggest that some may have been prejudiced against Plaintiff, given its association with recovering drug addicts. However, in light of the plain language provided by the ADA's implementing regulation, this is not sufficient on its own to satisfy the "regarded as" definition of disability. As Defendant rightly notes, there is no evidence in the record whatsoever as to whether any city officials or residents had any notions concerning the effect of drug addiction on RHJ patients' lives. Doc. No. 106 at 17. Nor was there any suggestion by Plaintiff that these perceptions limited patients' major life activities, except possibly the fact that some patients had to find alternate means of securing treatment after

the City shut down the clinic in October 2006. Finally, there was no testimony as to how city representatives or officials "treated" RHJ's patients as having an impairment, as there was no indication of any direct interaction between those respective parties. Absent this, Plaintiff has not demonstrated that its patients were regarded as having an impairment as defined by the ADA.

Accordingly, because Plaintiff has not satisfied any of the definitions set forth for a disability, it does not have standing to bring claims through its association with its patients under the ADA or the RA.

4. Whether a different standard applies as to Plaintiff's claims for damages

Plaintiff claims that even if it has not fulfilled standing requirements for equitable relief through its association with its patients, it still has standing to seek money damages on its own behalf. In doing so, it asserts that the Court must employ a bifurcated analysis and apply a different standard to the standing question for its claim for money damages. Essentially, Plaintiff argues that because these damages claims do not rely on RHJ's association with patients, the Court need not conduct the same inquiry regarding RHJ's patients as was necessary for equitable claims under the ADA and RA. For support, Plaintiff cites to this Court's decision in *RHJ I*, which granted such standing by stating that "resolution of the standing inquiry for damages is relatively straightforward..." *RHJ I*, 754 F.Supp.2d at 762.

However, in allowing Plaintiff's damages claims to go forward, the Court in no way dismissed the importance of demonstrating that RHJ was associated with individuals with a disability. Rather, the Court found that under the ADA and RA, "[p]laintiff does not need to rely on any injuries to third parties." *Id.* This follows the Third Circuit's decision in *Addiction Specialists* that the operators of a methadone clinic had standing in their own right to bring damages claims, and did not need to rely on the *injuries* of third parties to do so. *Addiction*

Specialists, 411 F.3d at 407-8. However, as already noted, in *Addiction Specialists* the question of whether the plaintiff had an association with disabled individuals was never disputed, thus preventing the need for an inquiry as to whether those patients qualified as such under the ADA and RA. In *RHJ I*, because the Court had already provisionally found, *for purpose of that motion alone*, that such an association existed, it followed the *Addiction Specialists* precedent and found standing as to Plaintiff's damages claims. As the ADA's implementing regulations set forth, public entities may not discriminate against an individual or entity "*because of the known disability of an individual* with whom the individual or entity is known to have *a relationship or association*." 28 C.F.R. 35.130(g) (emphasis added). Therefore, Plaintiff must still demonstrate that such patients qualified as having a disability under the ADA and RA – which, as demonstrated by this Court's review of the evidentiary record, it has not. Accordingly, Plaintiff's standing argument also fails as to money damages under the ADA and RA.

The Court emphasizes that, in finding that Plaintiff does not have standing to bring this suit under the ADA or RA, it makes no judgment whatsoever as to the challenges facing opioid addicts, or any other drug addicts for that matter. Those diligently working to end their own addictions and rebuild their lives are to be commended and welcomed back into society, and Congress enacted the ADA and RA to facilitate those goals. To be sure, there is some evidence in the record to suggest that this mentality was not prevalent within the City's government during the time relevant to suit. But this is not enough to establish, under any of the three aforementioned definitions for "disability" under the ADA and RA, that RHJ's patients qualified under the statute. Someday, a higher court may definitively find that opioid addiction constitutes a *per se* disability, and grant standing under the respective Acts without the need for the individualized inquiry that was lacking in this case. Until then, absent the evidence which

Plaintiff was required to introduce at trial, the Court is compelled to find that no standing exists for Plaintiff as to the ADA and RA. By so finding, the Court need not consider the merits of Plaintiff's claims under the ADA and RA relating to Defendant's enforcement of Section 621 and its enactment of Ordinance 1720.

B. Plaintiff's Claims Pertaining to Section 621 (42 U.S.C. § 1983)

In its Complaint, Plaintiff brought claims under the 14th Amendment for Defendant's alleged violation of its Equal Protection and Substantive Due Process rights through the application of Section 621. Surprisingly, Plaintiff has made no arguments as to them in its Proposed Findings.[22] However, the Court will not construe this as abandonment of these claims; rather, it will consider both of them in light of the facts made available at trial.

1. Section 621 and the Equal Protection Clause

Plaintiff has alleged that Defendant violated its equal protection rights by denying RHJ a permit under Section 621. In its discussion of whether Ordinance 1720 violated its equal protection rights, Plaintiff asserts that it qualifies under the Supreme Court's "class of one" category for those asserting land use and zoning challenges under the Equal Protection Clause. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989). Although Plaintiff made no specific "class of one" argument as to its equal protection claim under Section 621, the Court will apply it here. To succeed under a "class of one" theory, Plaintiff must demonstrate that 1) Defendant treated it differently from others similarly situated, 2) Defendant did so intentionally, and 3) there was no rational basis for the difference in treatment. *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d

[22] Plaintiff does maintain in its Proposed Findings that Section 621 violated the ADA and RA, both facially and as applied to RHJ. To the extent that any of the arguments in this section of Plaintiff's submission are relevant to its equal protection and substantive due process claims, the Court will consider them here.

Cir. 2006). Rational basis review is appropriate because Plaintiff brings its equal protection challenge on the basis of a disability, namely drug addiction.[23] *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 136-7 (3d Cir. 2002). Regardless of whether Plaintiff's challenge concerns the facial validity of Section 621 or its application, it "bears the burden of negating all conceivable rational justifications for the allegedly discriminatory action or statute." *New Directions*, 490 F.3d at 302 (citing *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

Plaintiff's equal protection claim against Defendant regarding Section 621 pertains to how the City applied it to RHJ in denying it permission to open its methadone clinic.[24] In its argument regarding Ordinance 1720 and the Equal Protection Clause, Plaintiff compares itself to other "medical facilities", and the Court adopts that comparison for purpose of reviewing Plaintiff's claim based on Section 621. Doc. No. 104 at 67. Plaintiff argues that by denying RHJ a Certificate of Use, Defendant subjected it to a different standard than other medical facilities, and this decision was made by Defendant with animus toward Plaintiff. Id. at 67-8. Finally, Plaintiff maintains that none of the City's proffered reasons for rejection of its application – which included parking space and traffic – were legitimate, and that the sole reason for the City's action against RHJ was the animus felt by city officials regarding RHJ officials and RHJ's

[23] Plaintiff would have the Court employ a heightened rational basis review, which involves a "more searching inquiry" regarding actions taken against discrete and insular minorities. Doc. No. 104 at 68. The Third Circuit did not apply such a test for drug addicts or drug treatment clinics in *New Directions*, and the Court declines to do so here.

[24] Plaintiff has also argued that Section 621 is facially invalid under the 14th Amendment. However, as Defendant notes, no evidence was presented from the legislative record. Absent evidence refuting any rational basis that may have existed for passage of Section 621, the Court cannot find it facially unconstitutional under a substantive due process theory or the Equal Protection Clause. In *New Directions*, after considering the legislative record, the district court determined that Section 621 did not facially violate the Equal Protection Clause. *New Directions Treatment Services v. City of Reading*, 415 F.Supp.2d 501, 510-2 (E.D.Pa. 2005). On appeal, the Third Circuit declined to reach the Equal Protection question after finding Section 621 invalid under the ADA and RA. *New Directions*, 490 F.3d at 307-8.

patients. For its part, Defendant maintains that parking and traffic concerns were legitimate reasons to deny RHJ a Certificate of Use, and that because Plaintiff cannot refute these reasons, its cannot show that the City's enforcement of Section 621 constituted a violation of its equal protection rights. Doc. No. 102 at 21.

The Court heard very little evidence at trial as to how the City treated RHJ differently from other medical facilities in its application of 621. However, even assuming that this was the case, and further granting that there is some evidence that city officials manifested a degree of animus toward methadone clinics, Plaintiff's equal protection claim cannot survive rational basis review. At the time it acted against RHJ's application, the City was operating pursuant to a then-lawful statute. RHJ was subjected to a public hearing because it had already stipulated in state court that it was locating within 500 feet of a public park. Regarding the hearing itself, although animus toward RHJ may certainly have been a motivating factor in the City's denial of a Certificate of Use, Plaintiff has not fulfilled its burden of negating all other reasons proffered by the City to justify that denial. The Court has already found that, based on the testimony of city representatives, there were legitimate concerns by city officials concerning traffic and parking during the evaluation of RHJ's application. Other courts have found such concerns to be rational justifications of a municipality's actions when subjected to an equal protection challenge. *New Directions Treatment Services v. City of Reading*, 415 F.Supp.2d 501, 509-10 (E.D.Pa. 2005), overruled on other grounds by *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007). Accordingly, Plaintiff's equal protection claim as it pertains to Section 621 must fail.

2. Section 621 and Substantive Due Process

In addition to its equal protection claim, Plaintiff also argues that Defendant's application of Section 621 violated Plaintiff's substantive due process rights. Because the City's action in denying a Certificate of Use constituted executive rather than legislative action, Plaintiff must prove that City officials engaged in conduct that "shocks the conscience." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington,* 316 F.3d 392, 399-400 (3d Cir. 2003). This standard will be satisfied for "only the most egregious official conduct." *Eichenlaub v. Twp. of Indiana,* 385 F.3d 274, 285 (3d Cir. 2004). Governmental conduct that is purposefully injurious is most likely to be indicative of conduct that "shocks the conscience." *Evans v. Sec'y Pa. Dep't of Corrs.,* 645 F.3d 650, 660 (3d Cir. 2011). As the Third Circuit has noted, whether the plaintiff has met this standard is determined by a fact-driven inquiry, and "[t]he exact degree of wrongfulness necessary to reach the conscience-shocking' level depends upon the circumstances of a particular case." *Miller v. City of Philadelphia,* 174 F.3d 368, 375 (3d Cir. 1999). In the zoning and land use context, the "shocks-the-conscience" standard is "designed to avoid converting federal courts into super zoning tribunals." *Eichenlaub,* 385 F.3d at 285. This is because "[l]and-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." *United Artists*, 316 F.3d at 402.

The Court finds that Plaintiff has not met this elevated standard. Once again, while some city representatives may have been ill-disposed toward Plaintiff's proposed methadone clinics and/or its clients, none of the actions taken by the City pursuant to Section 621 were so blatantly injurious as to suggest a violation of Plaintiff's substantive due process rights. Pursuant to a then-lawful statute, the City properly a) obtained an injunction against the operation of RHJ's

clinic when it learned it was within 500 feet of a public park; 2) scheduled a public hearing to consider RHJ's application for a Certificate of Use, as set forth in Section 621; 3) allowed for statements from RHJ's representatives, along with comments and questions from the public; and 4) denied RHJ's application under Section 621, based on at least two legitimate areas of concern – traffic and parking. Given the Third Circuit's reluctance for courts to involve themselves in such fact-specific zoning decisions, as set forth in *Eichenlaub*, the Court would be overreaching to find a violation of Plaintiff's rights here. Therefore, Plaintiff's substantive due process claim pertaining to Defendant's application of Section 621 fails.

C. Plainitff's claims pertaining to Ordinance 1720 (42 U.S.C. § 1983)

Finally, Plaintiff has brought claims relating to its equal protection and substantive due process rights under the 14th Amendment for Defendant's actions in passing Ordinance 1720, which specifically prohibited methadone and drug treatment clinics from the Transitional and Commercial-Highway Zoning Districts, and relegated them to the O-1 Office District. Because Ordinance 1720 was passed by the DuBois City Council, and was never applied by that body through an executive action, Plaintiff's challenge goes to the ordinance's facial validity. The Court addresses each of these constitutional claims in turn,

1. Ordinance 1720 and the Equal Protection Clause

Plaintiff has alleged that Defendant violated its Equal Protection Rights by passing Ordinance 1720. As already discussed for Section 621, Plaintiff asserts that it qualifies under the "class of one" category. To succeed on this claim, Plaintiff must demonstrate that 1) Defendant treated it differently from others similarly situated, 2) Defendant did so intentionally, and 3) there was no rational basis for the difference in treatment. Once again, Plaintiff bears the burden of negating all conceivable rational justifications for the allegedly discriminatory action or

statute. Plaintiff argues that 1) Ordinance 1720 treated it differently from other "medical facilities" by preventing it from opening in zoning areas in which other medical facilities were allowed to operate; 2) the City's actions were intentional, as demonstrated by the animus manifested by city officials in their dealings with RHJ representatives; and 3) there was no rational basis for the City's actions, as any proffered reasons were pretextual.[25] Doc. No. 104 at 67-9. Defendant counters that 1) Ordinance 1720 does not treat methadone treatment facilities differently from other non-medical offices that render medical services; 2) there was no animus or intent on the City's part; and 3) the City had multiple rational bases for its actions, mostly stemming from its desire to facilitate the revitalization and expansion of DRMC. Doc. No. 102 at 29-31; Doc. No. 106 at 18-28. Defendant insists that, in excluding methadone and drug treatment clinics from certain areas of the City, it was trying to "specifically include and encourage them" within the O-1 Office District. Doc. No. 102 at 32.

As discussed above, a close reading of Ordinance 1720 reveals that it specifically excludes methadone clinics and other drug treatment clinics from large areas of the City, and relegates them to the O-1 Office District. Ex. 22. Besides methadone and drug treatment clinics, no other uses were specifically prohibited in the Transitional District or Commercial-Highway District by Ordinance 1720. Id. Defendant attempts to explain this discrepancy by suggesting that Ordinance 1720 specifically distinguished between medical *offices* and medical *facilities*, with the former allowed in the Transitional and Commercial-Highway Zoning Districts, and the latter relegated to the O-1 Office District. Therefore, Defendant suggests, "Ordinance 1720, alone and when read in conjunction with the City's zoning code, treats medical *offices* different than medical *facilities* – it does not, however, treat one kind of medical facility different than

[25] Once again, Plaintiff would have the Court employ a heightened rational basis review, which involves a "more searching inquiry" regarding actions taken against discrete and insular minorities. Just as we indicated for Plaintiff's equal protection challenge to Section 621, we decline to do so here.

another." Doc. No. 106 at 27. In other words, because methadone and drug clinics were dealt with in the same way as all other medical *facilities*, there was no disparate treatment under the Equal Protection Clause.

However, the plain language of the ordinance refutes this semantic distinction. Section 1 specifically states that the following uses are allowed in the Transitional District: "*Offices* for the conduct of professional services such as legal, medical, psychological, therapy, dental, orthodontic, real estate, engineering and architectural *with the exception of* drug treatment clinics of any kind which shall be prohibited" (emphasis added). The phrase "with the exception of" indicates that drug treatment clinics *are* considered as medical *offices*, but are distinct from the remainder of uses within that group, which are allowed in the Transitional District. Similarly, Section 3 states that the following uses are allowed in the Commercial-Highway Zoning District: "*Offices* for the conduct of professional services such as legal, medical, psychological, therapy, dental, orthodontic, real estate, engineering and architectural *with the exception of* methadone treatment facilities and drug treatment facilities of any kind which shall be prohibited..." (emphasis added). Once again, the phrase "with the exception of" indicates that methadone treatment facilities and drug treatment facilities *are* considered as medical *offices*, but are distinct from the remainder of uses within that group, which are allowed in the Commercial-Highway District. Nor is Defendant's argument availing that a primary purpose of the O-1 Office District is to accommodate "medical facilities." The only medically-related uses labeled as "facilities" in Section 4 of the ordinance are for "[d]rug treatment clinics or facilities including methadone treatment facilities or clinics" and "[p]ain treatment facility or clinic." In short, Ordinance 1720 makes no neat or meaningful distinction between "medical offices" and "medical facilities", as Defendant would have the Court believe. Clearly, RHJ provides medical services to its clients.

As such, on the plain face of the ordinance, it was treated differently from others similarly situated.

With this established, the next question is whether, by passing the portions of Ordinance 1720 affecting drug treatment clinics, city officials intended to treat them differently from other medical offices and/or facilities. On this point, the Court finds that the plain language of the ordinance – which specifically prohibited methadone and drug treatment facilities, and no other medical uses, from the Transitional and Commercial-Highway Zoning Districts – speaks for itself and demonstrates the City's intention to do precisely that. However, even were this insufficient to show intent, there was additional evidence that city officials simply wanted an easy solution to the problem presented by the *New Directions* decision. As already noted, the Court found as unconvincing city representatives' dismissal of RHJ as a motivating factor for the final text of the ordinance. Even though city witnesses consistently testified that Ordinance 1720 was not meant to exclude a methadone facility, they could not explain why the specific language of the ordinance had that precise effect. Doc. No. 95 at 10, 120; Doc. No. 96 at 167. Nor could they explain why numerous other medical facilities were allowed in zoning districts from which methadone clinics were excluded. Doc. No. 95 at 12; Doc. No. 96 at 170. The City's attempt to explain Ordinance 1720's drug treatment clinic-specific provisions as either a) necessary in light of the *New Directions* decision or b) an attempt to make RHJ feel "welcome" are completely implausible and stretch the bounds of credibility, as has been set forth above. Accordingly, the Court finds that the disparate treatment of methadone and drug treatment clinics, which is evident in Ordinance 1720, was intended by the City when the ordinance was passed by City Council.

Finally, Plaintiff must demonstrate that the City had no other rational basis for its disparate treatment of methadone and drug treatment clinics. Here, Defendant attempts to execute a sleight-of-hand regarding the proper rational basis inquiry. Instead of directing the Court to consider its motives when specifically prohibiting methadone and drug treatment clinics in the Transitional and Commercial-Highway Districts, Defendant instead insists that the Court should look at *the entire statute* and consider all of the rationales that could have potentially influenced its final passage, including the City's desire to create a medical campus near the local regional hospital. This larger goal included efforts to improve traffic flow, allow for additional uses by the hospital and its affiliates in certain areas of the City, and ensure the continued growth and expansion of the hospital. Doc. No. 102 at 31. No one disputes the City's ability to uses its police power to pass zoning regulations accomplishing those ends, which are all legitimate interests. What is in dispute is whether the City's *disparate treatment of RHJ and other drug treatment clinics* as medical facilities had any rational basis whatsoever. See *Board of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 366-67 (2001) (holding that under the Equal Protection Clause, the sovereign may base its actions on an individual's disability as long as there is a "rational relationship between *the disparity of treatment* and some legitimate governmental purpose" (emphasis added)). As Plaintiff rightly notes, "[w]hether Ordinance 1720 was somehow related to creating a 'centralize[d] campus,' addressing 'congestion,' or encouraging methadone treatment facilities is completely irrelevant to the equal protection inquiry because it in no way justifies treating methadone clinics dissimilarly from other medical facilities." Doc. No. 105 at 10-11.

Given this standard, the Court finds that Defendant has not articulated any rational basis for the aforementioned provisions in Ordinance 1720. None of Defendant's expressed reasons

for Ordinance 1720 – creating and expanding a medical campus, managing traffic flow and parking, or moving all medical facilities to the O-1 Office District – could have possibly been the rationale for specifically excluding methadone and drug treatment clinics from the Transitional and Commercial-Highway Zoning Districts. Neither city officials nor the President of DRMC could provide a clear answer as to how the hospital expansion project was specifically benefitted by excluding drug treatment clinics from these areas. Doc. No. 98 at 142. Nor could city officials explain how methadone or drug treatment clinics caused any particular traffic or parking problems. Doc. No. 95 at 124; Doc. No. 98 at 67. And if the City was fixated on consolidating medical functions to one zoning area, there were presumably other medical offices or facilities that could have been relegated to the O-1 Office District, as methadone or drug treatment clinics were through Ordinance 1720.

Faced with the Third Circuit's decision in *New Directions*, which could have overturned City Council's previous denial of a Certificate of Use to RHJ under Section 621, the City drafted an ordinance that was "too clever by half". City officials likely believed, and have continued to argue, that cloaking such a discriminatory ban on methadone and drug treatment clinics within a larger zoning ordinance would shield it from constitutional scrutiny. The Court finds these efforts to be futile. Accordingly, Ordinance 1720 is facially unconstitutional under the Equal Protection Clause and must be struck down. Further, the Court finds that once enacted, Ordinance 1720 effectively prevented Plaintiff from opening a methadone clinic in the City's Transitional and Commercial-Highway Zoning Districts.

2. Ordinance 1720 and Substantive Due Process

In challenging Ordinance 1720, Plaintiff also alleges a violation of its substantive due process rights. Having found Ordinance 1720 unconstitutional under the Equal Protection

Clause, the Court need not address this question, as Plaintiff's substantive due process dispute concerns the language in the ordinance enabling disparate treatment of methadone and drug treatment clinics, as compared to all other accepted uses within the City. Plaintiff challenges no additional sections of the ordinance as violating substantive due process. Because the Equal Protection Clause provides an explicit textual source of constitutional protection against this sort of governmental conduct, it must be the guide for analyzing this claim.[26] *Graham v. Connor*, 490 U.S. 386, 395 (1989). Had this legislative action affected all persons or entities equally – which it did not – substantive due process analysis would apply. See *Berg v. Evan*, 979 F.Supp. 330 (E.D.Pa. 1997) ("Substantive due process analysis is appropriate when state action burdens all persons equally when they exercise a specific right... When state action distinguishes between similarly situated persons to determine who may and may not exercise a right, the court's inquiry is guided by the principles applicable to equal protection analysis").

D. Damages

Because Plaintiff has prevailed on an equal protection claim, it may receive compensatory damages under 42 U.S.C. § 1983. *Addiction Specialists*, 411 F.3d at 407. These damages may include lost profits, out-of-pocket losses, and other intangible injuries. *Id.*; *Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253, 265 (3d Cir. 1995). Under 42 U.S.C. § 1988,

[26] Were substantive due process analysis to apply, the Court would also find Ordinance 1720 as unconstitutional under that analysis. As noted in *RHJ I*, the City's passage of Ordinance 1720 was a legislative act for purposes of substantive due process analysis. *RHJ I*, 754 F.Supp.2d at 768; see also *Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3rd Cir. 2006). Consequently, it can only withstand a substantive due process challenge if the government "'identifies the legitimate state interest that the legislature could rationally conclude was served by the statute." *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000). Because Ordinance 1720 is a legislative act, Plaintiff need not meet the "shocks the conscience test." *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (2006). The Third Circuit has indicated that "the analysis under substantive due process is essentially the same as an equal protection analysis, i.e., is there a rational basis underlying the legislation in question." *Cospito v. Heckler*, 742 F.2d 72, 84 (3d Cir. 1984). As already set forth, the City's articulated reasons could not pass a rational basis test.

a prevailing party in a § 1983 claim may recover reasonable attorney's fees. 42 U.S.C. § 1988(b). At the discretion of the district court, a prevailing party may also be awarded prejudgment interest for actions under § 1983. *Hayduk v. City of Johnstown*, 580 F.Supp.2d 429, 482 n. 45 (W.D.Pa. 2008). The prejudgment interest rate is not limited by any statutory rate, but is within the discretion of the district court. *Air Vent, Inc. v. Vent Right Corp.*, 2011 WL 2117014 at *1 (W.D.Pa. May 24, 2011). The Court may also determine whether the interest should be simple or compounded. *Id.*

The Court has found that Defendant violated Plaintiff's equal protection rights through the passage of Ordinance 1720. However, Plaintiff did not have standing to raise its ADA and RA claims, and there is insufficient evidence to show that Defendant violated Plaintiff's constitutional rights for its actions pursuant to Section 621. Therefore, with the exception of Plaintiff's out-of-pocket/start-up costs at the 994 Beaver Drive location, the Court will not award damages for any of the City's actions prior to passage of Ordinance 1720 on November 27, 2007. Plaintiff is eligible to be compensated for its out-of-pocket/start-up costs prior to October 27, 2006, when the City obtained a preliminary injunction against the clinic's operation, because the City's later actions on November 27, 2007 prevented Plaintiff from realizing a return on that initial investment of capital. Accordingly, the Court finds that Plaintiff may recover $80,094.85 for costs expended prior to October 27, 2006. Plaintiff will also collect prejudgment interest on this amount, at the rate of six percent per annum, compounded monthly, with accrual commencing November 27, 2007 through the day of this Judgment.[27] This results in $26,137.89 in prejudgment interest, with total damages for pre-October 27, 2006 out-of-pocket costs of $106,232.74.

[27] Six percent is the Pennsylvania statutory rate, which other district courts have viewed as reasonable. *Air Vent, Inc. v. Vent Right Corp.*, 2011 WL 2117014 at *2 (W.D.Pa. May 24, 2011).

With regard to damages incurred after November 27, 2007, Plaintiff asks both for out-of-pocket costs and lost profits. The extent to which these costs are awarded depends on whether Plaintiff mitigated its damages after the City passed Ordinance 1720. A defendant alleging that a plaintiff failed to mitigate its damages must show 1) what reasonable action the plaintiff ought to have taken; 2) that those actions would have reduced the damages; and 3) the amount by which the damages would have been reduced. *Prusky v. ReliaStar Life Ins. Co.*, 532 F.3d 252, 258-9 (3d Cir. 2008). In its Proposed Findings, Defendant argues that Plaintiff failed to mitigate its damages by 1) declining to appeal the enactment of Ordinance 1720; 2) refusing to terminate its lease at 994 Beaver Drive when Joe Varacallo, offered it the opportunity to do so; 3) and making inadequate efforts to find an alternate location for its methadone clinic in and around the City of DuBois. Doc. No. 102 at 48. Plaintiff counters that its efforts to locate an alternate site in the City of DuBois and the surrounding area were reasonable. Doc. No. 104 at 76-7; Doc. No. 105 at 26-7.

The issue of mitigation is particularly important in this case because Plaintiff claims that it is entitled to over two million dollars in lost profits as a result of the City's actions. To that end, both sides presented expert testimony as to the clinic's potential realization of such profits.[28] A detailed analysis of the conflicts between the respective experts is unnecessary, as the Court finds that after November 27, 2007, Plaintiff had the opportunity to mitigate its damages by seeking an alternate location in the O-1 Office District, where, as the former President of DRMC

[28] The Court heard testimony from Plaintiff's expert William G. Krieger, a certified public accountant employed by Gleason and Associates in Pittsburgh, PA. Mr. Krieger earned a bachelor of science in accounting from Pennsylvania State University and a master's degree in business administration from the University of Pittsburgh. Mr. Krieger has almost thirty years of experience as an accountant. Doc. No. 97 at 2-4. Defendant presented the expert testimony of Brian Webster, a certified public accountant and senior manager employed by Alpern Rosenthal in Pittsburgh, PA. Mr. Webster earned a bachelor's degree in accounting from Pennsylvania State University and has over 15 years of experience as an accountant. Id. at 154-5. In general, the Court found the testimony of both expert witnesses to be reliable and persuasive.

testified, there was space available for medical facilities like the one Plaintiff sought to open and operate. Plaintiff argues that locating in the O-1 Office District was not an option, as it was the belief of RHJ's representatives that the hospital wanted nothing to do with RHJ or its methadone treatment clinic. However, the Court has already noted that it found the evidence for this allegation as insufficient. Simply put, the Court was not convinced that after the passage of Ordinance 1720, Plaintiff made a thorough effort to ascertain that leasing property from or near DRMC was a possibility. Such action would have been reasonable under the circumstances. Further, as Plaintiff's own witnesses testified, there was nothing that made 994 Beaver Drive so unique a location in its ability to generate profits for the clinic. Kathy Jones also admitted that a location near the hospital would have been an attractive possibility for Plaintiff's business. Therefore, the Court finds that had Plaintiff leased space in the O-1 Office District after the passage of Ordinance 1720, the clinic had as much potential to realize success as it would have at 994 Beaver Drive. With the exception of an initial transition period after November 27, 2007 – during which Plaintiff would have been attempting to secure a location in the O-1 Office District and moving operation of its clinic to that location – Plaintiff cannot recover, as it failed to mitigate these damages. In light of the real opportunity to open a clinic in the O-1 Office District, any calculation of damages incurred for failure to operate at 994 Beaver Drive would be speculative.

Regarding the interim period beginning November 27, 2007, the Court further finds that approximately six months would have been a reasonable period for Plaintiff to secure a new location and re-open its methadone treatment clinic in the O-1 Office District. Accordingly, Plaintiff may recover all of its out-of-pocket costs, including rent paid on its lease at 994 Beaver

Drive, incurred from November 27, 2007 through May 31, 2008, for a total of $20,650.46.[29] The Court will award prejudgment interest on this amount, starting May 31, 2008 and continuing through the day of this Judgment, at the rate of six percent per annum, compounded monthly, for a total of $5,918.44. Therefore, Plaintiff's out-of-pocket damages, plus prejudgment interest, for the period after the passage of Ordinance 1720 are $26,568.90. Regarding lost profits during this period, based on expert testimony, the Court finds that Plaintiff's methadone treatment clinic would not have realized a profit in what would have essentially been its first six months of operation. Accordingly, the Court declines to award Plaintiff lost profits for this time period.

Plaintiff's combined damages for Defendant's violation of its equal protection rights are $132,801.64. Pursuant to 42 U.S.C. § 1988, the Court further finds that Plaintiff is entitled to reasonable attorney's fees as to its equal protection claim pertaining to the passage of Ordinance 1720. Plaintiff is hereby directed to submit a Motion for Attorney's Fees and Expenses and Brief in Support no later than **September 5, 2012**. Defendant's response is due no later than **September 25, 2012**.

V. CONCLUSION

Through its passage of Ordinance 1720 on November 27, 2007, Defendant City of DuBois violated Plaintiff RHJ Medical Center, Inc.'s equal protection rights. Accordingly, the Court declares Ordinance 1720 unconstitutional under the Equal Protection Clause, and the ordinance is null and void, and has no effect. As a result of Defendant's actions, Plaintiff has been damaged in the amount of $132,801.64. Plaintiff is entitled to collect this amount from

[29] Defendant rightfully notes that Plaintiff had an opportunity to terminate the lease at 994 Beaver Drive as early as November of 2007, but the Court finds that it would have been reasonable for Plaintiff to maintain the lease on this location and store any office equipment and furniture there while it sought a new location in the O-1 Office District.

Defendant, plus reasonable attorney's fees for its successful equal protection claim. An appropriate order follows.