United States Court of Appeals for the Third Circuit

Case No: 12-3641

RHJ Medical Center, Inc.,

Plaintiff-Appellant,

v.

City of DuBois,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Pennsylvania, Case No. 09-131

Brief of Appellant RHJ Medical Center, Inc. and Volume I of the Appendix (A0001 –A0062)

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CORPORATE DISCLOSURE STATEMENT

Appellant RHJ Medical Center, Inc. has no parent corporations and there is no publicly traded corporation which owns more than 10% of its stock.

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STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a) as Appellant's claims arose from the United States Constitution and the laws of the United States. (A0009). The District Court entered a Final Judgment on August 17, 2012, which Appellant timely appealed on September 17, 2012. (A0002). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that Appellant RHJ Medical Center, Inc. ("RHJ"), a methadone clinic, lacked standing under the Americans with Disabilities Act and the Rehabilitation Act because its methadone patients were not "regarded as" disabled by the City of DuBois when the City improperly prevented RHJ from locating a methadone clinic at its desired location based upon the myths, stereotypes, and fears of RHJ's methadone patients?

This issue was raised below in RHJ's Proposed Findings of Fact and Conclusions of Law and in RHJ's Reply in Further Support of its Proposed Findings of Fact and Conclusions of Law. (A1850-A1852; A1885). The District Court ruled on this issue in its Findings of Fact and Conclusions of Law and accompanying Order of Court. (A0042-A0044).

2. Whether the District Court erred in finding that the City of DuBois satisfied the heavy burden of proof associated with its failure to mitigate affirmative defense by requiring RHJ to: (i) take *every* reasonable action in pursuit of mitigation; (ii) accede to the unconstitutional zoning demands of the City of DuBois; (iii) mitigate losses where the City of DuBois impaired RHJ's ability to avoid them; and (iv) locate in a dissimilar property?

This issue was raised below in RHJ's Proposed Findings of Fact and Conclusions of Law and in RHJ's Reply in Further Support of its Proposed Findings of Fact and Conclusions of Law. (A1839-A1843; A1873-A1874; A1903-A1904). The District Court ruled on this issue in its Findings of Fact and Conclusions of Law and accompanying Order of Court. (A0035-A0036; A0058-A0059).

STATEMENT OF RELATED CASE

This case has not previously been before this Court. RHJ is unaware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency, state or federal.

STATEMENT OF THE CASE

Appellant RHJ Medical Center, Inc. ("RHJ"), a methadone treatment facility, brought this action against the City of DuBois ("the City") 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.

The City initially prevented RHJ from operating a new methadone treatment center at its desired location in DuBois pursuant to Section 621 of the Pennsylvania Municipalities Code. This Court struck down Section 621 under the ADA and the Rehabilitation Act in *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007).

Immediately after this Court invalidated Section 621, the City enacted an unconstitutional zoning measure, Ordinance 1720, that was specifically designed to prevent RHJ from operating at its desired location. As a result of the City's actions, RHJ sustained significant monetary losses and its patients were unable to obtain proper care. Consequently, RHJ commenced an action against the City seeking compensatory damages, lost profits, declaratory relief and reasonable attorney's fees. RHJ's lawsuit challenged both the City's original reliance on Section 621 and its later reliance on Ordinance 1720.

After a six-day bench trial and post-trial briefing, the District Court found that Ordinance 1720 violated the Equal Protection Clause of the United States Constitution because it served no rational purpose. Accordingly, the District Court awarded RHJ $132,801.64 for the costs it initially incurred in locating in DuBois and for the costs it incurred during the first six months that Ordinance 1720 was in effect. However, the District Court concluded that RHJ lacked standing under the ADA and the Rehabilitation Act to recover damages it suffered during the period the City prevented RHJ from operating pursuant to the invalid Section 621. In addition, the District Court held that RHJ could have mitigated its damages by locating in the area the City unconstitutionally zoned RHJ after the passage of Ordinance 1720. Thus, the District Court did not award RHJ any of the profits that RHJ would have realized had the City not violated its constitutional rights. RHJ has timely appealed the District Court's standing and mitigation findings. (A0002).

STATEMENT OF FACTS

This case concerns the all-too familiar tale of a methadone treatment center being zoned out of a community in need based upon the myths and fears associated with the individuals it is trying to treat. This appeal focuses on two discrete issues: (i) the legal effect of the City's stereotypical view of RHJ's patients under the ADA and the Rehabilitation Act for purposes of standing and (ii) the legal interpretation and application of mitigation principles to a party whose constitutional rights were violated by a discriminatory zoning ordinance.

RHJ Leases Property at 994 Beaver Drive in DuBois.

In 2006, RHJ, a family-owned methadone treatment center, decided to locate a new facility in DuBois after being informed by the Commonwealth of Pennsylvania that DuBois was an area of need. (A0189; A0322; A0009-A0010). In the attempt to secure a suitable property, RHJ contacted Joe Varacallo ("Varacallo"), a professional real estate developer, property manager, and commercial broker in the DuBois area. (A1033). For its treatment center, RHJ required a (i) stand-alone building of (ii) approximately 4,000-5,000 square feet (iii) that was not located near residences and that was (iv) for lease not purchase. (A0066; A0091; A0472; A0491; A0493; A1071-A1072; A1280-A1281).

The first property Varacallo suggested met three of RHJ's requirements but was located in a residential area. (A0010; A1037-A1038). RHJ rejected this

property because its early hours of operation preclude locating near residences. (A0472; A0010). Varacallo then showed RHJ an office property at 994 Beaver Drive, which was located in downtown DuBois in the Transitional District. (A1039-A1040; A0010). Beaver Drive was populated by medical facilities and other commercial properties. (A1039).

RHJ found 994 Beaver Drive to be an excellent location as it was the ideal size, accessible to a major highway, and was not located near any residences. (A0388; A0472; A0010). Accordingly, RHJ signed a ten-year lease at 994 Beaver Drive. (A0472-A473; A0010). RHJ then began preparations for opening. (A0330-A0333; A0360-A0361; A0013).

The Mayor's Radio Interview.

Before opening, RHJ learned that the City had a problem with it locating in DuBois after the Mayor of DuBois John Herm Suplizio ("the Mayor") participated in a radio interview in which he discussed RHJ's attempt to open a methadone treatment center at 994 Beaver Drive. (A0198-A0199; A0575; A1668). In the radio interview, the Mayor admitted that DuBois had a drug problem but that it needed to be taken care of by "the proper people." (A1669; A0014). The Mayor stated: "You know we hear and we read things about these methadone clinics in other areas, and *we don't like them*, you know what I mean." (A1669; A0014). (emphasis added)

In response to the Mayor's comments, the host of the radio interview replied: "They definitely—just the mention of it makes the kind of the hair on the back of your neck stand up." (A1669). When the host stated that: "You know I understand that you gotta throw your garbage somewhere," the Mayor agreed with him. (A1669; A0015). The Mayor then commented that he "would have a problem" if a methadone clinic attempted to open in DuBois. (A1675; A0015). The Mayor concluded the radio interview by stating that even if RHJ was needed, the City needed "to pull together and get them in the spot they need to be in." (A1676; A0015).

The City Enforces Section 621 Against RHJ.

Following the Mayor's radio interview, the DuBois City Council authorized the DuBois City Solicitor Toni Cherry ("the City Solicitor") to draft a letter to RHJ advising it that 994 Beaver Drive was within 500 feet of the Beaver Meadow Walkway, which the City claimed was a public park under Section 621. (A0018-A0019). Under Section 621, methadone treatment centers were prohibited from operating within 500 feet of a public park unless authorized after a public hearing. 53 P.S. § 10621. RHJ, which had already opened and begun treating patients, disputed that the walkway constituted a public park under Section 621 and refused to close its doors to its severely-opiate-addicted clients. (A0009; A0018-A0019; A0186-A0187; A0202-A0204).

Upon learning that RHJ was treating patients, the City filed suit to enjoin RHJ's operation at 994 Beaver Drive. (A0702-A0703; A0852; A0020). The City believed it was required to file suit to enforce Section 621, even though it was a state law. (A1010; A0020). Because the City Solicitor faxed notice of the suit to RHJ at night after closing, RHJ received the notice only a half an hour before the injunction hearing was scheduled to be heard and was unable to contest the City's request for an injunction. (A0206; A0392-A0393; A0020). As a result, the injunction was issued and RHJ was forced to close. (A0020).

The Public Hearing on RHJ's Request for a Certificate of Use.

In order to lift the injunction, the City required RHJ to complete a certificate of use application for operation at 994 Beaver Drive pursuant to Section 621. (A0207-A0208; A0021). The City Solicitor created a "case specific application" for RHJ asking it 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." (A1450-A1451; A0022). Prior to RHJ, the City Solicitor had never provided a "case specific application" for a certificate of use to any other business. (A0807-A0808).

At the public hearing on RHJ's certificate of use application, RHJ representatives discussed why RHJ selected 994 Beaver Drive, detailed RHJ's qualifications, and provided statistics on the economic and societal benefits of

methadone treatment centers to the surrounding community. (A1456-A1457; A0208-A0209). At the conclusion of their remarks, residents and city officials commented on RHJ's application. (A1457; A0024).

Tina Anand ("Anand"), a resident, asked RHJ's on-site physician "what happens if a patient goes bad at your facility" and whether the doctor had privileges at DuBois Regional Medical Center ("DRMC") to treat the patient "if there's an overdose." (A1461). Anand was concerned because: "I'm a stay-at-home mom. But I'd seen just so many patients overdose on heroin[] and different types of drugs and I was concerned for these patients if something like this happens to them." (A1463).

Anand also wondered: "Why did you pick that area, right dead center in DuBois where we have the mall, the movies, children walking home from school on that walkway, why did you not pick an area that was maybe on the outskirts." (A1462). Anand was worried about security and "the violence that this will bring right into our town, right dead set DuBois." (A1464).

Anand went on: "I think the main concern of people, that this facility is right in the middle of DuBois. It's not on the outskirts . . . We just feel that probably this facility needs to be moved out just a little further." (A1464). When asked by an RHJ representative where RHJ should locate, Anand stated:

> Well I'm not sure. I don't know what the rules and the laws are. And I think that's what your problem is here

> and . . . What's the not in my backyard attitude. Everybody has it, as soon as you move it out there, we don't . . . No this is not in our backyard, *this is right in our face*. This is not in our backyard.

(A1464). (emphasis added).

The Mayor agreed: "And you really are 100% right. You are smack dab in the middle." (A1464; A0026). At this point, the City Solicitor interrupted the proceedings to state that the only way RHJ could locate at 994 Beaver Drive was to show City Council "some overriding reason why they should ignore the legislative mandate . . ." of Section 621. (A1465; A0025). The City Solicitor later admitted that Section 621 did not include any language regarding the necessity to prove an "overriding reason." (A0810-A0812; A0025).

Ben Blakley, the Solicitor for the DuBois Zoning Hearing Board ("the City Zoning Solicitor") was next to speak. (A0603-A0604; A0025). He expressed his belief that a methadone treatment center would adversely affect property values in the area:

> This is a high value commercial district. We've had testimony here tonight that about 100 addicts are going to show up at this place on a daily basis for treatment. The addicts coming in for treatment will be driving and I don't know who's going to be driving them. It's certainly been my experience as an attorney for 30 years that it's very likely that these people who are driving in will be driving with suspended licenses, without licenses, certainly causing a problem with the traffic but how does the fact that this clinic that is going to be located in a high property value district with constant influx of

> addicts, has any study been done by you folks as how this is going to impact your neighbors with the value of their properties?

(A1466; A0025.)

The City Zoning Solicitor was worried about the "severe" condition of RHJ's patients. (A1466). Representatives from RHJ attempted to address his concerns by asserting that (i) methadone clinics have no detrimental effect on surrounding properties; (ii) RHJ did not accept court-ordered patients, contrary to his suggestion; (iii) RHJ is similar to a doctor's office and (iv) there was a need in DuBois for a methadone clinic. (A1468; A0025). However, the City Zoning Solicitor still wondered about the suicide rate on methadone overdoses because of what is "in the paper all the time." (A1468). He also stated: "There's something else. You have such a great resume on how well you're doing . . . [w]ell apparently if it's so good, why is there such a stigma about methadone clinics and why are they being asked to stay out of cities?" (A1468; A0025).

The City Zoning Solicitor concluded by describing the type of people he feared would come to DuBois because of the presence of a methadone treatment center:

> One concern that I have as a citizen of DuBois is what type of element does it bring in to the community. My understanding is there was a similar facility on the other side of the county that as a result of arson is no longer here. Obviously this type of, at least in that particular case brings a criminal element. We're all firemen here . .

> Whether we want to get up and fight a fire on the 900 block of Beaver Drive because somebody doesn't like this, what is it bringing into the community? What type of element is it bringing into the community? And what type of response is that element going to generate.

(A1469-A1470; A0025).

Nancy Moore, Chairman of the DuBois Planning Commission ("the City Planning Chairman"), questioned RHJ about its security "[b]ecause drugs were involved." (A1227; A0602; A0024; A1458). She reiterated the need to "accentuate the positive[s]" of Dubois and "protect our assets." (A1471; A0026).

The Denial of RHJ's Application for a Certificate of Use.

Following the public hearing, the City Council voted unanimously to deny RHJ's application for a certificate of use for the location at 994 Beaver Drive and directed the City Solicitor to prepare a document of findings of fact and conclusions of law to support that decision. (A1571; A0611; A0027-A0028). The City Solicitor simply incorporated the public hearing comments made by DuBois residents and officials into the findings, which were unanimously adopted by the City Council. (A1569-A1571; A0953-A0955; A0027-A0028).

In its findings, the City Council detailed a number of concerns supporting its decision. First, the City Council emphasized that RHJ did not have a physician on site at all times. (A1569). The Mayor explained this concern as follows: "Just

when you're—with drugs like that, that's what you're, you know—that's what you're worried about, something happening." (A0617).

Second, the City Council found that RHJ had "no on-site security personnel but will depend upon the services of the City's police force and fire department to handle emergency situations." (A1569). On-site security is not a requirement for any new business entering DuBois. (A0618; A1198-A1199; A0028).

Third, the City Council pointed out that RHJ did not have a physician on staff at DRMC to specifically treat its patients when they were hospitalized. (A1569). The Mayor testified that RHJ was required to have its own physician on staff at DRMC because "it's not a typical business." (A0618-A0620). The City does not require any business to have a physician on staff at DRMC. (A1199; A0028).

Fourth, the City Council determined that "[t]he facility does not have a means of transporting patients and if a patient were to have an overdose, transportation to DuBois Regional Medical Center would come via a call to 9-1-1." (A1570). No other medical facility in DuBois is required to have its own ambulance and transportation to DRMC. (A0620; A1201; A0028).

As a result of these findings, the City Council determined that RHJ's operation would not serve the "health, safety and general welfare" of the City's

residents, denied RHJ's application for a certificate of use, and prohibited RHJ from operating at 994 Beaver Drive. (A1571; A0029).

The *New Directions* Decision

In June 2007, this Court ruled that Section 621 violated the ADA and the Rehabilitation Act in *New Directions*, a case also involving a city's unlawful attempt to keep a methadone clinic from locating at its desired location. Less than two weeks later, the City Solicitor discussed the *New Directions* decision at a city council meeting. (A1647-A1648). In reference to *New Directions*, the City Planning Chairman asked whether the City's laws should be reviewed and possibly amended. (A1645; A0030). In response, the City Solicitor said that she believed it prudent to do so. (A1645; A0030).

With Section 621 no longer supporting the City's denial of a certificate of use, RHJ approached the City in October of 2007 and sought a new certificate of use application to open at 994 Beaver Drive. (A0488-A0489; A0030). However, even though Section 621 had been invalidated for over three months, the City handed RHJ the same "case specific application" with the 500-foot rule that RHJ had been required to complete under Section 621. (A0488-A0489; A0030). RHJ also sought to dissolve the injunction preventing it from locating at 994 Beaver Drive. (A0030; A0034). However, the City rendered this action moot when, one

week later, the City Council heard first reading of Ordinance 1720; it was passed shortly thereafter on November 27, 2007. (A0030).

Ordinance 1720

Ordinance 1720 amended the City's zoning to specifically prohibit "methadone or drug treatment clinics or centers" in the "Transitional District" and permitting medical facilities "with the exception of methadone treatment facilities and other drug treatment facilities of any kind" in the "Commercial-Highway Zoning District." (A0031). The Mayor explained that methadone treatment clinics were specifically enumerated in Ordinance 1720 because: "[B]eing that a hospital would be able to better, you know—if something did happen, be able to handle anything, any situations like that. If anything went astray, something went wrong, everything would be in that area." (A0757).

Similarly, the City Planning Chairman testified that Ordinance 1720 treated methadone treatment centers differently than other medical facilities "because [other medical facilities] weren't dispensing drugs" like methadone clinics. (A1232; A1248-A1249). The City Solicitor explained that Ordinance 1720 was enacted to create "the most convenient spot for our citizens with disabilities to receive proper treatment." (A1654; A1351-A1354; A1364).

RHJ's Attempt to Find a New Location After Ordinance 1720.

Ordinance 1720 relegated methadone treatment clinics to the "O-1 Office District." (A0031). The O-1 Office District is made up of three separate areas of DuBois. Because RHJ was precluded from locating anywhere else in DuBois, RHJ visited and researched each section of the O-1 Office District. (A0405; A0490; A0035). When RHJ could not find anything meeting its specifications in those areas, RHJ expanded its search and visited neighboring townships, met with landlords, and spoke with a city official, all in the attempt to find an alternative location to open a methadone clinic. (A0403-A0404; A0490; A0494; A0550).

RHJ found a suitable property of approximately 5,000 square feet in nearby Sandy Township. (A0404; A0405-A0406; A0463; A0494; A0769). RHJ visited the property multiple times and entered into negotiations with Jim Smith ("Smith"), the building's owner. (A0404; A0405; A0766; A0767). However, shortly after learning that RHJ intended to open a methadone clinic in his building, Smith stopped returning RHJ's telephone calls and refused to lease the space to RHJ because of the stigma associated with methadone patients. (A0404; A0767-A0768; A0770; A0036).

To assist in its search for an alternative location, RHJ employed Varacallo, the only exclusive commercial broker in the DuBois area, for seven months after the passage of Ordinance 1720. (A1060-A1061). Varacallo had a financial

incentive to locate suitable properties for RHJ because he worked on a commission basis and would only receive compensation if he found a suitable property for RHJ. (A1061; A0494-A0495; A0036).

Varacallo searched all three areas zoned as O-1 Office District. (A1062; A0035-A0036). The first O-1 location was "pretty much a shale pit" and also residential in nature. (A1062; A0035). The second O-1 location ("DRMC East") is primarily owned by DRMC, residential in nature, and did not contain any commercial properties available to lease with approximately 4,000 square feet. (A1062-A1063; A0035). The third O-1 location ("DRMC West") is primarily owned by DRMC, residential in nature, and did not contain any commercial properties available to lease with approximately 4,000 square feet. (A1063-A1064; A0035-A0036).

Varacallo extended his search to Sandy Township and found three available locations but each property failed to meet RHJ's requirements. (A1131-A1136; A0035-A0036). Varacallo testified that there were "not many office complexes that had 4- or 5000 square feet available" anywhere near DuBois. (A1134). However, since the passage of Ordinance 1720, multiple new medical treatment centers and a variety of other businesses have located on Beaver Drive in DuBois, where RHJ was barred. (A1064-A1066; A0034).

As a result of the limitations imposed by Ordinance 1720, RHJ was unable to locate a suitable replacement property in the DuBois area. Thus, RHJ has not opened or operated a methadone clinic in DuBois since the City unlawfully applied the invalid Section 621 against RHJ to close its original Beaver Drive location. (A0037).

SUMMARY OF THE ARGUMENT

In finding that RHJ lacked standing under the ADA and the Rehabilitation Act, the District Court applied the incorrect legal standard to RHJ's "regarded as" disabled claim. Instead of properly focusing on whether the City *perceived* RHJ's patients as substantially limited in a major life activity, the District Court confined its analysis to whether the City's perceptions *actually* limited the major life activities of RHJ's patients. This legal error prevented the District Court from giving due consideration to the uncontroverted evidence of the City's unfounded and illegitimate fears of RHJ's patients. The City stereotypically viewed RHJ's patients as (i) needing constant medical supervision to avoid relapsing into drugs and (ii) spawning serious crime and violence. Thus, the City perceived RHJ's patients as suffering from a drug impairment that substantially limited the major life activities of "caring for one's self" and "productive social functioning."

The District Court's determination that the City satisfied its affirmative mitigation defense was premised on three errors of law and one error of fact. First, the District Court did not consider the substantial, reasonable actions that RHJ took to mitigate its damages by seeking an alternative location after the City violated its constitutional rights. Instead, the District Court focused exclusively on the one potential additional action (i.e., pursuing a lease from the local medical center) that the City argued RHJ *could* have taken. Therefore, the District Court placed the

burden on RHJ to demonstrate that it took *every* reasonable mitigation action and did not consider the totality of RHJ's reasonable mitigation efforts as required by this Court's prior rulings.

Second, the sole potential course of action that the District Court faulted RHJ for not pursuing would have required RHJ to capitulate to the City's unconstitutional zoning scheme by locating in the O-1 Office District. The law does not require a plaintiff to give in to the unlawful demands of the defendant in order to mitigate its damages. Third, the City should not be relieved of liability for RHJ's damages where the City impaired RHJ's mitigation options by enacting Ordinance 1720 which restricted RHJ's ability to find an alternative location.

Finally, even assuming the District Court correctly interpreted and applied mitigation law, the record does not support the District Court's factual conclusion that contacting the local medical center would have reduced RHJ's damages because the medical center did not have suitable space for RHJ during the relevant period.

ARGUMENT

I. The District Court Erred in Finding that RHJ Lacked Standing under the ADA and the Rehabilitation Act Because the City Regarded RHJ's Methadone Patients as Disabled When it Improperly Prevented RHJ from Operating at 994 Beaver Drive Based Upon Myths, Stereotypes, and Fears of RHJ's Methadone Patients.

The District Court concluded that RHJ did not have standing under the ADA and the Rehabilitation Act to recover damages for the City's application of the invalid Section 621 by applying the incorrect legal standard. (A0057). According to the District Court, the City's discriminatory intent "had no bearing on whether Plaintiff's patients were *in fact* substantially impaired." (A0043) (emphasis added). In addition, the District Court found that RHJ did not establish that the City's "perceptions limited patients' major life activities." (A0043-A0044).

This is not the test for the "regarded as" prong of the ADA and the Rehabilitation Act, which only requires the defendant to believe that an individual is substantially limited in a major life activity. The sole focus of the "regarded as" prong is on the *intent* of the defendant; not on the *effect* of its perceptions. Whether RHJ's patients were "in fact substantially limited" or whether the City's discriminatory perceptions *actually* limited RHJ's patients' major life activities is irrelevant under the inquiry. Thus, the District Court misplaced its focus and failed to give due consideration to the uncontradicted evidence showing that the City held stereotypical views regarding RHJ's patients.

Application of the proper legal standard leads to one conclusion: the City believed that RHJ's patients were so severely addicted to drugs that they required constant medical attention and increased security for the inevitable criminal activity that RHJ's patients would cause. Therefore, the City regarded RHJ's patients as suffering from a drug impairment that substantially limited the major life activities of "caring for one's self" and "productive social functioning." This is all that is required for RHJ to have standing under the ADA and the Rehabilitation Act.

A. Standard of Review

"A court's decision regarding standing is a legal conclusion subject to de novo review." *In re Global Indus. Techs.*, 645 F.3d 201, 209 (3d Cir. 2011). *See also Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 762 (3d Cir. 2004) (reviewing de novo district court's determination that the plaintiff was not "disabled" within the meaning of the ADA).

B. The Purpose of the "Regarded As" Prong is to Combat Stereotypical Assumptions about the Disabled and its Focus is on the Defendant's Intent.

To have standing under the ADA or Rehabilitation Act, the plaintiff must establish that she has a disability.[1] *Andrew M. v. Del. Cnty. Office of Mental*

[1] Congress has directed that the ADA be interpreted in a manner consistent with the Rehabilitation Act and the Third Circuit considers claims under those statutes together. *Yeskey v. Commw. of Pa. Dep't of Corr.*, 118 F.3d 168, 170 (3d Cir.

Health and Mental Retardation, 490 F.3d 337, 350 (3d Cir. 2007). In order to satisfy the disability element of an ADA or Rehabilitation Act claim, a plaintiff must show that she has "a physical or mental impairment that substantially limits one or more major life activities" or is "regarded as having such an impairment." 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(20)(B). In analyzing the "regarded as" prong of the ADA, the Supreme Court has held that misperception is the key:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

Sutton v. United Air Lines, 527 U.S. 471, 489 (1999).

According to the Supreme Court, "[t]hese misperceptions often result from stereotypic assumptions not truly indicative of . . . individual ability." *Id.* at 489. Thus, the "regarded as" prong is designed to cover individuals "rejected . . . because of the myths, fears and stereotypes associated with disabilities." *Id*. In the

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1997). The Rehabilitation Act specifically provides that "[n]o otherwise qualified individual 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). The relevant section of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Third Circuit, this means that in "regarded as" cases, the district court must "focus[] not on [the plaintiff] and his *actual* disabilities, but rather on the reactions and perceptions of the persons interacting or working with him." *Buskirk v. Apollo Metals*, 307 F.3d 160, 167 (3d Cir. 2002) (citation omitted) (emphasis added). The District Court did not follow this principle because it focused on whether RHJ's patients were "in fact substantially limited" and whether the City's perceptions *actually* limited the major life activities of RHJ's patients. This legal error prevented the District Court from properly considering the City's belief that RHJ's patients suffered from (i) an impairment that (ii) substantially limited their major life activities.

C. The City Believed that RHJ's Patients Suffered from an Impairment.

Under the ADA, a drug addiction is a "physical or mental impairment" that qualifies an individual as a "handicapped person." 28 C.F.R. § 41.31(b)(1)(i). Therefore, any patient afflicted by an opioid addiction suffers from an impairment covered by the ADA. *See A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 367 (4th Cir. 2008) ("Unquestionably, drug addiction constitutes an impairment under the ADA"); *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 439 (8th Cir. 2007) (same) (citing *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002)); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002) (same). The City believed that RHJ's patients were addicted to drugs and,

thus, suffered from an impairment under the ADA. (A1569-A1570; A1461; A1466-A1470; A1669-A1672; A1674; A1676).

D. The City Believed that RHJ's Patients were Substantially Limited in the Major Life Activities of "Caring for One's Self" and "Productive Social Functioning."

"To be substantially limited . . ., an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195-96 (2002) (internal quotation marks and alterations omitted).[2] The focus is on "the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id.*

"Caring for one's self" and "productive social functioning" are major life activities. 42 U.S.C. § 12102(2). *See also EEOC v. Autozone, Inc.*, 630 F.3d 635, 640 (7th Cir. 2010) ("Self-care has long been recognized as a major life activity

[2] Under the ADA Amendments Act of 2008, which superseded *Williams*, an individual meets the requirement of "being regarded as having such an impairment" whether or not the impairment limits or *is perceived to limit* a major life activity. RHJ concedes that there is no indication that Congress intended the ADA Amendments to have retroactive effect and that courts have relied on the ADA as it existed at the time of relevant events. However, the conclusion that RHJ's patients were "regarded as" disabled by the City is only underscored by the clarifying language in the Amendments. *See EEOC v. Autozone, Inc.*, 630 F.3d 635, 641 n.3 (7th Cir. 2010).

under the ADA."); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (finding that caring for oneself encompasses a broad range of normal activities related to daily living, including feeding oneself, driving, grooming, and cleaning home); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 342 (6th Cir. 2002) (holding that "productive social functioning" is a major life activity). Relying on unfounded myths, stereotypes, and fears about drug addiction, the City regarded RHJ's patients as substantially limited in their ability to care for themselves and function productively in society.

1. The City Believed that RHJ's Patients Were Substantially Limited in their Ability to Care for Themselves Because They Could Not Live Independently Without Relapsing into Drugs.

The record demonstrates that the City viewed RHJ's patients' addiction as substantially limiting their ability to live independently from the influence of drugs and relapse. *See Reg'l Econ. Cmty. Action Program, Inc.*, 294 F.3d at 47-48 (2d Cir. 2002) ("Because the inability to live independently without suffering a relapse . . . limits the major life activity of 'caring for one's self,' an activity that is necessarily an important part of most people's lives, the residents of the proposed halfway houses would have met . . . the statutory definition of a disability") (citations and quotations omitted).

Despite a complete lack of knowledge about methadone treatment, the Mayor's first public comments regarding RHJ were that: (i) he didn't "like"

methadone clinics based on what "we hear"; (ii) drug addicts are comparable to "garbage"; and (iii) he would "have a problem" with a methadone clinic trying to open in DuBois. (A1669-A1670; A1675). The City acted on these stereotypical views by forcing RHJ to explain why its patients would "not be detrimental to the health, safety, and general welfare of the residents of the City" and surrounding entities. (A0022; A1450-A1451; A807-A808).

At the public hearing on RHJ's application, City officials and DuBois residents voiced irrational concerns without any supporting evidence about RHJ's patients' ability to abstain from drug use while being treated by RHJ. City resident Anand was concerned about patients going "bad" at RHJ's facility and whether RHJ's doctor had privileges at the local hospital to treat the inevitable "overdoses" of RHJ's patients. (A1461).[3] Anand believed that RHJ's patients would "overdose

[3] In applying the incorrect legal standard, the District Court refused to consider Anand's comments in making its "regarded as" determination because it did not believe that she was sufficiently affiliated with the City. (A0024). However, the City adopted Anand's stereotypical remarks as reasons for denying RHJ the right to locate at 994 Beaver Drive, albeit in a more politically correct fashion. (A1461-A1464; A1569-A1570). Thus, even though Anand was not employed by the City, the decision denying RHJ the right to locate at 994 Beaver Drive was imbued with her discriminatory intent and her comments are relevant to the "regarded as" inquiry. *See Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (holding that under the ADA and the Rehabilitation Act, "a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter"); *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772, 783-84 (D. Md. 2001) (considering residents comments for purposes of discerning town's discriminatory intent where record shows "Council members

on heroin[] and different types of drugs" *even while* receiving treatment for their addiction from RHJ. (A1463).

The City Zoning Solicitor professed his unsupported belief that RHJ's patients would be unable to drive legally and safely because, ostensibly, they would still be under the influence of drugs. (A1466). *See Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 767 (10th Cir. 2006) (holding that caring for one's self "encompasses normal activities of daily living; including . . . driving"). After RHJ representatives described the stable condition of methadone patients, the City Zoning Solicitor expressed his view that RHJ's patients were a suicide risk. (A1468). While RHJ had a "great resume", the City Zoning Solicitor found that this was not enough to overcome the "stigma surrounding methadone clinics" and the fact that they are being zoned out of cities. (A1468).

Against this backdrop, the City voted unanimously to deny RHJ's application for a certificate of use to operate at 994 Beaver Drive. (A1571). As support for this decision, the City simply adopted the stereotypical comments made at the public hearing about RHJ's patients' expected drug use. (A1569-A1570). In doing so, the City assumed that RHJ's patients would frequently relapse into drugs when it obligated RHJ to have its own physician on staff at the local hospital and its own ambulance to transport patients who "overdose." (A1569-A1570; A0028).

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agreeing with or responding directly to community opposition based on fears and stereotypes of mentally disabled people").

The City viewed RHJ's patients' perceived inability to live independently from the influence of drugs and relapse as severe. At the public hearing, the City Zoning Solicitor indicated that property values in the area would be adversely affected by "the *constant* influx of addicts" showing "up at this place on a *daily* basis for treatment." (A1466; A0603-A0604) (emphasis added). The City Zoning Solicitor distinguished between a patient of a doctor's office, who is "going in for routine medical treatment," and patients of RHJ, "who are going in with severe problems. . ." (A1466).

In denying RHJ's application to operate at 994 Beaver Drive, the City required RHJ to have a physician on site "*at all times*" because of the seriousness of RHJ's patients' drug addiction and the City's belief that "with drugs like that . . . you're worried about something happening." (A1569; A0617). The City had no evidence to support this position. (A0617). The City mandated a physician's presence "*at all times*" even though it was aware that state regulations governing methadone clinics like RHJ only require a physician to be on the premises one hour for every ten patients. (A1458).

The City viewed the severity of RHJ's patients' inability to take care of themselves as distinct from the average person in the general population. The City Zoning Solicitor differentiated RHJ's patients from other medical patients because of the significant nature of their addiction. (A1466). The City required RHJ to

have its own physician on staff at the local hospital and its own ambulance even though the City does not require any business serving the general population, including other medical clinics, to do the same. (A1199; A0620; A1201). The City placed these mandates on RHJ because the City believed that RHJ's patients were not "typical" and needed constant medical attention to avoid a relapse into drugs. (A0618-A0620).

Courts agree that this type of evidence is sufficient to establish a substantial limitation on a major life activity. *See City of Middletown*, 294 F.3d at 48 ("Here, the plaintiffs' clients would have been deemed substantially limited because they are unable to abstain from alcohol abuse without continued care; absent assistance, they cannot adequately care for themselves"); *U.S. v. Audubon*, 797 F. Supp. 353, 358–59 (D. N.J. 1991) (holding that residents of a residential home for recovering drug users were "handicapped" under the FHA[4] because their "addictions substantially limit their ability to live independently" without relapse and, thus, to "care for themselves"), *aff'd*, 968 F.2d 14 (3d Cir. 1992); *Human Res. Research and Mgmt. Grp., Inc. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 252 (E.D.N.Y. 2010) ("[I]ndividuals who need the support of a 'halfway house' to avoid a relapse to alcoholism or drug addiction qualify as disabled").

[4] "Courts generally consider individuals deemed to be 'handicapped' under the FHA to likewise be 'disabled' within the meaning of the Rehabilitation Act and the ADA." *McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 821 (W.D. Pa. 2010) (citation omitted).

2. The City Believed that RHJ's Patients Were Substantially Limited in their Ability to Function Productively in Society Because They Increase Crime.

The record demonstrates that the City viewed RHJ's patients' addiction as substantially limiting their ability to avoid increasing crime in DuBois. Anand stressed the need for security because of the certain violence that RHJ's patients "will bring right into our town, right dead set DuBois." (A1464). The City Planning Chairman reiterated this concern "[b]ecause drugs were involved." (A1227; A1459). *Cf. Quiles-Quiles v. Henderson*, 439 F.3d 1, 11 (1st Cir. 2006) (holding that employee was "regarded as" disabled by employer who believed he was a "risk to security" because "[t]he belief that the mentally ill are disproportionately dangerous is precisely the type of discriminatory myth that the Rehabilitation Act and ADA were intended to confront").

The City Zoning Solicitor described the "criminal element" he feared would come to DuBois because of the presence of a methadone clinic. (A1469-A1470). He questioned whether he or the other City firefighters at the public hearing would want to put out a fire resulting from arson at 994 Beaver Drive because of the negative reactions of others to RHJ and its patients. (A1469-A1470). *Cf. U.S. v. Happy Time Day Care Ctr*., 6 F. Supp. 2d 1073, 1082 (W.D. Wis. 1998) (finding that "[a] person would be covered under [the 'regarded as'] test if a restaurant

refused to serve that person because of a fear of 'negative reactions' of others to that person").

The City viewed RHJ's patients' perceived ability to attract criminal activity as severe. Despite knowledge of RHJ's ample security measures, the City mandated that RHJ have its own on-site security because of the violence and criminal activity it believed RHJ's patients would bring to DuBois. (A1458; A1569). The City did not want RHJ to "depend upon the services of the City's police force and fire department to handle emergency situations." (A1569).

The City believed that this ability to attract crime separated RHJ's patients from the average person in the general population. RHJ was required to have on-site security for its patients even though no other business in DuBois was similarly required, including other medical clinics. (A0618; A1198-A1199; A0028). Anand spoke out against RHJ's chosen location at 994 Beaver Drive because she feared the presence of RHJ's patients around children. (A1462). Anand suggested that RHJ choose another location for its patients "on the outskirts", away from the general population because 994 Beaver Drive was "right in our face." (A1462; A1464). The Mayor agreed. (A1464). The City Planning Chairman likewise emphasized that the City needed to "accentuate the positive[s]" of DuBois and "protect our assets" from the criminality and violence of RHJ's patients. (A1471).

The Sixth Circuit relied on nearly identical comments in a zoning hearing transcript to support its finding that a city regarded the defendant's methadone patients as disabled. In *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 341 (6th Cir. 2002), the city's assistant police chief noted the "increased level of criminal activity" and "violence" around "for-profit" methadone clinics although he "provided no statistics and gave no specifics" regarding this opinion. He expressed concern about "addicts" and "the safety of the neighborhood children inasmuch as there [was] a school near the proposed site." *Id.* at 329. Another police officer testified that, although he had no direct experience with for-profit methadone clinics, he believed there would be an uptick in criminal activity and that drug dealers would start to congregate near the clinic. *Id.* at 341.

In evaluating this evidence under the "regarded as" prong, the Sixth Circuit concluded that

> a person who is denied services or benefits by a public entity because of myths, fears, or stereotypes associated with disabilities would be covered under the regarded as prong, whether or not the persons' physical or mental condition would be considered a disability under the first or second test in the definition of disability.

Id. at 341–42 (citing 28 C.F.R. § 35.104).

The court rejected the defendant's argument that because the discrimination the methadone clinic faced was "based on the alleged increased crime that drug addicts bring to an area instead of the actual impairment of drug addiction," the

methadone clinic's patients were not "regarded as" disabled. *Id.* at 342. To the contrary, the ADA and the Rehabilitation Act are designed

> to ensure that persons are not victimized by *stereotypical assumptions concerning their handicap*. Therefore, where the discrimination results from unfounded fears and stereotypes that merely because Plaintiff's potential clients are recovering drug addicts, they would necessarily attract increased drug activity and violent crime to the city, such discrimination violates the ADA and Rehabilitation Act.

Id. (citations and quotations omitted).

Based on this analysis, the Sixth Circuit found that the city's statements that the methadone clinic's patients would continue to abuse drugs and attract criminal activity to the city evidenced the city's belief that the patients were, "at the very least, limited [in] the major life activity of productive social functioning, as their status as recovering drug addicts was consistently equated with criminality." *Id.* (citation omitted). The same is true here.

E. The City Regarded RHJ's Patients as Disabled Because it Prevented RHJ from Operating at 994 Beaver Drive for No Legitimate Reason.

The Department of Justice comments to the regulations it promulgates on the "regarded as" prong for public entities provide that if a person is rejected by a public entity for no legitimate reason, "a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the 'regarded as' test." 28 C.F.R. § 36.104; *Merchant v. Kring*, 50

F. Supp. 2d 433, 435 (W.D. Pa. 1999). *See also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (explaining that an agency's interpretation of its own regulation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation").

The "regarded as" inference is appropriate in this case for two reasons. First, the District Court found that RHJ's application to operate at 994 Beaver Drive was denied primarily for illegitimate and discriminatory reasons. (A0028). Second, after *New Directions* affirmed that methadone clinics were protected under the ADA and the Rehabilitation Act and that Section 621 violated both statutes, the City responded immediately by "specifically exclude[ing] methadone clinics . . . from large areas of the City" for no rational reason. (A0030-A0031; A0054-A0055; A1660). The complete lack of rational basis for Ordinance 1720 leads to the City's professed irrational one: to locate RHJ, in the City's own words, "in the most convenient spot for our citizens with *disabilities* to receive proper treatment." (A1654-A1655; A0757; A1351-A1353; A1232; A1248-A1249) (emphasis added).

II. The District Court Erred in Holding that RHJ Could Only Mitigate its Damages by Contacting DRMC About Leasing an Unlisted, Dissimilar Property in the O-1 Office District of DuBois.

The District Court found that the City satisfied its heavy burden of proving that RHJ failed to mitigate the damages caused by the City's violation of its constitutional rights. According to the District Court, "after November 27, 2007,

Plaintiff had the opportunity to mitigate damages by seeking an alternate location in the O-1 Office District, where . . . there was space available for medical facilities like the one Plaintiff sought to open and operate." (A0059). The District Court was not convinced that RHJ "made a thorough effort to ascertain that leasing property from or near DRMC was a possibility." (A0059). According to the District Court, "[s]uch action would have been reasonable under the circumstances."

In reaching this conclusion, the District Court made three errors of law and one error of fact. First, evidence that, in retrospect, leasing property from DRMC would have been feasible is not proof that the course *actually pursued* by RHJ was unreasonable—the test for mitigation of damages. Second, the law does not require that a plaintiff can *only* mitigate its damages by acceding to the unconstitutional zoning demands of the discriminating defendant. Third, the plaintiff is not responsible for mitigating losses where the defendant *himself* prevents the plaintiff from taking steps necessary to avoid them.

Even assuming the District Court correctly interpreted and applied mitigation law, the record does not support the District Court's factual finding that RHJ could have reduced its damages by contacting DRMC because DRMC did not have suitable space available for RHJ after November 27, 2007.

A. Standard of Review.

The Third Circuit exercises plenary review over the district court's choice and interpretation of applicable mitigation principles. *Post v. St. Paul Travelers Ins. Co.*, 691 F.3d 500, 514-15 (3d Cir. 2012). *See also S.J. Groves & Sons Co.*, 576 F.2d 524, 530 (3d Cir. 1978) (holding that, after bench trial, "the district court erred in imposing on [the plaintiff] as a matter of law a duty to engage [third party]" in order to mitigate its damages); *In re Kellett Aircraft Corp*., 186 F.2d 197, 200 (3d Cir. 1950) (reviewing the district court's mitigation ruling de novo).

A district court's determination that the plaintiff did not adequately mitigate losses and that reasonable efforts would have reduced their damages are findings of fact reviewed for clear error. *Prusky v. Reliastar Life Ins. Co.*, 532 F.3d 252, 257 (3d Cir. 2008). Factual findings are clearly erroneous when the Third Circuit is "left with the definite and firm conviction that a mistake has been committed." *Frett-Smith v. Vanterpool*, 511 F.3d 396, 399 (3d Cir. 2008). The Third Circuit can affirm the district court's factual findings only when they are plausible when viewed in light of the entirety of the record. *Brisbin v. Superior Valve Co.*, 398 F.3d 279, 285 (3d Cir. 2005).

B. The Proper Focus of the Mitigation Inquiry is on the Reasonableness of the Plaintiff's Actual Conduct—Not the Availability in Hindsight of Other Reasonable Alternatives.

Mitigation is an affirmative defense, for which the breaching party bears the burden of proof. *Koppers Co., Inc. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1448 (3d Cir. 1996). "When mitigation is appropriate, the test to be applied to the plaintiff's conduct is whether the conduct taken in response to the defendant's breach was reasonable." *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank of Evans City*, 611 F.2d 465, 471 (3d Cir. 1979) (citations omitted). Reasonable conduct "is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented." *Prusky*, 532 F.3d at 259 (citation omitted).

The requirement of mitigation of damages is "not an absolute, unyielding one, but is subject to the circumstances." *S.J. Groves*, 576 F.2d at 528. Because the law does not favor wrongdoers, "[t]he standard of what reason requires of the injured party is lower than in other branches of the law." *Ellerman Lines, Ltd. v. The President Harding*, 288 F.2d 288, 290 (2d Cir. 1961) (holding that "if the plaintiff takes such action within the range of reason, the defendant is liable for further damages resulting therefrom"). For this reason, "the range of reasonable conduct is broad and the injured party must be given the benefit of every doubt in assessing her conduct." *EEOC v. Ross*, 420 F. Supp. 919, 925 (S.D.N.Y. 1976). In

the context of discrimination, the mitigation burden is a "heavy" one for the defendant. *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3d Cir. 2001); *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1979) ("A claimant is required to make only reasonable exertions . . . It requires only an honest good faith effort") (citation omitted).[5] An injured party who makes reasonable but unsuccessful efforts to avoid additional loss is not precluded from recovery. *Prusky*, 532 F.3d at 263.

The District Court interpreted this body of law to mean that if a defendant shows a *single* reasonable action the plaintiff could have taken to reduce its damages, the defendant satisfies its affirmative mitigation defense regardless of the course of conduct actually pursued by the plaintiff. Instead of determining whether the multiple actions that RHJ pursued were reasonable, the District Court focused solely on the one and only action the City claimed RHJ should have taken. Thus, the District Court placed the burden on RHJ to demonstrate that it took *every* reasonable action in order to mitigate its damages. This was error for two reasons.

[5] Title VII decisions evaluating an employee's mitigation efforts after an employer's discriminatory conduct provide a framework for evaluating the duty to mitigate in the § 1983 context. *Squires v. Bonser*, 54 F.3d 168, 172 (3d Cir. 1995) ("Because of this consonance of the underlying policy considerations, the framework of analysis governing reinstatement in Title VII actions also governs in § 1983 actions"); *see also Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994) (importing mitigation doctrine from Title VII mitigation cases in evaluating § 1983 claim for damages).

First, the mitigation doctrine is a flexible one and permitted RHJ to pursue a broad range of reasonable alternatives after its constitutional rights were violated. *See Fed. Ins. Co. v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 350 (2d Cir. 1986) ("If the course of action chosen by the plaintiff was reasonable, the plaintiff can recover despite the existence of another reasonable course of action that would have avoided further damage"); *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999) (same). This is why the Third Circuit requires a mitigation analysis to consider "*all* the facts and circumstances of each case." *Prusky*, 532 F.3d at 259 (citation omitted).

The fact that RHJ did not reach out to DRMC as suggested by the City is not proof that RHJ failed to mitigate its damages—mitigation law is not so rigid as to require the plaintiff to take a specific course of action. *See Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 727 F. Supp. 2d 256, 279 (S.D.N.Y. 2010) (holding that the defendant's proposed jury instructions "misconstrue the applicable legal standard for mitigation of damages [because it] erroneously requires [the plaintiff] to undertake a particular action rather than actions that were reasonable under the circumstances at the time"); *Matsushita Elec. Corp. of Am. v. Gottlieb*, 1991 U.S. Dist. LEXIS 10511, at *9 (S.D.N.Y. Aug. 1, 1991) ("Proof of mitigation of damages requires only a showing that plaintiff took reasonable steps to cut its losses, not that plaintiff did what the defaulting defendants would have

had it do, or what in hindsight seems most effective to reduce the defaulting defendants' damages").

Second, a defendant cannot satisfy its mitigation burden by simply pointing to further reasonable actions the plaintiff could have taken. *Thurber v. Reilly's Inc.*, 521 F. Supp. 238, 242 (D. Mass. 1981). Rather, the defendant must show that the course of conduct the plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek alternatives. *Id.*; *see also Bonura v. Chase Manhattan Bank, N.A.*, 629 F. Supp. 353, 356 (S.D.N.Y. 1986) (same). This principle ensures that the burden to prove failure to mitigate stays with the defendant. Otherwise, the plaintiff is obligated to prove that it took *every* possible reasonable action in order to satisfy *the defendant's affirmative defense*—this is not consistent with the law on mitigation.

Indeed, courts are universal in rejecting the approach adopted by the District Court that mitigation is determined solely by what the plaintiff *did not do* instead of what the plaintiff actually did. *See Moore v. Univ. of Notre Dame*, 22 F. Supp. 2d 896, 907 (N.D. Ind. 1998) ("Nor does the fact that [the plaintiff] did not apply for certain positions mentioned by defendant indicate a failure to mitigate") (citations omitted); *Gorzelsky v. Leckey*, 586 A.2d 952, 955 (Pa. Super. Ct. 1991) (rejecting the defendant's argument that the plaintiffs failed to mitigate their damages by not accepting the defendant's offer to lease property because the

plaintiffs' duty to mitigate did not mandate that they take this exact course of action); *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 797 (Wash. 2004) (rejecting the defendant's argument that the plaintiff failed to mitigate damages "because he did not seek part-time employment or seasonal employment or any other employment outside the 75 mile radius"; the doctrine of mitigation only requires the plaintiff to act reasonably); *Saybrook Convalsescent Hosp., Inc. v. Klevecz*, 2006 Conn. Super. LEXIS 3029, at *13 (Oct. 12, 2006) ("The fact that the plaintiff could conceivably have made further efforts to recover on the debt without assuming undue risk or burden does not mean that it failed to mitigate damages. It is not required that the plaintiff do everything in its power to mitigate, merely that it make reasonable efforts to do so").

The Third Circuit's decision in *Prusky* illustrates this concept. In *Prusky*, the Court began its analysis by evaluating the "[r]easonableness of the [plaintiff]s' mitigation efforts." 532 F.3d at 258-64. The court focused on whether the investment strategy chosen by the plaintiffs to mitigate their damages constituted a reasonable substitute for the investment that they lost due to the defendant's breach. *Id.* The court concluded that the plaintiffs *unreasonably* failed to mitigate their damages because "the passive, post-breach allocation of Plaintiffs' funds to a risk-free, low-return money market fund is decidedly not a comparable alternative investment" to the one they lost. *Id.* at 261. Only after making this finding that the

plaintiffs behaved *unreasonably* post-breach did the court address "the availability of other reasonable alternative methods of mitigation." *Id.* at 264.[6]

The District Court's approach is not in line with *Prusky*. With respect to RHJ's attempt to mitigate its damages, the District Court found that: (i) RHJ's representatives actively explored alternate sites in the area for its methadone clinic but could not find anything suitable (A0035); (ii) RHJ employed Varacallo to assist in the search (A0010; A1060-A1061); (iii) Varacallo was one of the largest commercial property owners in the City and the only exclusive commercial broker in the DuBois area (A1060); (iv) Varacallo was on a commission basis and had a financial incentive to secure a new property for the methadone clinic (A0036); (v) Varacallo could not locate any available properties in the O-1 Office District that met RHJ's specifications in the seven months following the passage of Ordinance 1720 (A0035-A0036; A1060); (vi) Varacallo made additional efforts to locate properties outside of DuBois (A0036); (vii) Varacallo eventually identified a

[6] While *Prusky* is legally instructive, it is factually distinct. *Prusky* involved inaction following a breach of contract—the plaintiff did not attempt to mitigate its damages by finding an alternative investment vehicle but simply sat on its money in a money market account. *Id.* at 259. *See also Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 668 (3d Cir. 1993) (holding that when the plaintiff "transferred his assets into the money market fund" upon breach, he "neglected to undertake appropriate measures to avert losses but instead enhanced damages through *inaction*") (emphasis added). Thus, the district court and the Third Circuit in *Prusky* were deciding whether a reasonable alternative action was better than the plaintiff's chosen course of doing nothing for purposes of mitigation. In contrast, the District Court required RHJ to take a specific course of action without regard to the affirmative and extensive steps that RHJ undertook to minimize its damages.

suitable property in Sandy Township owned by Jim Smith, whom RHJ met with on several occasions (A0036); and (viii) "Smith ultimately declined to lease his property to RHJ." (A0036).

The District Court never found that RHJ's attempt to secure a lease in the DuBois area was unreasonable. In fact, the District Court was "persuaded" that RHJ undertook significant efforts to lease an alternative property in the DuBois area. (A0036). This is all that mitigation law requires. While "[t]he court's preference may very well have been the best; that however, is not the test." *S.J. Groves*, 576 F.2d at 529; *Kellett Aircraft*, 186 F.2d at 198-99 ("The rule of mitigation of damages may not be invoked . . . for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter").

The District Court's error was in finding that, despite RHJ's numerous affirmative actions, the City proved its failure to mitigate defense by pointing out one additional course of action that RHJ did not pursue. Ultimately, the fact that RHJ could have done more in the eyes of the City and the District Court does not overcome the reasonableness of what RHJ *actually* did. *See Bowyer v. Dish Network, LLC*, 2010 U.S. Dist. LEXIS 38714, at *15-16 (W.D. Pa. Apr. 20, 2010) (applying proper mitigation standard in holding that evidence of 52 available jobs did not overcome the plaintiff's unsuccessful but diligent effort to find suitable

work); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir. 1981) (reversing district court's decision on mitigation because the plaintiff introduced evidence of his efforts to obtain alternative suppliers of gasoline and the defendant "did no more than establish that [the plaintiff] failed to contact a few known suppliers of gasoline").

C. RHJ was Not Required to Capitulate to the City's Unconstitutional Zoning Demands in Order to Mitigate its Damages.

The District Court held that RHJ could only mitigate its damages by contacting DRMC about an unlisted property in the O-1 Office District and, thus, accede to the unconstitutional zoning demands of the City. However, "the law does not require a party to mitigate in a way that requires continued dealing with the breaching party." *Citizens Fed. Bank v. U.S.*, 66 Fed. Cl. 179, 186 (2005) ("Accordingly, courts have been reluctant to require parties, under the duty to mitigate, to deal further with the breaching party . . ."); *H Naito Corp. v. Quest Entm't Ventures, L.P.*, 58 Fed. Appx. 778, 780 (9th Cir. 2003) ("[Defendant] has cited no authority in support of its argument that [plaintiff] was obligated to re-lease the property to [defendant] itself, when [defendant] was the party that caused the original breach" of the lease in order to mitigate its damages).

A similar concept was expressed by the Third Circuit in an analogous setting in *Eazor Express, Inc. v. The Int'l Bhd. of Teamsters*, 520 F.2d 951 (3d Cir. 1975).

There, in the context of a union's breach of a no-strike agreement, the court held that a party cannot be required to mitigate damages by capitulating to the demands of the defendant. *Id.* at 969-70. Thus, the Third Circuit found that the district court "clearly erred" in holding that the employer could *only* mitigate its damages by assenting to the improper requests of the union to end the union's strike. *Id.*

Eazor stands for the proposition that a defendant cannot make unlawful demands and then, when called upon to compensate the plaintiff for the resulting loss, insist that the plaintiff could have minimized its harm by acceding to the unlawful demands. The same is true here. RHJ cannot be required to capitulate to the City's unconstitutional zoning demands through the back door of mitigation. Nor may RHJ be required to *only* take such mitigation steps that have the perverse effect of giving the City exactly what it desired all along: RHJ "out of its face" and in the O-1 Office District.

The City cannot have it both ways. The City cannot pass an unconstitutional ordinance preventing RHJ from locating in the prime commercial districts in DuBois and then claim, when called upon to compensate RHJ for the resulting loss, that RHJ should have minimized its damages by acceding to the City's unconstitutional demands to locate in the O-1 Office District.

D. RHJ Was Prevented From Taking Steps to Mitigate its Damages by the City's Unconstitutional Actions.

In the Third Circuit, "the plaintiff is not held responsible for avoiding losses if the defendant himself prevents the plaintiff from taking steps necessary to avoid them." *Toyota Indus. Trucks*, 611 F.2d at 471. As the District Court found, the City's passage of Ordinance 1720 "effectively prevented [RHJ] from opening a methadone clinic in the City's Transitional and Commercial-Highway Zoning Districts." (A0055). Following the City's unconstitutional enactment of Ordinance 1720, the District Court found that multiple medical treatment centers had opened in the Transitional and Commercial Highway Zoning Districts where RHJ was excluded from by the City. (A0034; A1064-A1065). In fact, these areas were "loaded" with similar medical facilities because of their location along the "main artery" between DuBois' central business district and the mall. (A1039; A1042).

In contrast, Ordinance 1720 relegated RHJ to one discrete area of the City made up entirely of (i) a shale pit, (ii) residences, and (iii) property owned by DRMC. (A1062-A1064). Even the City could only identify a *single* potential property for RHJ to lease in the O-1 Office District from 2006 until the present.[7] (A1279, A1280). Thus, by unconstitutionally zoning RHJ out of the areas of the

[7] As discussed below, this potential property was not suitable for RHJ.

City where there were properties that met RHJ's specifications, the City took affirmative steps to prevent RHJ from mitigating its damages.

E. The Record Does Not Support the District Court's Finding that there was Space Available in the O-1 Office District that Met RHJ's Specifications after November 27, 2007.

A defendant who establishes that the plaintiff's affirmative mitigation actions were unreasonable must still demonstrate that an alternative existed that would have reduced the plaintiff's damages. *Prusky*, 532 F.3d at 258-9. It is well-established that a plaintiff who has been discriminated against is not required to accept a "lesser or dissimilar" alternative in order to satisfy their duty to minimize damages. *Caufield v. The Ctr. Area Sch. Dist.*, 133 Fed. Appx. 4, 11 (3d Cir. 2005). In the discrimination context, the defendant must present evidence of a "virtually identical" alternative. *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 85 (3d Cir. 2009). Assuming that the District Court properly interpreted and applied the legal standards for mitigation, the record does not support its factual finding that contacting DRMC would have reduced RHJ's damages because DRMC did not have a "virtually identical" alternative to 994 Beaver Drive.

The District Court found that DRMC had "space available for medical facilities like the one Plaintiff sought to open and operate." (A0059). As the sole basis for this determination, the District Court relied on two pieces of testimony

from the former DRMC President regarding DRMC West and DRMC East. (A0036).

With respect to DRMC West, the former DRMC President testified that (i) DRMC owned a medical arts building that "right now is around 98,000 square feet"; (ii) DRMC leases at market rates; (iii) DRMC would not refuse to lease space to a medically-assisted addiction treatment facility; and (iv) he "believed" a single family residence not owned by DRMC was "available for purchase" in 2007. (A0036; A1270-A1273).

This testimony does not support the District Court's conclusion that a suitable space was available for RHJ at DRMC West. First, none of this testimony was specific to RHJ, as the former DRMC President admitted that he had no idea what RHJ's specifications for a property were. (A1282-A1283). In the District Court's own words, the former DRMC President "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." (A0035). This was the District Court's *very rationale* for discrediting the entirety of the City's real estate expert on the subject. (A0035).

Other courts have found that general evidence of alternatives is insufficient to establish the affirmative defense of mitigation. *See Delliponti v. DeAngelis*, 681

A.2d 1261, 1265 (Pa. 1996) (holding that a defendant did not carry its burden on mitigation where it proffered evidence that comparable jobs were generally available because such evidence "does not establish that there were actual vacant positions available to Appellant"); *Hemphill v. City of Wilmington*, 813 F. Supp. 2d 592, 599-600 (D. Del. 2011) (finding that list of more than 200 teaching positions in the City during the relevant period could not satisfy the defendant's mitigation burden because it lacked the detail necessary to prove that a "substantially equivalent" position existed that met the plaintiff's specifications).

Second, the only specific property identified by the former DRMC President in DRMC West did not meet RHJ's requirements, as found by the District Court. The District Court determined that RHJ required a space (i) of approximately 4,000 square feet (ii) not located near a residential area and (iii) not for purchase. (A0035). The single family residence identified by the former DRMC President was (i) of an unknown square footage, (ii) in a residential area, and (iii) only available for purchase. (A1270-A1273). RHJ was not required to accept this dissimilar property. *See Kellett Aircraft*, 186 F.2d at 198-99 ("One is not obligated to exalt the interests of the defaulter to his own probable detriment").

The other piece of testimony cited to as support for the District Court's mitigation determination concerned DRMC East. (A0036; A1277-A1280). The former DRMC President's testimony is as follows:

Q: Okay. And there was space available in 2006, 2007 in that facility?

A: In the East Campus?

Q: Yes.

A: Yes, there was.

Q: And was there approximately 35 – 3800 square feet?

A: It was around 3500, sure.

(A1279-A1280).

This testimony does not support the District Court's conclusion that a suitable space was available for RHJ at DRMC East. First, the former DRMC President admitted on cross-examination that this space *was located in a residential area*. (A1283). The District Court noted multiple times that RHJ did not want to locate near a residential area because of its early hours of operation. (A0010; A0035; A0472; A0491). Indeed, the District Court credited Varacallo's testimony that, prior to leasing 994 Beaver Drive, RHJ rejected an otherwise suitable property in DuBois specifically because of its proximity to residences. (A0010).

Second, RHJ required a property that was 4,000 square feet and had Varacallo searching in the range of 4-5,000 square feet; the DRMC East space was 3,500. (A0035; A1071; A1280-A1281). Third, RHJ wanted a "stand-alone

building"; the DRMC East space was in a medical complex. (A0493; A1280-A1281).

Fourth, the City only established that the property was available to lease at some point in 2006 and 2007. RHJ's obligation to mitigate did not begin *until* the end of 2007, when the City passed the unconstitutional Ordinance 1720. *See Toyota Indus. Trucks*, 611 F.2d at 472 ("We reject [defendant]'s initial argument that a duty to mitigate damages could arise *before* it dishonored both of the submitted drafts") (emphasis added). Thus, this space was not a suitable alternative when there was no evidence that it was actually available to lease when RHJ's duty to mitigate arose. *See Koppers Co.*, 98 F.3d at 1448 (holding that because all of the defendant's proffered mitigation evidence concerned alternatives that were available *prior* to the defendant's breach, such "evidence was legally insufficient to make out a claim of failure to mitigate damages").[8]

These were RHJ's requirements for a property and RHJ was not obligated to settle for a lesser or dissimilar property in order to exalt the interests of the City, which violated RHJ's constitutional rights by prohibiting it from operating at its

[8] Even assuming that the space was still available in December of 2007, RHJ was not required to act "at once" to lease the first property it saw in order to mitigate its damages. *See Second Nat'l Bank of Hoboken v. Columbia Trust Co.*, 288 F. 17, 23-24 (3d Cir. 1923) (holding that the plaintiff does not have to act "at once" in order to mitigate its damages but can take time to explore the market). Indeed, the District Court found "that approximately six months would have been a reasonable period for [RHJ] to secure a new location." (A0059).

desired location pursuant to two separate invalid laws. *See Kellett Aircraft*, 186 F.2d at 198-99.

CONCLUSION

For the foregoing reasons, RHJ requests that this Court: (i) reverse the decision of the District Court entering judgment in favor of the City on RHJ's claims under the ADA and Rehabilitation Act; (ii) remand the case to the District Court for entry of judgment in favor of RHJ on RHJ's claims under the ADA and Rehabilitation Act; (iii) reverse the decision of the District Court finding that RHJ failed to mitigate its damages after November 27, 2007; and (iv) remand the case to the District Court for a determination of the damages that RHJ is entitled to recover as a result of the City's violation of its constitutional rights.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify:

1) that Matthew Monsour and Kevin Batik are members of the bar of this Court.

2) that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,390 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3) that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

4) that the text of the PDF copy and the hard copy of the brief are identical.

5) that a virus check was performed on the PDF copy of the brief using Symantec Endpoint Protection, version 11.0.7101.1056 and that no virus was detected.

6) that on December 19, 2012 I caused to be served two copies of this Brief and Volume I of the Appendix via United States first class mail, postage prepaid, upon the following:

Thomas J. Elliot, Esq.
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7) that on September 19, 2012, the same day that I transmitted to the Court an electronic version of this Brief and Volume I of the Appendix, 10 copies of this Brief and Volume I of the Appendix were mailed, via United States, first-class mail, postage prepaid to:

Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

/s/ Matthew Monsour

VOLUME I OF THE APPENDIX

Tab No. 1
Notice of Appeal

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 JUDGE KIM R. GIBSON**
v.	:	
CITY OF DUBOIS,	:	
Defendant.	:	

NOTICE OF APPEAL

Plaintiff RHJ Medical Center, Inc., by its undersigned counsel, gives notice of its appeal to the United States Court of Appeals for the Third Circuit from the Order and Findings of Fact and Conclusions of Law entered in this action on August 17, 2012 (D.E. 107) as well as from all other adverse rulings in this case.

Dated: September 17, 2012

Respectfully submitted,

/s/ Matthew D. Monsour
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served this 17th day of September 2012, via Electronic Filing, upon the following:

Thomas J. Elliot, Esq.
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/s/ Matthew D. Monsour

Tab No. 2
Order

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

Tab No. 3
Findings of Fact and Conclusions of Law

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.	)	

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,

[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.