

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

**NO. 05-4353**

**NEW DIRECTIONS TREATMENT SERVICES, on its Own Behalf  
and on Behalf of its Patients; ANGEL DOE; DAN COE; JOSEPH JOE;  
LUIS LOE; CARLOS POE; PETER VOE.  
Plaintiffs-Appellants,**

**v.**

**CITY OF READING  
Defendant-Appellee.**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA, THE  
HONORABLE PAUL S. DIAMOND, CIVIL ACTION NO. 04-CV-1311**

---

**APPELLANTS' BRIEF**

Barbara E. Ransom, ID No. 64166  
Michael Churchill, ID No. 04661  
Public Interest Law Center  
of Philadelphia  
125 S. 9<sup>th</sup> Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19107  
215-627-7100

Counsel for the Appellants

DATE: January 17, 2006

## **CORPORATE DISCLOSURE STATEMENT**

Appellant, New Directions Treatment Services is a 501(c)(3) non-profit corporation. Appellant is not aware of any publicly held corporation that is a party to this proceeding.

## TABLE OF CONTENTS

Page:

JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES PRESENTED .....	1
STATEMENT OF RELATED CASES .....	3
STATEMENT OF STANDARD OF REVIEW .....	3
STATEMENT OF THE CASE .....	3
I. Nature of the Case .....	3
II. Disposition of District Court .....	6
STATEMENT OF FACTS .....	9
I. Methadone Treatment .....	9
II. NDTS as a Provider of Rehabilitative Services .....	11
III. NDTS Operates Without Complaint in a Residential Neighborhood .....	13
IV. The Growing Need for Methadone Treatment Services in Reading .....	14
V. NDTS with City Assistance Identified a Site Zoned Highway Commercial In Reading Where Most of Its Patients Reside. ....	15
VI. The Passage of 53 P.S. § 10621 .....	16
VII. There is No Suitable Site in Reading Which Is Not Governed by Section 10621 .....	18
VIII. Rejection of the Clinic by the City .....	19
IX. The Individual Plaintiffs .....	21
SUMMARY OF ARGUMENT .....	22

**TABLE OF CONTENTS (Cont'd)**

Page:

ARGUMENT ..... 25

I. The Denial of a Permit to NDTs Violated the Equal Protection Clause of the Constitution Because the Reasons Offered Were Not Rational Nor Legitimate in Light of the Uses Permitted as of Right in the Commercial Highway District. .... 25

II. The Action of City Council Denying NDTs a Permit Violated Federal Statutes Designed to Prevent Discrimination Against Persons with Disabilities. .... 32

A. The reasons for denying NDTs a permit were pretextual in light of other permitted uses. .... 33

B. The Court erred in requiring discrimination by reason of disabilities to be the sole cause of the City’s denial rather than a motivating factor for finding a violation of the ADA. .... 38

C. All of the Individual Plaintiffs as well as NDTs, have standing to enforce the statutes. .... 39

III. Pennsylvania’s Statute Singling out Methadone Clinics for a Unique Zoning Procedure Facially Violates Federal Statutes Protecting Persons with Disabilities and the Equal Protection Clause ..... 44

IV. The District Court’s Denial of Plaintiffs’ Motion for Class Certification Was an Abuse of Discretion Because it Increased the Requirements for Being a Class Representative. .... 50

V. Conclusion ..... 55

## TABLE OF AUTHORITIES

### FEDERAL CASES

	Page:
<i>Addiction Specialists, Inc. v. Twp. of Hampton</i> , 411 F.3d 399 (3d Cir. 2005) . . .	40
<i>Baird v. Rose</i> , 192 F.3d 462 (4 <sup>th</sup> Cir. 1999) . . . . .	38
<i>Bay Area Addiction Research and Treatment, Inc. v. City of Antioch</i> , 179 F.3d 725 (9 <sup>th</sup> Cir. 1999) . . . . .	40, 46, 47
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 . . . . .	passim
<i>Doe v. Mandy</i> , 514 F.2d 1179 (7 <sup>th</sup> Cir. 1975) . . . . .	54
<i>Eisenberg v. Gagnon</i> , 766 F.2d 770, (3d Cir. 1985) <i>cert. denied</i> , <i>sub nom. Pelino v. Eisenberg</i> , 474 U.S. 946 (3d Cir. 1985) . . . . .	50
<i>In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation</i> , 55 F.3d 768 (3d Cir. 1995) . . . . .	50, 51
<i>Grasty v. Amalgamated Clothing &amp; Textile Workers Union</i> , 828 F.2d 123 (3d Cir. 1987) . . . . .	53
<i>Greenfield v. Villager Industries Inc.</i> , 483 F.2d 824 (3d Cir. 1973) . . . . .	53
<i>Hassine v. Jeffes</i> , 846 F.2d 169 (3d Cir. 1988) . . . . .	53-54
<i>Innovation Health Systems, Inc. v. City of White Plains</i> , 117 F.3d 37 (2d Cir. 1997) . . . . .	passim
<i>MX Group, Inc. V. City of Covington</i> , 293 F.3d 326 (6th Cir. 2002) . . . .	31, 40, 47
<i>Merrill Lynch</i> , 259 F.3d 154 (3d Cir. 2001) . . . . .	50-51
<i>Newman v. GHS Osteopathic, Inc.</i> , 60 F.3d 153 (3d Cir. 1995) . . . . .	34, 38

**TABLE OF AUTHORITIES (Cont'd)**

	Page:
<i>Regional Economic Community Action Program v. City of Middletown</i> , 294 F.3d 35 (2d Cir. 2002) .....	34, 37, 39
<i>Reproductive Health Svcs. v. Webster</i> , 662 F.Supp. 407 (W.D. Mo. 1987) .....	54
<i>Roe v. Operation Rescue</i> , 123 F.R.D. 500 (E.D. Pa. 1988) .....	55
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	25, 48, 49
<i>Smith-Berch, Inc. v. Baltimore County, Md.</i> , 115 F.Supp.2d 520 (D. Md. 2000) .....	47
<i>Sullivan v. City of Pittsburgh</i> , 811 F.2d 171 (3d Cir. 1987) .....	30, 37, 40
<i>Teahan v. Metropolitan-North Commuter R. Co.</i> , 951 F.2d 511 (2d. Cir. 1991) .....	41, 42, 44
<i>Tsombanidis v. City of West Haven</i> , 180 F.Supp.2d 262 (D. Conn. 2001) .....	36
<i>Union Pacific R.R. v. Greentree Trans. Tracking Co.</i> , 293 F.3d 120 ((3d Cir. 2002) .....	3
<i>United States v. Borough of Audubon</i> , 797 F.Supp. 353 (D.N.J. 1991), <i>aff'd</i> , 968 F.2d 14 (3d Cir. 1992) .....	36
<i>Wetzel v. Liberty Mutual Insurance Co.</i> , 508 F.2d 239, <i>cert. denied</i> , 421 U.S. 1011 (3d Cir. 1975) .....	25, 52

**TABLE OF AUTHORITIES (Cont'd)**

Page:

**FEDERAL STATUTES**

Equal Protection Clause of the Fourteenth Amendment  
of the Constitution . . . . . 1, 45

28 U.S.C. § 1291 . . . . . 1

28 U.S.C. § 1331 . . . . . 1

28 U.S.C. § 1337 . . . . . 1

28 U.S.C. § 1343 . . . . . 1

29 U.S.C. § 705(20)(C)(i) . . . . . 40, 42

29 U.S.C. § 794 . . . . . 1, 5

29 U.S.C. § 794(a) . . . . . 34

42 U.S.C. § 1983 . . . . . 1, 4

42 U.S.C. § 12101(b) . . . . . 33

42 U.S.C. § 12114 . . . . . 40

42 U.S.C. § 12132 . . . . . 1, 5, 33, 39

Rule 23(a) . . . . . 51, 52

Rule 23(a)(4) . . . . . 53, 54 Rule 23(a)

Rule 23(b) . . . . . 51

Rule 23(b)(2) . . . . . 6

**TABLE OF AUTHORITIES (Cont'd)**

Page:

Rule 12(c) ..... 7

Rule 30(b)(6) ..... 16

**STATE & MUNICIPAL STATUTES**

53 P.S. § 10621 ..... passim

Reading Zoning Statute § 27-810 ..... 16

**REPORTS**

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 87 (1990),  
reprinted in 1990 U.S. Code Cong. & Admin. News 267, 596 ..... 41

Newberg on Class Actions 4th Ed. § 3.26 ..... 53

## **JURISDICTIONAL STATEMENT**

The District Court had jurisdiction over these claims for violations of the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, as well as claims under 42 U.S.C. § 1983, pursuant to 28 U.S.C. §§ 1331, 1337, and 1343.

This appeal is from a final order filed and entered August 22, 2005, entering judgment on behalf of the Defendant and dismissing all of Plaintiffs' claims with prejudice. The appeal, pursuant to 28 U.S.C. § 1291, was timely filed within 30 days on September 21, 2005. The appeal is also from a non-final order denying class certification entered November 2, 2004 which became appealable upon entry of final judgment.

## **STATEMENT OF ISSUES PRESENTED**

1. Did the District Court commit an error of law in finding that Reading's denial of a permit did not violate the Equal Protection Clause when it failed to compare the impact of uses allowed in a Commercial-Highway zone to the impact of the NDTs clinic.

2. Did the District Court err when it failed to consider other allowed uses when it concluded that Reading's reasons for denying the permit were not pretext and did not violate the ADA or Section 504.

3. Did the District Court apply the wrong legal standard in holding that under the ADA plaintiffs may prevail only if the defendant acted "solely" by reason of disability, when the standard is whether disability is "a motivating factor."

4. Did the District Court err in denying standing to five of the Individual Plaintiffs based on the exclusion from coverage for persons "currently engaged in the use of illegal drugs" when Reading did not "act on the basis of such use" but acted on the basis of the Plaintiffs legal methadone use.

5. Did the District Court err in finding a Pennsylvania zoning statute that singles out methadone clinics for a special procedure does not facially violate the ADA, Section 504 and the Equal Protection Clause when it did not examine what difference existed, if any, between the uses not subjected to the special requirements and methadone clinics.

6. Did the District Court abuse its discretion when it denied class certification because Plaintiffs had not supplied the identities of class representatives proceeding as Pseudonyms.

Each of the foregoing issues was raised in connection with the motions for summary judgment filed by the parties and ruled upon in the opinion of the court filed August 22, 2005.

### **STATEMENT OF RELATED CASES**

This case has not been before this Court before, and Appellants are not aware of any other case or proceeding that is any way related which is pending or about to be presented before this court or any other court or agency, state or federal.

### **STATEMENT OF STANDARD OF REVIEW**

The District Court's grant of Summary Judgment is subject to de novo review, using the same standard that the District Court should have applied. See, e.g., *Union Pacific R.R. v. Greentree Trans. Tracking Co.*, 293 F.3d 120 (3d Cir. 2002). District court decisions denying certification of class actions are reviewed for abuse of discretion.

### **STATEMENT OF THE CASE**

#### **I. Nature of the Case**

This case concerns the claims of New Directions Treatment Services and six individual Plaintiffs who are recovering heroin addicts who rely on methadone for treatment. Plaintiffs claim Defendant City of Reading discriminated against them

on the basis of disabilities in violation of the United States Constitution, 42 U.S.C. § 1983, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 (“Rehabilitation Act”) when Reading denied NDTs an occupancy permit for a methadone clinic at 700 Lancaster Avenue in a Commercial-Highway district. The previous tenant of the premises had been a drug and mental health treatment facility which did not utilize methadone for treatment and had operated without neighborhood complaint.

In 1999, the Pennsylvania General Assembly passed 53 P.S. § 10621 which prohibits the establishment and operation of any methadone treatment facility 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” without the express approval of the governing body of the municipality.

In September 2001, NDTs, a licensed provider of methadone treatment faced with a burgeoning population of methadone-dependent clients at a nearby municipality, applied to Reading for an occupancy and operation permit for 700 Lancaster Avenue. A-612.

On January 14, 2002 and February 28, 2002, City Council held hearings on the application and on March 25, 2002, following strong community opposition, unanimously denied NDTs the permit.

On March 25, 2004, Plaintiffs filed this Complaint (A-53) against the City and the seven City Council members who voted to deny the permit. The four counts of the Complaint were:

- Count I: Fourteenth Amendment Violations of Due Process and Equal Protection – alleging that the state statute is facially discriminatory and not rationally related to any governmental interest and that Reading’s refusal to grant NDTs a permit to occupy and operate a methadone treatment facility at 700 Lancaster Avenue was arbitrary and based on irrational prejudice against methadone-dependant persons.
- Count II: Violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 – alleging that 53 P. S. § 10621 facially and by operation of the City contravenes Congress’ intent to extend the Act’s protection to those individuals participating in a supervised rehabilitation program to obtain the benefits of the Rehabilitation Act when seeking services from a qualifying local government.
- Count III: Violations of Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 – alleging that 53 P.S. § 10621 facially and by operation

of the City discriminates against opiate-dependent persons who rely on methadone treatment to be and remain substance free by denying NDTs's application for a permit to occupy and operate a methadone treatment clinic in Reading.

- Count IV: Supremacy Clause – alleging that 53 P.S. § 10621 facially and by Reading's application conflicts with the federal scheme that controls the distribution and regulation of methadone treatment.

- Plaintiffs sought declaratory and injunctive relief and damages for the harm they suffered as a result of Defendants' discriminatory actions.

Defendants filed an Answer and a Demand for a Jury.

## **II. Disposition of District Court**

Plaintiffs' complaint was filed as a class action and on September 27, 2004 Plaintiffs moved to certify the class pursuant to Rule 23(b)(2) of the Fed. R. Civ. P. as: all persons residing in the City of Reading and its surrounding community who have been, are currently, or will be at risk of being on the waiting list to receive methadone treatment; and, all opiate-dependant residents of the City of Reading and its surrounding community who have needed, now need or in the future may need methadone treatment. Dkt. Entry #15. Defendants argued that since the individual Plaintiffs brought this action in pseudonym, they had not produced a record that demonstrated that they could "assume the responsibility of

serving as class representatives.” Dkt. Entry #27 at 12. On November 2, 2004, the District Court denied without prejudice Plaintiffs’ motion for class certification on the basis that Plaintiffs had not provided Defendants with the information necessary for Defendants to determine whether the named class representatives can represent the class adequately.<sup>1</sup> A-2. Plaintiffs appeal that decision.

On September 3, 2004, Defendants filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) (Dkt. Entry #8) arguing that the Council Members – named in their individual and official capacities – who voted to deny NDTS’ request for a zoning permit are entitled to judgment on all counts on the grounds of absolute quasi-judicial immunity and qualified immunity in their individuals capacity and that such claims are unnecessarily duplicative in their official capacity since Reading was also a defendant. On October 17, the court dismissed the Council Members on all counts. That Order is not the subject of this appeal.

---

<sup>1</sup>On the same date that the District Court denied Plaintiffs’ Motion for Class Certification, it also granted Plaintiffs’ Motion to Proceed in Pseudonym. Dkt. Entry #31. The court allowed the individuals to proceed in pseudonym, but required them to make their legal identities known only to Defendants’ counsel. Plaintiffs promptly complied with this Order.

On September 21, 2004, the Defendants filed a Motion for Partial Judgment on the Pleadings with respect to Count IV, the Supremacy Clause claim on the grounds that 53 P.S. § 10621 is not preempted by the federal laws that control the distribution and regulation of methadone treatment. Dkt. Entry #12 at 3. The Court granted Defendants' Motion and dismissed Count IV on October 15, 2004. Dkt. Entry #23. That Order is not the subject of this appeal.

Following the close of discovery Plaintiffs submitted a Motion for Partial Summary Judgment arguing that, as a matter of law, 53 P.S. § 10621 and its implementation by Reading to deny NDTs a permit to operate a methadone treatment facility at 700 Lancaster Avenue violate the Constitution, the ADA and the Rehabilitation Act. Dkt. Entry #39. Plaintiffs sought an injunction to grant NDTs the permit.

Reading cross filed a Motion for Summary Judgment on the three remaining counts Dkt. Entry #37.

By letter dated April 2, 2004, Plaintiffs had informed the Pennsylvania Attorney General that the constitutionality of Section 10621 was being challenged. The State declined to intervene. By order of the Court, the Attorney General briefed the partial summary judgment motion as an amicus and participated in the March 24, 2005 oral arguments.

Following oral arguments, the Court, on August 22, 2005, denied Plaintiffs' Motion and granted Defendant's Motion. A-3. Reasoning that the federal courts should not sit as a zoning board of appeals, the court dismissed the complaint and entered judgment against the Plaintiffs. The court dismissed the constitutional claims because the undisputed facts establish a clear and rational relationship between the denial of the permit and "legitimate governmental purposes." A-18. Further, the court reasoned that because Plaintiffs could have appealed Reading's zoning decision to the Berks County Common Pleas Court, Plaintiffs were not denied due process. A-22.

The court based its dismissal of Plaintiffs' claims under the ADA and the Rehabilitation Act on the lack of standing of five of the six named individuals reasoning that they were not persons with a disability because, at the time Reading denied NDTS's application, they "recently" used illegal drugs. A-25. The District Court also reasoned that regardless of the standing issue, Plaintiffs claims could not proceed under the federal statutes because the other stated reasons for Reading's denial of NDTS's application established that the permit was not denied "solely" by reason of their disability. A-25.

## STATEMENT OF FACTS

### I. Methadone Treatment

Methadone is a synthetic opiate that acts to supply to the brain opiates that heroin addicted persons crave but are not able to produce on their own. Ingesting external opiates like heroin for an extended period – as is required for participation in a methadone program – disables the brain’s ability to produce its own opiates. A-166 at p 84 and 87. Outpatient methadone treatment programs administer methadone to reduce the patients’ cravings for heroin and block heroin’s euphoric effects, thereby enabling patients to lead productive lives. Some patients stay on methadone indefinitely, while others move from methadone to abstinence. A-65.

According to the White House Office of National Drug Control Policy, methadone “is a rigorously well-tested medication that is safe and efficacious for the treatment of narcotic withdrawal and dependence.” It is also “one of the most monitored and regulated medical treatments in the United States.” A 1994 study of drug treatments found “the rates of illegal drug use, criminal activity and hospitalization were lower for MMT [methadone maintenance treatment] patients than for addicts in any other type of drug treatment program.”

[www.whitehousedrugpolicy.gov/publications/factsht/methadone.](http://www.whitehousedrugpolicy.gov/publications/factsht/methadone)

Methadone treatment programs – regulated by the Food and Drug Administration until 2001 – are now regulated by the Center for Substance Abuse Treatment (“CSAT”) and the Drug Enforcement Agency (“DEA”) and are licensed by the state in which the program is located. A-55 at ¶ 5. The National Institute of Drug Abuse considers methadone to be the best treatment for heroin addiction. A-115. Indeed, the Pennsylvania Bureau of Drug and Alcohol requires all counties in Pennsylvania to have contracts with methadone facilities. A-636. Despite this official support for methadone treatment facilities, and the fact that there are heroin users in all 67 counties of Pennsylvania, there are only 31 methadone treatment facilities in 15 counties. A-173 at p 115-6.

## **II. NDTS as a Provider of Rehabilitative Services**

NDTS’s comprehensive rehabilitation services include medically supervised and licensed outpatient methadone treatment. A-172 at pp 111-13 Because many of its clients are addicted to other drugs, NDTS’s treatment is not limited to methadone, but includes HIV/AIDS counseling, mental health counseling, and support groups. A-156 at pp 10-12; A-172 at pp 112-13. NDTS is fully certified by both the CSAT and the DEA and licensed by the Commonwealth to operate a methadone clinic. NDTS has maintained the appropriate federal certifications and

state licenses since 1980 and operates methadone treatment facilities successfully in Pennsylvania. A-55 at ¶ 5.

NDTS began providing services in the adjacent municipality of West Reading when Reading's Community General Hospital closed its methadone clinic in 1990. It is the only methadone clinic in Berks County. A-101-102. NDTS initially makes a thorough assessment of each applicant to determine the most effective treatment program for each client. A-181 at p 30. Typically patients report daily for their medication, as well as attend scheduled counseling sessions. Patients are subject to urine drug screening to ensure they are taking their methadone and no longer using illegal drugs. A-180 at p 28. If a patient does test positive for illegal drug use, NDTS attempts to work with that individual through further counseling and by altering the methadone dosage. A-180-81 at pp 29-30; A-166 at p 88. If these methods fail, the client will be asked to leave the program. A-66 at p 88.

NDTS gives its clients ample opportunity for stabilization and rehabilitation, recognizing that relapse is a part of the recovery process and that retention in treatment is critical to restoring the heroin addict to health. A-165 at p 82. The treatment records of individual plaintiffs attest to the benefits that they

attain by participating in the program, even after initial periods of relapses. See A-388-91; A-522-527.

NDTS has been tremendously successful in the rehabilitation of persons with heroin addiction and in providing an effective program in the treatment of methadone-dependant persons. The review of the data reports on relapses that NDTS is required to maintained for funding purposes show a five year history of drug testing. A-571 at ¶ 19; A-580-81. Positive screens for patients at the West Reading facility showed a diminution from 34% positive for opiates in the first six months of treatment to 6% positive at the end of the first year, to 1% positive after five years in the program. A-580; A-568 at ¶ 8. Neal Byrnes, NDTS's Program Director, attested to the state and federal requirement that at the point of admission of any non-transferring patient to a methadone treatment facility an applicant's drug screens must be 100% positive. A-567 at ¶¶ 5-6. Mr. Byrnes reported that 78% of the 263 patients whom NDTS admitted for methadone treatment in 2004 were still in treatment. Only 13 patients (5% of the 263 admitted) left as a result of continued drug use. Id. at ¶¶ 9-10.

### **III. NDTS Operates Without Complaint in a Residential Neighborhood**

The NDTS facility in West Reading is in a residential neighborhood in closer proximity to residences, which are in row houses adjacent to it, than

proposed in Reading. A-628. It does not permit congregation outside its facilities. The former West Reading landlord testified at the second public hearing that NDTs does not tolerate client misbehavior and did not impair the community. A-660. The Executive Director testified that there had been no serious incidents in West Reading, that neighbors did not view it as a threat, and characterized NDTs's operations as "a very tight ship." A-627-28; A-633-34. No opponent cited a single instance of interaction between clients and neighbors in West Reading.

#### **IV. The Growing Need for Methadone Treatment Services in Reading**

As the only rehabilitative service to provide methadone treatment in response to the "serious heroin problem in Reading and Berks County," NDTs is supported in its expansion effort by the Council on Chemical Abuse ("CCA"), the Berks County Drug and Alcohol Agency. It warned the lack of available methadone services "will likely increase heroin-related problems for the citizens of Reading." A-243.

In 1990, the West Reading facility originally served 145 persons, and by 2001 it was licensed to serve 190 persons. A-175 at p 123. At the date of filing its complaint, NDTs had reached its maximum capacity at the of 245 persons. The limited capacity forced NDTs to maintain a waitlist, which it began collecting in

electronic form in or about 2000. In 2000, 44 persons averaged 44 days wait time; in 2001, 55 persons averaged 49 days; in 2002, 51 persons averaged 58 days; in 2003, 37 persons averaged 66 days; and, in 2004, 44 persons averaged 43 days A-182 at pp 42-43; A-186-87 at pp 69-71. A wait time is particularly onerous for current heroin addicts who live very chaotic lifestyles and are often homeless and without telephones. A-167 at pp 92-94.

**V. NDTs with City Assistance Identified a Site Zoned Highway Commercial In Reading Where Most of Its Patients Reside.**

This increasing demand for methadone treatment was the impetus for NDTs to seek a permit to operate an additional treatment facility in Berks County, specifically in Reading where there was a proliferation of heroin abuse and where 65 to 75 percent of its patients resided. A-636; A-243. NDTs contacted the Mayor and City Council in order to determine a suitable location for the methadone clinic and was advised to avoid the downtown business area. Members of the City's administration suggested 700 Lancaster Avenue as a possible location because there had been no complaints from the neighbors when the site was used as a drug treatment center. A-570 at ¶ 9.

Seven hundred Lancaster Avenue is located in the City's "( C-H) Commercial Highway" zone. A-653. It has approximately 20 off-street parking

spaces. A-158 at pp 18-19. There is a bus stop across the street and a traffic light at the intersection. A-695. There are approximately 75 residences within 500 feet of the site. The previous occupant of the building, the Berks Counseling Center, had been a clinic treating drug and alcohol addicts and mentally ill persons. The former facility had existed for a long time with no complaints from neighbors and left when it needed more space. A-625; A-653. Therefore, in August 2001, NDTs entered into a ten year lease of the premises (A-583) and shortly thereafter sought an occupancy permit. A-612.

Uses Reading permits as of right without any hearing in the Commercial Highway zone include beer distributors, convenience stores, drive-thrus, nightclubs, motels, and emergency health care facilities.<sup>2</sup> The C-H zone in which 700 Lancaster Avenue is located abuts a “manufacturing commercial zone”, a “heavy manufacturing zone” and two high density residential zones. A-689. Karl Graybill, Defendant’s Rule 30(b)(6) designee for expertise in the City’s zoning practices, admitted that the methadone clinic would have been “grouped ... into [the] professional office [category], clinic/hospital/doctor office use” and therefore would have been permitted in the C-H zone without hearings or further municipal action, but for 53 P.S. § 10621. A-208 at pp 48-49; A-664.

---

<sup>2</sup> Reading Zoning § 27-810, A-688, is attached to this brief.

## **VI. The Passage of 53 P.S. § 10621**

In May 1999, the Pennsylvania General Assembly considered and passed HB 1335, an act amending P.L. 805 (the Pennsylvania Municipalities Planning Code) to prohibit the location of methadone treatment facilities in certain locations, specifically to create a statutory buffer zone of 500 feet.<sup>3</sup> The statute supercedes the otherwise universal provisions of the Municipal Planning Code by requiring a public hearing and a vote of the governing body of the municipality after written notice is provided to all persons residing within the buffer zone.

Specifically, the statute prohibits any:

methadone treatment facility from being 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.

53 P.S. § 10621(a)(1). A methadone treatment facility could be established and operated closer than 500 feet of the protected establishments if a municipality's governing body votes "in favor of the issuance of an occupancy permit or certificate" after a public hearing is held on the matter that allows the owners of the affected real property an opportunity to be heard. 53 P.S. § 10621(b).

---

<sup>3</sup>The Pennsylvania Statute, 53 P.S. § 10621, A-52, is attached to this brief.

Representative Serafini, who had sponsored similar legislation that had called for a 2,500 foot buffer, supported the Bill because:

It is unfortunate that we have to have methadone treatment facilities at all .... and these facilities .... do not benefit anyone but the heroin addict, and they should be located either in a community that welcomes this kind of facility or out in an area away from people who have kept themselves clean and free of drugs and should not be confronted by this kind of pollution in their community.

A-598. The bill was passed in the House on **May 3, 1999**, and then presented to the Senate for concurrence and passed by the Senate without discussion on the next day. A-599-600.

**VII. There is No Suitable Site in Reading Which Is Not Governed by Section 10621**

Under Section 10621 there is no suitable site available in the City of Reading which would not require a hearing and special Council approval. As a consequence of Reading's interpretation of Section 10621, Mr. Graybill could identify only three possible areas in Reading in which a methadone facility would not be within the 500 foot restriction. A-201-09 at pp 20-50. The three non-conflicting areas within the City are: Charles Evans Cemetery; a heavy manufacturing area totally occupied by two steel companies, Carpenter Technology Corporation and Dana Corporation; and, the Riverside area. A-203-

04 at pp 28-30 and A-206-07 at pp 41-44. While not zoned for residences, the Riverside area had existing non-conforming residences in it. The zoning officer did not know if those residential uses would trigger the 500 foot buffer, and did not know if in fact there were any suitable facilities available. A-207-08 at pp 43-46. Mr. Cooper testified that NDTS had been unable to locate any suitable site which would not trigger the 500 foot buffer.<sup>4</sup> A-159 at p 22.

### **VIII. Rejection of the Clinic by the City**

Although Mr. Graybill did not regard 700 Lancaster Avenue as being within 500 feet of the premises a “residential housing area,” he submitted NDTS’s request for an occupancy permit to City Council for its approval pursuant to Section 10621 because there are “residential uses” allowed within 500 feet of 700 Lancaster Ave. A-208 at pp 48-49. Notice of a public hearing was sent to property owners and residents in December 2001 and two hearings held. At the first hearing NDTS described its operations and invited Council members to come and look at their facility in neighboring West Reading. None visited the facility or conducted any review of methadone treatment programs. Also at that first hearing, City residents presented a petition with more than 200 signatures opposing

---

<sup>4</sup> He also testified that NDTS had hired an independent realtor to assist its search. A-159 at p 22.

approval. A spokesperson for the opponents asserted neighborhood values would go down, that neighborhood children would be affected, that he had a daughter and wouldn't want her near a methadone clinic, and that he would move if he lived next to one. No council member asked him the basis for his fears for his daughter's safety. There was no testimony about potential traffic problems. A-617-57.

A second hearing was held February 28, 2002 in the community, where many residents protested, voicing again concerns about safety and property values, with claims that the clinic would "compromise the quality of life" for children and families, that it would "break" or be "detrimental to" "community spirit," would require additional police, and would "destroy neighborhood and family standards."<sup>5</sup> No concerns about traffic problems were recorded. No complaints were made about the drug treatment center which previously occupied the proposed premises. The former landlord at the NDTs West Reading facility testified positively about its impact on his neighbors.

Council members Figueroa, and Ganster stated they would vote in accordance with community members' views and President Spencer stated that

---

<sup>5</sup> Although the hearing was video taped and a stenographer present, the City has no transcript or tape; consequently, the parties are dependent upon the City's official minutes. A-659-62.

the views of the community would carry weight in his decision. He confirmed that it was the identity of the clinic's patients which was of concern by declaring "Reading can no longer carry the burden for the outlying communities in supporting treatment facilities." Ms. Reed stated that the residents had raised legitimate concerns. Mr. Waltman stated his belief that methadone treatment "condones addiction" and that the clinic would "compromise the stability" of the community. Mr. Kerns stated a clinic could break the community spirit. A-661-62.

On March 25, 2002 after a speaker identified as "representing the citizens of the Millmont area" again stated the clinic "would adversely affect the quality of life" in the residential area, the City Council unanimously voted not to grant approval. The only council member to record his views, Councilman Schorn, noted council's opposition to locating a treatment center "in a highly residential area." A-663-70.

The next day the Council President wrote NDTs to inform it of the rejection and suggested Council would support a methadone clinic in "a non-residential area." A-247.

## **IX. The Individual Plaintiffs**

The individual Plaintiffs are each users of methadone for treating heroin addiction. Plaintiffs Doe, Poe and Voe were on the NDTs West Reading waiting list during or shortly before the time the application for a permit in Reading was pending because of the lack of capacity at West Reading. Plaintiff Loe was on the waiting list for four months from December 2003 to March 2004 because of the lack of capacity at West Reading. While on the waiting list Plaintiffs either received no treatment or had to make a daily two-hour round trip to a facility in Coatsville or a ninety minute round trip to Allentown.

All of the Individual Plaintiffs have severe handicaps rendering them persons with disabilities for reasons apart from their drug addiction, including AIDS (Coe), traumatic brain injury and post traumatic stress (Joe), disabling heart condition (Loe and Poe), bi-polar disorder and clinical depression (Doe), heart condition and disabling arthritis (Voe).

Plaintiff Loe has not used any illegal drugs for the 23 years he has been on methadone. None of the Plaintiffs had used any illegal drugs for the last eight months for which records were provided prior to November 2004. Intermittent drug use occurs with some recovering addicts. At the time the complaint was filed in March 2004 five of the six Individual Plaintiffs had been without illegal drug

use for at least three months. At the time of the denial of the permit, one plaintiff was just entering treatment (Voe), and three had been without any illegal drug use in the prior three months (Joe, Loe and Poe).

### **SUMMARY OF ARGUMENT**

The District Court upheld the action of the City of Reading denying a permit to NDTS to locate a methadone clinic in a commercial highway district on the grounds that it did not matter if the City Council was reacting to animosity against methadone users because it was rationally acting on the basis of legitimate considerations of the clinic's impact on public safety, traffic, and loitering.

The Court wrongly reached this conclusion without ever evaluating the impact on public safety, traffic and loitering of the broad range of uses the City allows as of right in that neighborhood, including a drug treatment facility previously located at that exact spot that did not use methadone as a form of treatment. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) directs a careful analysis of what uses are permitted in order to determine if the refusal is rational and based on legitimate factors. That analysis demonstrates that Plaintiffs, and not Defendant, are entitled to Summary Judgment on the issue whether the Equal Protection Clause was violated.

A similar analysis of whether the City's justification is pretext is necessary under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act which prohibit discrimination by reason of disabilities. Again the Court only looked to whether there were independent reasons articulated and did not examine whether they were pretext when compared with permitted uses. The Court erred in setting a standard for a violation of the ADA of showing that discrimination was the "sole" cause of the decision, rather than "a motivating factor" as determined by the case law. The Court also erred in finding only NDTs and one individual plaintiff were covered by the two federal statutes on the grounds that five of the Individual Plaintiffs had "recently" used illegal drugs. The exclusion for persons using illegal drugs applies only when the covered entity – the City – acts on the basis of that illegal use. Here the City acted on the basis of the legal use of methadone.

The District Court rejected Plaintiffs' claims that the Pennsylvania statute requiring a special procedure for approval of permits to methadone clinics – notice to neighbors, a public hearing and a vote of the governing body on the individual permit – facially violates the Equal Protection Clause, Section 504 and the ADA on the grounds that increasing public participation is a legitimate public purpose. In coming to that conclusion the court failed to ask and never identified what

about methadone use justified singling it out for this burdensome requirement, as set forth in Supreme Court precedents like Cleburne and Romer, 517 U.S. 620 (1996).

Although this case was filed as a class action the District Court refused to certify the class in response to Defendant's objection that the Individual Plaintiffs were not adequate representatives. The Court's refusal was based on its conclusion that Plaintiffs had not provided enough information to determine whether they were adequate representatives. Plaintiffs had provided all information sought concerning their medical history of drug and methadone use and membership in the class; it had not at that time provided their names. The decision of the Court imposed an additional standard, not required by Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) and other cases in order to be a class representative, and was therefore an abuse of discretion.

## ARGUMENT

### **I. The Denial of a Permit to NDTS Violated the Equal Protection Clause of the Constitution Because the Reasons Offered Were Not Rational Nor Legitimate in Light of the Uses Permitted as of Right in the Commercial Highway District.**

The denial of a permit for a methadone clinic at 700 Lancaster Ave. was a discriminatory violation of the Equal Protection Clause because it was not rationally related to a legitimate governmental purpose when compared with the uses the City of Reading permits at that location. The City allows drug and alcohol clinics which don't use methadone as their form of treatment, it allows night clubs and motels where people may loiter and act noisily, it allows bus and transit terminals where people may come and wait at any time, it allows convenience stores open all night and it allows beer distributors selling six packs. Through its zoning ordinance City Council has determined that there is sufficient parking and access to transportation to permit these uses as of right in this area zoned Commercial-Highway and that these are appropriate uses in this neighborhood.

Without comparing the impact of any of these allowed uses – indeed, without ever mentioning their existence – the lower court held it was permissible to exclude a methadone clinic because vague concerns about traffic, loitering and public safety, were legitimate and rational, non-discriminatory grounds for the decision.<sup>6</sup>

---

<sup>6</sup>The District Court takes as a premise the City's decision that Section 10621 applies to the request for an occupancy permit in a Commercial Highway zone even though it is not exclusively nor even primarily a 'residential housing area'

The lower court greatly exaggerated the evidence that any factor except community fear over public safety motivated opposition. Although the court states “Members of the public expressed concerns about patients crossing the highway, loitering, double parking, and increased traffic and pedestrian congestion” (A-17) there is not a single reference to any of these subjects by community witnesses in the transcript of the January 14, 2002 hearing or in the minutes of the February 28 and March 25, 2002 meetings. The concern by one councilwoman for double parking and instances of patient jaywalking at West Reading cited by the court (A-17) ignored the fact that while NDTs had no off-street parking in West Reading it would have 20 spaces at 700 Lancaster Ave. A-158 at pp 18-19. By contrast, the record was rife with concerns about the impact on “quality of family life” and on Council members’ desires to defer to community fears. A-659-62; A-652; A-664.

A reason for excluding a use that is “rational” or “legitimate” means the City Council could articulate a way in which the methadone clinic or its clients would impact any of these concerns in a way different from allowed uses. There was no such articulation from any witness or decision maker, nor could there be in light of the prior occupancy of the same premises by Berks Counseling Center

---

but merely permits residential uses.

which also treated recovering illegal drug users, but which did not use methadone in its treatment. Only one conclusion is possible: these concerns were pretext for a discriminatory motivation, to keep this particular use and its clients out not because of any evidence that they would have any more detrimental impact than other permitted uses, but because of the fear and dislike of this group.<sup>7</sup>

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) makes clear that **the lower court fatally erred by its failure to examine permitted uses when determining whether the exclusion of the methadone clinic was for legitimate rather than discriminatory purposes.** In that case the Court was confronted with the action of a city council which singled out group homes for the mentally retarded, requiring that use to undertake a special process – apply for and be granted a special use permit – which other residential users were not required to undergo. The City defended both the separate procedure and the denial of the permit on the grounds they were rationally related to legitimate government

---

<sup>7</sup> It is not a defense to a claim of differential treatment or unconstitutional classification to show that a methadone clinic might have loitering problems, or might have traffic problems, or might disturb neighbors with its time of operations if other permitted uses have these same undesirable impacts. It is only “rational” and allowable, if the impacts are foreseeably different in quality or quantity from those permitted impacts.

purposes – controlling congestion, securing “serenity of the neighborhood,” protecting safety of the residents, etc.

Justice White, writing for the Court, set forth the appropriate mode of analysis, asking: “May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?” The city could not treat this facility differently, he said, “unless [it] would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.” 473 U.S. at 448 (emphasis added). The Court then carefully examined each proffered reason, but did not, as the court below did, merely ask if it were in some abstract way one of the issues a city could be concerned with, but compared the impact of the excluded use with permitted uses. In doing so, the Court determined that the other uses permitted in the zone could not be distinguished from the excluded group home in their impact on the community. Therefore, the Court held, the reasons “fail rationally to justify singling out [a group home for the retarded] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.” Id. at 450.

In words which are directly applicable here, the Court held that deferring to the fears and concerns of the community in denying the special permit was not a defense, first stating “mere negative attitudes, or fear, unsubstantiated by factors

which are properly cognizable in a zoning proceeding, are not permissible bases for treating” one use from another. It then went on to say “...the city may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some faction of the body politic.” Id. at 448. The Court repeated this statement, declaring “denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation.” Id. at 449.

It is simply ludicrous for the Council to say that jaywalking is more likely from clients of the clinic than from clients and shoppers at the other permitted uses, particularly when there is a traffic light at the intersection and an authorized bus stop across the street. A-695. Similarly, there is no reason to believe that parking is more of a problem with the clinic users.<sup>8</sup> These rationales are classic pretextual reasons adopted to conceal illegitimate desires to exclude, in this case recovering addicts of illegal drugs using a legal drug.

Subsequently, courts faced with attempts to exclude a methadone clinic or similar entity serving disfavored clientele have made the comparisons required by

---

<sup>8</sup> The double parking observed in West Reading obviously goes to the adequacy of West Reading’s zoning ordinances and parking requirements, not to what is allowed in Reading’s Commercial Highway district and ignores the off-street parking available at the Reading location. No evidence was offered that the clinic requires more parking than a night club, motel or other permitted uses.

the Supreme Court in Cleburne. In Sullivan v. City of Pittsburgh, 811 F.2d 171, 183 (3<sup>rd</sup> Cir. 1987) the court overturned the denial of permits to alcoholic treatment centers on both Equal Protection and Section 504 grounds because the proffered non-discriminatory public safety reasons were ‘irrational’ in light of actual conditions. In MX Group, Inc. V. City of Covington, 293 F.3d 326, 342 (6<sup>th</sup> Cir. 2002) the court held:

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.

The court there examined the allegations of potential increased criminal activity by methadone users and rejected them based on testimony that the clinic operated at other sites without incidents of criminal activity and that methadone clinics present no more problems in the way of drug trafficking than other permitted uses.

Id.

In the City Council proceedings in this case there was not an ounce of evidence introduced as to increased criminal activity in a community resulting from a methadone clinic run by NDTS.

In Innovation Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997) the court noted “although made aware of other similar uses in the same district, the [defendant] ZBA did not explain the distinction between [plaintiff’s] proposed use and the other mental health professionals and social workers who do not work exclusively with chemically-dependent persons.” It went on to say “The lack of a credible justification for the zoning decision raises an additional inference that the decision was based on impermissible factors, namely the chemical-dependent status of IHS’s clients.” Id.

Echoing the Supreme Court, the Second Circuit stated:

Although the City certainly may consider legitimate safety concerns in its zoning decisions, it may not base its decisions on the perceived harm from ...stereotypes and generalized fears. Id.

The fear of crime and decline of community standards expressed in this case, without any analysis or data, and in the face of NDTS’s actual record, is simply that “generalized fear.”

The failure of the District Court to consider the evidence of other permitted uses when determining whether or not the denial of the permit violated the Equal Protection Clause is legal error requiring this Court to reverse the grant of summary judgment for defendants. The absence of any evidence in the record before City

Council that the concerns articulated to the court –traffic, congestion, and community safety – impacted the community to a greater extent from the proposed NDTs methadone clinic than from the prior drug treatment center and other permitted uses, entitles Plaintiffs to summary judgment in their favor, finding that the denial was not based on legitimate, rational reasons.<sup>9</sup>

**II. The Action of City Council Denying NDTs a Permit Violated Federal Statutes Designed to Prevent Discrimination Against Persons with Disabilities.**

**A. The reasons for denying NDTs a permit were pretextual in light of other permitted uses.**

The Americans with Disabilities Act was passed to provide “ a national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S. C. § 12101(b)(1). “Both Title II of the ADA and Section 504 of the Rehabilitation Act prohibit discrimination based on disability by a public entity.” Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 44 (2d Cir. 1997).

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

---

<sup>9</sup>All of the individual Plaintiffs as well as NDTs have standing to pursue this claim and are entitled to the benefits of judgment.

to discrimination by any such entity.” 42 U.S.C. § 12132. The Rehabilitation Act similarly 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 lower court granted summary judgment to the defendant on the claims that the actions of the City Council denying the permit violated the Americans with Disabilities Act and Section 504 of the Rehabilitation Act prohibiting discrimination on the basis of disability. The basis of the Court’s decision was that Plaintiffs “must show that their identity as heroin addicts or methadone users was the sole reason for the City’s decision” denying a permit. According to the Court, “the undisputed evidence shows that the City based its denial of the NDTs application on a variety of reasons, including public safety, traffic, and loitering concerns.” A-25.

**Again, the court never examined whether, in light of other permitted uses, the reasons of public safety, traffic, and loitering were pretextual.** Under well established law, in a disparate treatment case plaintiffs must establish a prima facie case that they were treated differently, defendants must then articulate a legitimate non-discriminatory reason, and plaintiffs may then rebut by showing the

proffered reasons are pretextual. Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156-8 (3d Cir. 1995); Regional Economic Community Action Program v. City of Middletown, 294 F.3d 35, 48-9 (2d Cir. 2002)(“RECAP”).

Plaintiffs do not dispute that some City council members raised the concerns cited by the court during the course of the hearings as they sought some justification to turn down the application. Plaintiffs have consistently disputed whether those proffered reasons were the actual reasons in light of council members’ frequent statements that they wished to defer to neighborhood opposition and their failure to obtain any evidence that the clinic would affect safety, traffic or loitering in a more adverse manner than other permitted uses. There was no analysis of the number of cars which would use the site or any comparison to the traffic generated by other permitted uses. There was no evidence that clients of the clinic were more of a danger to the community or loitered more than the drug abuse and mental health clients of the Berks Counseling Center which was allowed at that location as of right. In fact, the reasons stated can only be described as pretextual, as other uses which would impose similar or heavier burdens on the community had already been approved in the zoning ordinance. Consequently, the requirements of but for causation has been met – but for the presence of former drug addicts using methadone on the

premises the use would have been approved. The court's failure to make the analysis required to determine whether the justifications were pretextual is legal error.

The error is even clearer when set in the context of the community hostility to the permit based on the fears that former heroin addicts using methadone as a means of recovery would endanger their children and their community. While it is difficult for courts to make judgments about motivations of legislative bodies acting collectively, case law rightly requires courts to be particularly sensitive to whether justifications are "legitimate" or whether they are discriminatory pretext when fears and negative attitudes based on stereotype are expressed by the public or some members of the legislative body. The court in United States v. Borough of Audubon, 797 F.Supp. 353 (D.N.J. 1991), aff'd, 968 F.2d 14 (3d Cir. 1992) said "Discriminatory intent may be established where animus towards a protected group is a significant factor in the community opposition to which the commissioners are responding." Id. at 361.

Similarly, the court in Innovative Health Systems, 117 F.3d at 49 said, "a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision makers personally have no strong views on the matter." This reasoning was followed in Tsombanidis v. City of

West Haven, 180 F. Supp.2d 262, 286 (D.Conn. 2001) (“Governmental actions taken in response to significant community bias may be tainted with discriminatory intent even where municipal employees and officials were not themselves biased . . . . Once the plaintiffs have shown that the defendant’s decision was motivated at least in part by a discriminatory animus, the burden shifts to the defendant to prove that it would have made the same decision even if it had not been motivated by an unlawful purpose.”)

In Sullivan v. City of Pittsburgh, this Court noted that in Cleburne, “the Council’s decision was based at least in part on the negative attitude of the majority of property owners.” 811 F.2d 171,184 (3d Cir. 1987)(emphasis added). It found relevant that “here as in Cleburne, appellees demonstrated that the City took its essentially unjustified action in an atmosphere charged with hostility towards a minority group [recovering alcoholics].” Id. at 185. Given the petition delivered to Council and the repeated speeches that the clinic would destroy the community, the atmosphere in Reading was equally hostile.

In RECAP, 294 F.3d at 51-2, the court reversed a grant of summary judgment, holding that plaintiffs had met their burden of production that proffered reasons for denying a program for recovering alcoholics a permit was pretext. The Court cited statements that “this City has done more than its share,” and

“there seems to be a tremendous over-concentration of these type of facilities (i.e., halfway houses) in this City as compared to the surrounding townships” as impermissible reasons for denying the permit. Exactly similar statements were made by Council President Spencer (“Reading can no longer carry the burden for the outlying communities in supporting treatment facilities.”) (A-662) and by resident Vince Gagliardo (“enough social service and treatment facilities are located in the City and this facility should expand . . .in West Reading.”). A-660

This record demonstrates that Plaintiffs raised sufficient evidence of pretext so that summary judgment against them was error. Moreover, based on the absence of any evidence that the articulated reasons had any validity in light of the permitted uses at that site, Plaintiffs are entitled to summary judgment.

**B. The Court erred in requiring discrimination by reason of disabilities to be the sole cause of the City’s denial rather than a motivating factor for finding a violation of the ADA.**

The District Court, moreover, was wrong in requiring that the discriminatory motive be the “sole cause” under the ADA. A-25. In Newman v. GHS Osteopathic, 60 F.3d at 158, this Court held that “in a pretext case [under the ADA] a plaintiff need prove only that the illicit factor ‘play a role in the employer’s decision making process and that it had a determinative effect on the outcome of that process.’” Similarly the Fourth Circuit in Baird v. Rose, 192 F.3d

462, 468-70 (4<sup>th</sup> Cir. 1999), after careful analysis of the contrasting statutory requirement in Section 504, rejected the “solely” requirement for a determination of discrimination under Title II of the ADA and instead held that if a plaintiff under Section 12132 “demonstrates that disability played a motivating role in the employment decision, the plaintiff is entitled to relief.” See also the RECAP case, 294 F.3d at 48-9 where the Second Circuit held that under the ADA plaintiffs must present evidence that intent to discriminate against the protected group “was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive” and that plaintiffs must show “that discriminatory purpose was a motivating factor in the City’s decision.” “By contrast,” the court said about cases under Section 504, “the plaintiffs must show that the defendants denied the permit ‘solely’ because of the disability.”

In imposing the Section 504 ‘solely’ standard on the ADA claim in this case the District Court erred. Because Plaintiffs met the more demanding standard by showing that the permit was denied solely because of the identity of the NDTs clients, recovering drug addicts using methadone, and any other reason was pretext, they are entitled to judgment under both statutes. But even if the hostility to methadone users by constituents was only one of the motivating reasons,

Plaintiffs under the ADA are entitled to a decision free of that bias and therefore would be entitled to judgment under the ADA.

**C. All of the Individual Plaintiffs as well as NDTs, have standing to enforce the statutes.**

The District Court rightly concluded that NDTs has standing to enforce the ADA and Section 504 in light of this Court's decisions in Addiction Specialists, Inc. v. Twp. of Hampton, 411 F.3d 399 (3d Cir. 2005) and Sullivan v. City of Pittsburgh, 811 F.2d at 182 n.12 (Section 504), and of other courts of appeals. Innovation Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997); MX Group, Inc. V. City of Covington, 293 F.3d 326, 342 (6<sup>th</sup> Cir. 2002); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9<sup>th</sup> Cir. 1999).

The court, however, found that five of the six Individual Plaintiffs were not, "handicapped individuals" or "individuals with a disability" within the coverage of Section 504 or the ADA respectively. While this determination will not affect any injunctive relief available, it denies these Plaintiffs the right to establish damages and sets the wrong standard.

The court reached its conclusion based on the sections of both acts which state persons otherwise disabled are not considered disabled if they are "currently

engaging in the use of illegal drugs, when a covered entity acts on the basis of such use.” 42 U.S.C. § 12114(a) and 29 U.S.C. § 705(20)(C)(i). The court dismissed five of the six Plaintiffs on the grounds that they “have ‘recently’ used illegal drugs.” A-25 The court did not state what time frame the “recently” was referring to or how close in time to that event “recently” means, but the record does not support its conclusion for all five of the Plaintiffs in any period.

More importantly, the court ignored the fact that Reading never “acted on the basis of” the Individual Plaintiffs’ illegal drug use, but acted on the basis of their legal use of methadone.

The statutory exclusion applies to educational programs and other services as well as employment. The requirement of “current” use is designed to protect rehabilitated persons from retroactive punishment – either discharge from employment or exclusion from a program when their former drug use no longer poses a threat – and it protects employers or service providers who take action directed at illegal drug use. Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 518-20 (2d Cir. 1991); H.R. Conf. Rep. No. 596, 101<sup>st</sup> Cong., 2d Sess. 87 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 267, 596 (“...no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem.”)(emphasis added). Reading, however, did

not take any action against the Individual Plaintiffs because of their illegal drug use. Pennsylvania's Section 10621 is directed at users of methadone, whether or not they are using illegal drugs, and the actions of Reading in denying the permit were directed at users of methadone irrespective of whether they were using illegal drugs. Reading would, and did, allow users of illegal drugs to receive treatment at this site without interference as long as they did not utilize methadone.

Consequently the court was wrong to invoke Sections 12114(a) and 705(20)(C)(i).

The inappropriateness of rejecting the individual's claims for denial of the zoning permit based on their intermittent illegal drug use during the rehabilitation process, is apparent when trying to decide the right time frame for applying the prohibition on illegal drug use. In employment cases, the courts have established that it is at the point when the discharge is made that is relevant on the grounds that the statute is designed to protect an employee who is not engaged in drug use or to protect a rehabilitated employee from retroactive punishment. Teahan, 751 F.2d at 518. In the denial of zoning services, the denial is on-going and the program beneficiaries hurt by the continuing injury include persons not even in the program or in need of methadone treatment at the time of the City's action. In Innovative Health Systems, 117 F.3d at 44, the court upheld the standing of John Does Nos. 1-3, "yet-to-be-identified, prospective IHS clients" who "will be

harmful by denial of the building permit” because the denial “will necessarily prevent some alcohol- or drug-dependent persons” from receiving needed services.

If however, the prohibition on illegal drug use applies, the appropriate time to require a plaintiff seeking injunctive relief not to be using illegal drugs is when they file suit seeking relief. Similarly, for plaintiffs seeking damages, the appropriate time to measure whether they are disabled is the time for which they are seeking to recover damages.

The admissions relied upon by the lower court, covering a period of use through November 23, 2004, do not provide any evidence of illegal use “recently enough so that continuing use is a real and on going problem” if the court meant recent in relation to the time of decision. The evidence relied upon shows prior to November 23, 2004 Dkt. Entry #37 at pp 15-20:

- Coe:** no heroin use for 22 months, no cocaine or other illegal drug use for eight months A-439-61;
- Doe:** no heroin or other illegal drug use for two years A-388 and A-495-501;
- Joe:** no heroin or other illegal drug use for 20 months, infrequent use in prior year A-501-11;
- Loe:** a methadone user for 23 years, there is no record of any illegal drug use while being treated;
- Poe:** no illegal drug use in 22 months, only two isolated instances in the prior two years A-521-27; and
- Voe:** no heroin use for 17 months, no cocaine for 12 months, no other drugs for 11 months A-550-63.

As can be seen from the above, Plaintiff Coe was the only Plaintiff to have used any illegal drug at any time in 2004. By no stretch can this use be described as “continuing and ongoing.”

Defendants assert the time to measure whether Plaintiffs were engaged in “continuing and on-going” drug use was March 2002 when the denial was originally made by defendant. The record shows at that time three Plaintiffs had not used any drugs within the preceding three months (January-March 2002): Joe, Loe, and Poe. If the appropriate time is when the complaint was filed, March 2004, none of the Plaintiffs except Coe had used any drugs within the preceding three months, and most had not used any for substantially longer than that. The Second Circuit in Teahan stated that the trier of fact must determine whether the usage was severe enough as well as recent enough to show a current problem at the relevant time so that the employee could not perform essential duties. The lower court on summary judgment could make no findings whether any of the drug use was “severe” or would interfere with the Plaintiffs’ ability to receive rehabilitation services from NDTs or provides a reason for denying non-discriminatory zoning services.

Because Reading never acted on the basis of Plaintiffs' use of illegal drugs, the District Court's decision that five of the Plaintiffs' did not have standing was based on the wrong standard and must be set aside.

### **III. Pennsylvania's Statute Singling out Methadone Clinics for a Unique Zoning Procedure Facially Violates Federal Statutes Protecting Persons with Disabilities and the Equal Protection Clause.**

The District Court also erred in finding that the state statute setting up a special zoning procedure that applied to methadone clinics and no other use did not violate the two federal statutes prohibiting discrimination against persons with disabilities or the Equal Protection Clause of the Constitution. The application of Pennsylvania's requirement for a zoning special procedure is based on a classification explicitly and solely based on disability. Furthermore, it operates not to advance the Congressional purpose of enabling persons with disabilities to participate more easily in everyday life but to frustrate that purpose.

The District Court failed to consider whether the state statute singling out methadone clinics from all other zoning uses for a separate and more onerous procedure on its face violates the prohibition on discrimination on the basis of disability in the ADA and Section 504. Instead, the court responded to and upheld defendant's claim that those statutes did not pre-empt state zoning laws. Plaintiffs do not claim federal law preempts state power to zone, nor even to zone for

persons with disabilities. Plaintiffs do claim that state zoning laws – just like local zoning ordinances concerning group homes which must comply with the ADA and Section 504– can not discriminate against persons with disabilities. Section 10621, by singling out for a special procedure, persons with disabilities who are dependent upon methadone, prima facie discriminates on the basis of disability.

The issue again would be whether there is a legitimate state interest, and if it is pretext for intentional discrimination or is necessary for advancing the legitimate state interest. The District Court, considering this issue in the context of whether the statute violated the Equal Protection Clause, held that the desire to foster public participation was a legitimate reason to provide for notice and hearing. The court, however, made no examination of what factor, if any, justified isolating methadone treatment facilities as the only zoning use for which a public hearing is necessary. There was no evidence offered or referred to in the legislative debates about how methadone treatment facilities differ in their impact on a community from many other uses. The fact that this is a state statute rather than a municipal ordinance should not change the Court’s analysis. As the Ninth Circuit said “[L]ocalities remain free to distinguish between land uses to effectuate the public interest. They just must refrain from making distinctions based on what Congress has determined to be inappropriate considerations.” Bay Area 179 F.3d

at 735. There is no record demonstrating that dependency upon methadone is an appropriate consideration upon which to distinguish land uses or zoning procedures.

Courts have found that absolute prohibitions on drug clinics and group homes can facially violate the ADA and Section 504. Bay Area supra; MX Group, 293 F.3d at 344-5. The district court tried to distinguish the Bay Area case on the ground that the ordinance there prohibited methadone clinics within 500 feet of certain uses, rather than requiring a special hearing. Although the level of burden is clearly greater, the analysis of whether there is something different about a methadone clinic which justifies being treated differently from other uses which are allowed should be the same, whether the burden is exclusion, as in MX and Bay Area, or a special permit public hearing, as in Pennsylvania.

In Smith-Berch, Inc. v. Baltimore County, Md., 115 F.Supp.2d 520 (D.Md. 2000) the court did strike down a county policy that required methadone clinics, though not other medical offices, to undergo a public hearing before receiving a zoning permit. In that case the court analyzed the policy as creating a disparate impact, imposing “a disproportionate burden on opiate addicts who require methadone therapy to aid in recovery.” Id. at 523. The court rejected a defense of

the policy as giving affected community members the opportunity to present their views:

But, since the County has only allowed the public to express its opinion on methadone clinics and not on other medical offices or drug treatment facilities, the public hearing requirement imposed on for-profit methadone clinics cannot be considered ‘necessary’ to the County’s zoning system. Id. at 524.

The limitation in Pennsylvania’s statute mandating a public hearing and vote of the municipal governing body only to permits for methadone clinics similarly demonstrates that it is not about increasing community participation in zoning matters but about special requirements for clinics serving disabled persons needing methadone treatment. Clearly the status of the users of the clinic was a motivating factor in the adoption of the statute, in violation of the ADA.

In Romer, Supra., the Court considered whether an amendment to the Colorado constitution which applied only to homosexuals violated the Equal Protection Clause. It began by finding that the amendment “imposes a special disability on those persons alone.” Id. at 631. It then inquired whether the legislative classification bears a rational relation to some legitimate end saying “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted

and the object to be attained.” Id. at 632. The purpose of requiring a “rational relationship to an independent and legitimate legislative end [is to] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” Id. at 633. The Court cautioned “laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.” Id. The evidence here is overwhelming that the purpose of the legislative action was not to promote citizen participation but to deter methadone users from participating in treatment programs in the community. Although less of a burden than that imposed in Romer, citizens relying on methadone have been singled out for a disfavored legal status: they are the only group in the state who are required to go through a public hearing and have a specific vote of the municipal body on their presence before being allowed to occupy a building and conduct their activities within 500 feet of residential areas and other designated uses. As the Court in Cleburne stated, fears alone can not constitute justification. Increased public participation can not be rational if a methadone clinic does not expose the community to any greater need for participation.

The lower court, however, stopped without inquiring whether the legislation is rationally related to that objective or how use of methadone implicates a greater need for public participation than for other drug rehabilitation

clinics or many other uses. It downplayed the clear evidence of the hostility towards the users of methadone who are the target of the law, described by one legislator as “pollution” despite their high success rates in ending addiction to illegal drugs. The Defendant failed to provide any rational basis for the state to impose different zoning requirements on heroin addicts who require methadone than on drug addicts who don’t. The proponents were clearly motivated by stereotypes and unsubstantiated fear of the type the Court found inadequate in Cleburne, supra. For that reason, the grant of summary judgment to the Defendant concerning the facial validity of Section 10621 must be reversed, and summary judgment granted to Plaintiffs invalidating Section 10621 as in violation of the ADA, Section 504, and the Equal Protection Clause.

**IV. The District Court’s Denial of Plaintiffs’ Motion for Class Certification Was an Abuse of Discretion Because it Increased the Requirements for Being a Class Representative.**

Because the District Court’s grant of a motion for certification is within its discretion, this Court’s review is for an abuse of discretion. Eisenberg v. Gagnon, 766 F.2d 770, 784-85 (3d Cir. 1985), *cert. denied, sub nom. Pelino v. Eisenberg*, 474 U.S. 946 (1985). The determination of whether the District Court abused its discretion can rest on “an errant conclusion of law or an improper application of law to fact.” Merrill Lynch, 259 F.3d, 154,165 (3d Cir. 2001)(citing In re General

Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995). Further, this Circuit has held that the defeat of the Individual Plaintiffs' claims on the merits, after denial of class certification, does not moot the class action issues. Eisenberg, 766 F.2d at 784. Consequently, it is appropriate for Plaintiffs to appeal the denial of class certification.

On September 27, 2004, Plaintiffs filed their motion seeking certification as a Rule 23(b) class.<sup>10</sup> Reading opposed the motion on the basis that the proposed class definition is invalid; declaratory and injunctive relief is not appropriate to the proposed class; and, Plaintiffs fail to meet the requirements of Rule 23(a). Dkt. Entry #27. The Court's November 2, 2004 Order<sup>11</sup> denying without prejudice class certification gave credence only to the argument that Plaintiffs failed to

---

<sup>10</sup>Plaintiffs sought to have certified as a class: 1) all persons residing in the City of Reading and its surrounding community who have been, are currently or will be at risk of being on the waiting list to receive methadone treatment; and, 2) all opiate-dependant residents of the City of Reading and its surrounding community who have needed, now need or in the future may need methadone treatment. A-67 at ¶ 45. Plaintiffs seek only injunctive relief for the putative class. A-56.

<sup>11</sup>The Court incorrectly identified its August 30, 2004 order (A-40) setting the briefing schedule for the class certification motion as the order denying the motion. A-6.

establish adequacy of representation.<sup>12</sup> Without explaining its reasoning, the court ordered Plaintiffs to provide “Defendant with the information necessary for Defendant to determine whether the name class representatives can represent the class adequately.” A-2. The Court’s order supports Defendant’s argument that the individual Plaintiffs must produce a record demonstrating their ability to “assume the responsibility of serving as class representatives.” Dkt. Entry #27 at 12. Although the ruling was without prejudice as law of the case it sets the boundary of what Plaintiffs must file in order to certify the class. The Order sets no determination on specific information that would be necessary for a determination of adequacy.

Although the Order provides no delineation of the information to be provided, it is apparent from the context of what had transpired. Defendants had served discovery requests on the Individual Plaintiffs which sought their individual treatment records. Plaintiffs complied with the requests, and at no time did Reading assert that the named Plaintiffs withheld any information requested except, their actual names. Nor did Reading seek any additional information in

---

<sup>12</sup>Plaintiffs argued – and Defendant disputed – that they had met all four of Rule 23(a)’s requirements.

connection with its opposition to class certification. It simply objected that class representatives should not proceed in pseudonym.

Rule 23(a)(4) requires the representative parties to “fairly and adequately protect the interests of the class.” Wetzel, 508 F.2d at 247 long ago established that this requires plaintiffs only to show: (1) their interests are not antagonistic to those of other class members, and (2) Plaintiffs’ attorneys are qualified, experienced, and generally able to conduct the litigation.

Reading itself concedes that Plaintiffs’ counsel are qualified to advocate on behalf of the class. Dkt. Entry #27 at 12. Hence, there can be no dispute that the litigation will be pursued vigorously and the claims of the class protected. *See Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 129 (3d Cir. 1987)(the assurance of vigorous prosecution is ordinarily associated with competent and experienced class counsel); *see also Greenfield v. Villager Industries Inc.*, 483 F.2d 824, 832 n. 9 (3d Cir. 1973)(“it is counsel for the class representatives and not the named parties, who direct and manage [class] actions.”).

Thus to challenge adequacy of representation, Reading must show that there is some conflict between the named Plaintiffs and the proposed class which the court must then evaluate. Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988)(the

inquiry is whether the putative plaintiff “has the ability and incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class”). Defendant failed to identify any conflict that would prevent the named representatives from meeting Rule 23(a)(4)’s adequacy requirement. *See* NEWBERG ON CLASS ACTIONS 4<sup>th</sup> Ed. § 3.26 (The conflict that will prevent a plaintiff from meeting Rule 23(a)(4)’s requirement “must be fundamental and go to the specific issue in controversy”). Plaintiffs’ ability to proceed in pseudonym is not fundamental to the litigation.

Reading’s challenge to insufficient information to challenge the adequacy of representation was predicated on the fact that the Individual Plaintiffs brought the suit anonymously.<sup>13</sup> While Reading could point to no authority for this proposition, there is contrary authority that supports the position that Plaintiffs in pseudonym can adequately represent a class. Courts routinely have certified the class when the representatives proceed in pseudonym.<sup>14</sup>

---

<sup>13</sup>The court granted the individual Plaintiffs leave to proceed in pseudonym on the same date that it denied the motion for class certification, requiring only that Defendants Counsel be provided only with exact names.

<sup>14</sup> *See* Roe v. Wade, 314 F.Supp 1217, 1225 (N.D. Tx. 1970); Reproductive Health Svcs. v. Webster, 662 F.Supp. 407, 412 (W.D. Mo. 1987); Doe v. Mandy, 514 F.2d 1179, 1182 (7<sup>th</sup> Cir. 1975).

In Roe v. Operation Rescue, 123 F.R.D. 500 (E.D. Pa. 1988), the Eastern District granted class certification to the Plaintiffs proceeding in pseudonym. In determining that Plaintiffs Roe and Moe, in spite of the discovery disputes that caused them not to attend their deposition, would provide adequate representation, the court recognized that serious social ostracization caused by their decision to have abortions, not only legitimized their right to proceed in anonymity, but reduced some of the requirements that ensue to a class member under the adequacy of representation requirement. Operation Rescue, 123 F.R.D. at 504-05. The District Court's decision to ignore such precedent and require Plaintiffs to provide Reading with undisclosed additional information when all of the Individual Plaintiffs' records, albeit in pseudonym, had been provided Defendant was clearly erroneous.

The circumstances of this case are no different than those in the abortion cases. The Individual Plaintiffs live in the immediate community, some with their families, several pay for their treatment from their salaries, and several get their treatment in the morning on their way to work. A-396; A-467-69; A-510; A-512; A-629. The signed petitions, outcries from the community at the public hearings and hostile and confrontational tone of the meetings from the general public and Council Members demonstrate the stigma that is attached to this disability. A-190

at pp 95-97; A-193-94 at pp 109-10; A-629-57; A-659-62. Plaintiffs' counsel's many years of experience in representing persons with disabilities will ensure that the claims of the class are vigorously pursued. Requiring more of the Individual Plaintiffs to satisfy the adequacy requirement would serve no purpose other than sending a chilling effect on class actions where there is a need for the named Plaintiffs to proceed in pseudonym.

## **V. Conclusion**

For the foregoing reasons the grant of Summary Judgment in favor of Defendants must be reversed, Summary Judgment on liability be granted in favor of Plaintiffs, and the case remanded for the determination of relief

By: \_\_\_\_\_  
Barbara E. Ransom, ID No. 64166  
Michael Churchill, ID No. 04661  
Public Interest Law Center  
of Philadelphia  
125 S. 9<sup>th</sup> Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19107  
215-627-7100

Date: January 17, 2006

Counsel for Plaintiffs-Appellants

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.4, I hereby certify that Barbara E. Ransom and Michael Churchill are members of the bar of this Court.

---

Barbara E. Ransom

Dated: January 17, 2006

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is 13,560 words long and is in compliance with FRAP 32(a)(7)(c)(1).

---

Barbara E. Ransom

Dated: January 17, 2006

CERTIFICATION OF IDENTICAL  
COMPLIANCE OF E-BRIEF AND HARD COPY OF BRIEF

I hereby certify that the text of the E-brief and the Hard Copies of the brief that were filed on January 17, 2006 are identical.

I further certify that a virus check was performed with Symantec Antivirus software.

---

Barbara E. Ransom

Dated:        January 17, 2006

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Brief for Appellant, New Directions Treatment Center was served via email and via Regular U.S. Mail, postage prepaid on January 17, 2006 on the following:

Steven K. Ludwig, Esquire  
Fox Rothschild LLP  
2000 Market Street, 10th Floor  
Philadelphia, PA 19103-3291

---

Barbara E. Ransom