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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YAKIMA NEIGHBORHOOD	)	
HEALTH SERVICES, a Washington	)	NO. 1:16-cv-03030-TOR
nonprofit corporation	)	
	)	
Plaintiff,	)	DEFENDANT'S MOTION
vs.	)	FOR SUMMARY JUDGMENT
	)	
CITY OF YAKIMA, a Washington	)	
municipal corporation;	)	
	)	09/15/2016 at 10:30 a.m.
Defendant.	)	With Oral Argument
_____	)	

DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

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I. MOTION

The City of Yakima seeks dismissal of the claims of plaintiff Yakima Neighborhood Health Services (“YNHS”) arising under the Fair Housing Act (“FHA”), the Equal Protection Clause and 42 U.S.C. 1983, the Washington Housing Policy Act, and the Washington Law Against Discrimination.

II. FACTUAL BACKGROUND

The facts pertinent to this matter are set forth in defendant’s LR 56(1)(a) statement of material facts (hereafter “DSF #___”). (ECF No. 17).

III. LEGAL ARGUMENT

A. Summary judgment and motion to dismiss standards.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Some of the City’s arguments may be better viewed as testing the legal sufficiency of YNHS’s claims, which is a matter governed by Fed. R. Civ. P. 12(b)(6). A complaint must contain “enough facts to state a claim to relief that is plausible on its face” rather than mere “naked assertion[s]” or “formulaic recitations.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

B. The FHA claims should be dismissed.

The FHA prohibits discrimination in housing practices on the basis of various classifications, including race, color, religion, and handicap. *See* 42 U.S.C. 3604. Persons recovering from drug or alcohol addiction are considered handicapped under the FHA. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1156-57 (9th Cir. 2013). The FHA defines “discrimination” to include “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. 3604(f)(3)(B). The FHA’s reasonable accommodation terms apply to zoning ordinances. *McGary v. City of Portland*, 386 F.3d 1259, 1264 (9th Cir. 2004).

1. YNHS fails to state a claim for reasonable accommodation.

A plaintiff must prove “(1) that the plaintiff or his associate is handicapped within the meaning of [the FHA]; (2) that the defendant knew or should reasonably be expected to know of the handicap; (3) that accommodation of the handicap may be necessary to afford a handicapped person an equal opportunity to use and enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that defendant refused to make the

requested accommodation.” *DuBois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006).

YNHS’s allegations on reasonable accommodation consist of a single paragraph that pronounces any reasonable accommodation effort “futile.” (ECF No. 4 at ¶5.11).

a. YNHS does not explain what reasonable accommodation it seeks.

The amended complaint contains no allegation showing what the proposed accommodation is, let alone whether it is reasonable. YNHS alleges that the City failed to “allow the community resource services center at the Property.” (*Id.*). But YNHS has been inconsistent in identifying what its proposed project actually is. (DSF #29, 31, 45, 79, 80, 83-85, 97). The City has stated that it will meaningfully respond to the accommodation request, but can only do so consistent with its need for basic information under its land use review processes. (DSF #80, 82, 84, 86, 92, 93). *See, e.g.*, Ch. 36.70B RCW (governing project review); Ch. 43.21C RCW (environmental review process). A city is “entitled to insist upon the re-submission of a formal application, with changes included” as part of the reasonable accommodation process. *Enriching, Inc. v. City of Fountain Valley*, 151 F. App’x 523, 525 (9th Cir. 2005) (cited per LR 7.1(f)(2)).

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3 In 2015 YNHS chose to defer environmental review and project-
4 specific review. (DSF #32, 34, 36, 47). YNHS acknowledged that these
5 processes would need to take place at a later time. (DSF #32). In its
6 pleadings here, YNHS also admits that project permit review was tolled and
7 remains pending. (ECF No. 4 at ¶3.2).
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10 The City's inquiry is germane because the FHA applies only to
11 "dwellings." 42 U.S.C. 3604(f)(1)(A) and 3604(f)(3)(B). A dwelling is
12 defined as a "residence." *Id.* at 3602(b). It is not clear that a temporary
13 emergency warming shelter is a dwelling. *See, e.g., Intermountain Fair*
14 *Hous. Council v. Boise Rescue Mission Ministries*, 655 F. Supp. 2d. 1150,
15 1158-59 (D. Idaho 2009), *affirmed on other grounds at* 657 F.3d 988 (9th
16 Cir. 2011) (finding that emergency overnight shelter not subject to FHA);
17 *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1044 n. 2 (9th Cir.
18 2006) (reserving ruling on temporary shelters); *Smith v. The Salvation Army*,
19 2015 WL 5008261 (W.D. Penn. 2015) (shelter not a dwelling). Shelters
20 may typically provide only temporary accommodations with restrictions
21 quite unlike residences. *See Karen Wong, Narrowing the Definition of*
22 *"Dwelling" Under the Fair Housing Act*, 56 UCLA L. Rev. 1867, 1868-74
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(2009) (arguing that expansive definition to encompass shelters would be harmful to those in need of shelter services).

YNHS's land use applications throughout 2014 and 2015 repeatedly emphasized that the shelter element of its proposal was "ancillary" and "modest" and "temporary" in contrast with the "primary purpose" of providing various services such as "case management, health and social services, employment, and housing consultation." (DSF #28, 11, 12). YNHS stated that its proposal was neither a group home nor a halfway house. (DSF #16, 33). No actual drug and alcohol counseling will take place. (DSF #16). As a "small warming center" the facility will provide "emergency homeless services" but YNHS will not provide "short-term or long term residential uses at this site." (DSF #29-31). The absence of residential uses was stated by YNHS as a "salient condition." (DSF #31). In public testimony, YNHS stated that any actual transitional housing for the homeless would arise from a referral to another facility, and that the proposed site would only be for "one night." (DSF #57). YNHS also stated that "[w]e're not proposing a dormitory or family shelter" and that "emergency housing/shelter is the key." (DSF #45).

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3 The City has never been provided with a land use application or an
4 environmental checklist from YNHS for its new proposed use. (DSF #88-
5 91, 94). No actual project review has ever taken place. The current
6 project's emphasis on tenancies for demised units appears to be more
7 consistent with an apartment building. Although this may prove to be a
8 dwelling for FHA purposes, the key point is that YNHS cannot, and has not,
9 alleged that the City must make a reasonable accommodation for a shifting
10 hypothetical use. The absence of a defined project also undermines a claim
11 that a particular accommodation is reasonable. These inadequacies fail the
12 fourth element of a cognizable FHA claim. *See DuBois*, 453 F.3d at 1179.

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17 **b. YNHS does not allege that the accommodation is necessary.**

18 A sufficient claim under the FHA must show that the accommodation
19 is necessary to afford the handicapped person an equal opportunity to use
20 and enjoy a dwelling. 42 U.S.C. 3604(f)(3)(B). The amended complaint
21 contains no allegation supporting this required element. (ECF No. 4). The
22 closest allegation, perhaps, is the claim that the City's actions "prohibit the
23 homeless from enjoying the same rights as its [sic] neighbors." (*Id.* at ¶5.9).
24 But this allegation says nothing about what "rights" the "neighbors" enjoy,
25 or how YNHS is deprived of those rights. Available sites zoned in support
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of the disabled homeless (e.g., group homes, boarding houses, and halfway houses), exist throughout the City including its residential zoning districts. (DSF #64).

YNHS's amended complaint fails the third element of a cognizable FHA claim. *See DuBois*, 453 F.3d at 1179.

c. YNHS does not allege the City refused to make an accommodation.

Only a refusal to make a reasonable accommodation is actionable. 42 U.S.C. 3604(f)(3)(b). The amended complaint contains no allegation that the City has refused to make any reasonable accommodation. (ECF No. 4).

The City and YNHS engaged in correspondence regarding the reasonable accommodation process without success. (DSF #79-87). YNHS admitted that there was never a reasonable accommodation request prior to its letter of March 10, which was the same date it sued the City on this basis. (DSF #95). Within three business days, the City answered YNHS's request for accommodation and sought clarification of YNHS's proposal. (DSF #80). In successive letters the City has reiterated its recognition of its reasonable accommodation duty. For example:

The City recognizes that YNHS may be entitled to ask for reasonable accommodation under the FHA. But this recognition is not the same as waiving the City's right to understand the scope of the YNHS proposal. (DSF #82).

Likewise:

Before the City makes a determination on the request of YNHS, it must be able to explain how a reasonable accommodation would result in a project-level approval. Lacking the participation of YNHS makes the City's task impossible to fulfill. (DSF #86).

Counsel for YNHS recognized in 2015 that "it's very, very difficult for the public to have a full grasp or understanding of what the proposal is, how the package is put together, how it's going to operate." (DSF #45). That point is no less true today. YNHS seems to believe that the City only has obligations to YNHS. The City must undertake its reasonable accommodation process in a publicly transparent manner. The City has made no decision, much less a refusal, of the request. (DSF #93).

2. The reasonable accommodation claim is not ripe.

"[R]ipeness is peculiarly a question of timing...and a federal court normally ought not resolve issues involv[ing] contingent future events that may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (internal quotations omitted). This is true even where declaratory relief is sought. *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991).

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3 YNHS sued the City over its reasonable accommodation request
4 simultaneously with making the request, while also stating that “it is futile to
5 seek a reasonable accommodation from the City.” (ECF No. 4 at ¶5.11).
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7 The concept of futility is a factor in the context of exhaustion of other
8 remedies. *Manufactured Homes Communities Inc. v. City of San Jose*, 420
9 F.3d 1022, 1034-36 (9th Cir. 2005) (takings claim). But “the futility
10 exception is narrow and mere uncertainty does not establish futility.” *Id.* at
11 1035.
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14 In its March 10 letter, YNHS stated that its use would consist of “30
15 demised residential units” with no “maximum length of stay” and
16 contradicted statements that its use was limited to a warming shelter. (DSF
17 #79). In its earlier amended complaint, YNHS alleged that its clients will be
18 “encouraged to stay at the center during the day” and that “couples and
19 families will be allowed to live together in the same unit and will be allowed
20 to have guests at the resource center,” also contradicting earlier public
21 statements to the contrary. (ECF No. 4 at ¶¶3.6, 3.8; DSF #45). No similar
22 allegations were contained in YNHS’s initial complaint. (ECF No. 1-1).
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25 The City requested that YNHS clarify its intended use of the site.
26 (DSF #80, 82, 84, 86). The reasonable accommodation demands of YNHS
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are, in some cases, directly contradicted by the actual land use applications filed by YNHS. (DSF #80, 82, 84). YNHS first stated that it “would respond comprehensively” and “in a holistic manner” to the City’s request for more information. (DSF #81). Later, YNHS admitted that its proposal “has shifted” but insisted that the concept of “demised units” was not a material change and that the City’s inquiries were “prevarication.” (DSF #85). In written discovery, YNHS stated that there are no “material differences” in its plans but also objected to answering an interrogatory seeking to clarify the matter because, according to YNHS, the question was “irrelevant.” (DSF #97). The issue is not irrelevant. The YNHS use remains unclear. The City cannot determine that the FHA applies, nor whether any particular accommodation is necessary. The issue of reasonable accommodation is not ripe. *United States v. Village of Palatine, Ill.*, 37 F.3d 1230, 1234 (7th Cir. 1994).

3. The disparate impact claim should be dismissed.

To establish a prima facie case of disparate impact under the FHA, “discriminatory impact must be proven; an inference of discriminatory impact is not sufficient.” *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008). Statistical analysis is necessary to show the presence of a

disproportionate impact on the disabled, and the statistics must show how the disabled fare compared to other groups of people on the relevant criterion, such as housing. *Id.* at 1118-19.

YNHS stated that its evidence of disparate impact is based on allegations in the complaint and transcripts of various hearings of the planning commission and the City Council. (DSF #98). YNHS does not actually identify anything in this material that shows a specific discriminatory effect. None of these sources of information sets forth any type of statistical evidence. The disabled homeless are not treated differently from anyone else seeking to reside in the SCC zoning district or in missions. Traditional forms of housing for the disabled (group homes, halfway houses) have not been suppressed or altered one iota by any challenged action. (DSF #64).

4. The disparate treatment claim should be dismissed.

A disparate treatment claim under the FHA requires a showing of discriminatory intent. *McDonald v. Coldwell Banker*, 543 F.3d 498, 509 (9th Cir. 2008). A plaintiff may make a prima facie case of discriminatory intent by pointing to a similarly situated entity that was treated better than the plaintiff. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142,

1158 (9th Cir. 2013), *rehearing denied en banc* at 746 F.3d 936 (9th Cir. 2014). YNHS does not allege, and has no facts to show, that any other similarly situated entity was treated differently than it was.

Alternatively, a plaintiff may produce direct or circumstantial evidence of discrimination. *Id.* at 1158-59. A multi-factor analysis is used to assess discriminatory intent. *Id.* at 1159. It may be sufficient, for example, if a city took action to eliminate or reduce the number of group homes or made statements indicating a plan to shut down existing group homes. *Id.* at 1162-63. Other factors might also be persuasive, such as enforcement of existing codes to target a protected use. *Id.* at 1163-64.

YNHS's evidence of disparate treatment is a near-verbatim restatement of its evidence of discriminatory impact. (DSF #99). The only additional evidence is the claim that the City:

...failed to reconcile the fears and statements made by the City Council and the members of the public regarding their concern of the residential nature of the community resource center with the fact that residences are allowed in a Small Convenience Center district. (DSF #99).

This statement is not attributed to any City official or the record of any City proceeding, and is nearly meaningless on close review. It does not indicate a discriminatory intent against any form of disability, much less with respect

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3 to group living by the disabled. Summary judgment dismissal is proper.

4 *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997).

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6 On the other hand, the record contains references to legitimate
7 concerns of the planning commission and the City Council regarding zoning
8 goals. (DSF #53-67). The planning and zoning effort that resulted in the
9 ordinance was lengthy, publicly scrutinized, and is devoid of any sinister or
10 discriminatory comments by any City official. Concern for zoning and
11 neighborhood character are per se examples of “a legitimate and
12 nondiscriminatory goal.” *Budnick*, 518 F.3d at 1116-17. Comments of
13 neighbors are a proper part of public review processes, and cannot be used,
14 without more, to support an inference of a discriminatory motive on the part
15 of the City itself. *Id.* at 1117-18.
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19 Perhaps most important, the claim of disparate treatment fails to
20 recognize that the effect of the ordinance was actually to confirm the
21 availability of zoning districts for missions commensurate with the
22 uncodified use interpretations from 1992 and 1995. (DSF #67, 49-52). The
23 classification of missions within the permissible zoning districts has
24 remained unchanged. (DSF #67). The regulatory burdens on existing
25 missions have remained unchanged. (DSF #67). No new enforcement
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actions are created. (DSF #67). The new zoning ordinance actually *reduced* the level of scrutiny, and modified the presumption of compatibility *in favor* of mission uses, when compared to the 2015 hearing examiner interpretation. (DSF #46). *See also* YMC 15.02.020 (definitions of classified uses).

YNHS's claim of disparate treatment is also belied by the strong support for the ordinance by a different mission operating in Yakima. (DSF #63). The evidence of YNHS contains nothing to suggest that the rationale of the City is a pretext.

C. The Equal Protection Clause claim should be dismissed.

YNHS alleges that a violation of the Equal Protection Clause (and 42 U.S.C. 1983) occurred because the City "has treated YNHS and other mission-type uses differently than other land use applicants...." (ECF No. 4 at ¶7.2). YNHS does not allege that it has been treated differently from other "mission-type uses." Its allegations of different treatment compared to other land use applicants are inconsequential without more, because zoning inevitably treats different land uses differently.

The equal protection allegation relates to the City's adoption of Resolution No. R-2015-113 and Ordinance No. 2015-022. (*Id.*). Neither the

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3 resolution nor the ordinance targets a suspect class nor impinges on a
4 fundamental right.

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6 The resolution adopted findings of fact and conclusions of law to
7 partially affirm and partially reverse a hearing examiner interpretation of an
8 unclassified land use. (DSF #69). The interpretation hearing occurred
9 because there was no clearly defined existing definition for the proposed
10 mission land use. (DSF #46). The resolution was the result of an appeal of
11 the interpretation, which was granted by the City Council due to technical
12 issues of the hearing examiner's jurisdiction. (DSF #69). The resolution did
13 not "classify" anything. (DSF #69). YNHS was not treated differently from
14 anyone else. Although the state court found that the City erred in its
15 handling of the appeal, there was no suggestion that the error related to any
16 constitutional infirmity. (DSF #75).
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19 The ordinance arose from an effort by the City to evaluate and,
20 ultimately, adopt a new land use definition to codify "missions" within the
21 Yakima Municipal Code. (DSF #53-67). This occurred following extensive
22 public study sessions and hearings of the planning commission and the City
23 Council. (DSF #58-67). There was no "applicant" for this process because
24 it arose as a legislative policy initiative by the City. It responded to
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3 ambiguity over the extent to which hearing examiner interpretations in 1992
4 and 1995 were equivalent to a codified development regulation. (DSF #53).
5 Again, YNHS does not allege that any other similarly situated applicant was
6 treated differently. One affected entity, the Union Gospel Mission, publicly
7 hailed the proposed ordinance as “sound, it’s logical, and it meets the
8 concerns that have been expressed.” (DSF #63). A representative of the
9 Union Gospel Mission complimented the City’s lead staff person as
10 conscientious and thoughtful. (DSF #63).
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14 The ordinance explains the basis of its adoption including the findings
15 and recommendation of the planning commission. (DSF #54). The
16 ordinance was recommended to create an appropriate level of review for
17 mission uses and to direct such uses to zoning districts where they would be
18 most compatible. (DSF #54). The City Council responded to the
19 recommendation by retaining the level of public review for such uses (as a
20 Class 2 use, which had been the case since 1992) rather than heighten the
21 review (to a Class 3 use). (DSF #67). The City Council was advised by its
22 lawyer regarding the FHA. (DSF #66).
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26 The ordinance left untouched related uses such as group homes,
27 treatment centers for drug and alcohol rehabilitation, boarding houses, and
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3 halfway houses. (DSF #64). The City had a legitimate interest in creating
4 the definition and integrating it into the municipal code.

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6 “The physically disabled are not a protected class for purposes of
7 equal protection under the Fourteenth Amendment.” *Gamble*, 104 F.3d at
8 307. In the absence of any suspect classification or effect on fundamental
9 rights only “rational basis” review is required. *Rui One Corp. v. City of*
10 *Berkeley*, 371 F.3d 1137, 1156 (9th Cir. 2004). Unless the legislative
11 classifications are wholly irrational, there is no equal protection violation.
12 *Fields v. Legacy Health System*, 413 F.3d 943, 955 (9th Cir. 2005). Judicial
13 review is at an end once a court identifies a plausible basis on which the
14 legislature may have relied. *Rui One Corp.*, 371 F.3d at 1155. Community
15 complaints can be a rational basis for different treatment under equal
16 protection analysis. *Anthony v. Mason County*, 2014 WL 7045151 (W.D.
17 Wash. 2014). Courts have expressed “extreme reluctance to entertain equal
18 protection challenges to local planning decisions.” *Macone v. Town of*
19 *Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002).

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25 **D. The state law claims should be dismissed.**

26 **1. The Washington Housing Policy Act claim fails.**

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YNHS sued the City under the Washington Housing Policy Act, Ch. 43.185B RCW. (ECF No. 4 at ¶¶6.3-6.4). But the WHPA contains no express or implied private right of action. *See* RCW 43.185B.005(2) (legislative statement of purpose) *and compare* RCW 49.60.030(2) (creating private right of action under WLAD). Instead, it sets forth policy statements promoting and encouraging the supply of housing throughout the state. *Id.*

For reasons stemming from the absence of a private right of action in the WHPA, it is also true that YNHS lacks standing to sue under the WHPA.

The issue of standing in federal courts is governed by federal law. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2667 (2013). A plaintiff must show an “injury in fact” that is “concrete” and not conjectural. *Id.* at 2661. But the WHPA contains only public policy directives. RCW 43.185B.005. The WHPA contains no terms relating to disability discrimination in housing. RCW 43.185B.009. YNHS has suffered no injury under the WHPA and there is nothing for this Court to redress. *Id.*

Also, the allegations of YNHS under the WHPA relate to disparate impact. (ECF No. 4 at ¶6.4). But as shown above, YNHS has no evidence of disparate impact. The WHPA claim should be dismissed.

2. The Washington Law Against Discrimination does not apply.

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3 The allegations of YNHS based on the WLAD also relate to disparate
4 impact, and fail for the same lack of evidence. *Id.*

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6 A more fundamental problem exists. The WLAD prohibits
7 discrimination within places of public accommodation, which for purposes
8 of argument may encompass the proposed YNHS facility. RCW 49.60.215.
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10 A prima facie case under the WLAD in a place of public accommodation
11 requires that the discrimination occur within the defendant's establishment.
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13 *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

14 YNHS obviously does not contend that it is committing
15 discrimination, and its proposed facility is not the City's. The City is not a
16 proper defendant because it is not in charge of the YNHS facility. Nothing
17 in the WLAD operates in a manner akin to the FHA's broad effect on
18 government conduct in zoning and land use decisionmaking.
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21 Although the WLAD also prohibits unfair practices with respect to
22 real estate transactions, YNHS cannot allege that the City has engaged in
23 any "in any real estate transaction or in the furnishing of facilities or services
24 in connection therewith." RCW 49.60.222(1)(b). No other type of unfair
25 practice in real estate transactions is applicable. *Id.* at 49.60.222. The
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27 WLAD simply does not work the way the FHA does. The WLAD focuses
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on unfair practices in existing dwellings and rights of the disabled to freely purchase, rent, or finance real estate. See RCW 49.60.040 (defining “dwelling” and “real estate transaction.”).

In the absence of a prima facie case under the WLAD, dismissal is proper. *Baugh v. Kadlec Health System*, 2015 WL 5165553 at * 4 (E.D. Wash. 2015).

IV. CONCLUSION

The previously-identified claims of YNHS should be dismissed. The City also seeks corresponding rulings dismissing YNHS’s claims for declaratory and injunctive relief.

DATED THIS 25th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System to which will send notification of such filing to the following:

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