

73136-0

73136-0

No. 73136-0-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

CITY OF BELLINGHAM, a municipal corporation,
Respondent / Petitioner below,

v.

SANG T. YI and MI SUN YI, husband and wife and the marital community
thereof; SANG T. YI CORPORATION, a Washington corporation d/b/a
Aloha Motel,
Appellants / Respondents below / Third Party Plaintiffs,

and

WHIDBEY ISLAND BANK, a former Washington state-chartered bank; et
al.
Respondents below.

v.

MAYOR KELLI LINVILLE and POLICE CHIEF CLIFFORD COOK,
Third Party Defendants.

APPELLANTS' OPENING BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

The statutory scheme on which the City of Bellingham (hereinafter “City” or “Bellingham”) bases its condemnation of the Aloha Motel is unconstitutional. RCW 35.80A.010 is vague and overbroad. It constitutes an unconstitutional delegation of legislative power. It makes a mockery of constitutional ideas of equal protection. Further, Chapter 35.80A RCW allows a taking of private property for private, rather than public, purposes. Therefore RCW 35.80A.010 et seq. is unconstitutional and void. A finding of public use and necessity cannot be based upon an unconstitutional statute. Therefore, the trial court erred in granting the City’s motion for decree of public use and necessity, which decision ought to be reversed, and the City’s petition dismissed.

II. ASSIGNMENT OF ERRORS

A. Assignments of Error

(1) The trial court erred in finding that RCW 35.80A.010 is constitutional.

(2) The trial court erred in finding that RCW 35.80A.010 is not unconstitutionally vague.

(3) The trial court erred in finding that RCW 35.80A.010 is not

unconstitutionally overbroad.

(4) The trial court erred in finding that RCW 35.80A.010 is not an unconstitutional delegation of legislative and judicial authority to the executive.

(5) RCW 35.80A.010 is inherently violative of equal protection of laws and should be voided as unconstitutional by this court.

(6) The trial court erred in finding that RCW 35.80A.010 et seq. does not authorize the taking of private property for private, rather than public, purposes.

(7) The trial court erred in finding that the City's proposed taking of the Aloha Motel is not a taking of private property for private redevelopment, rather than for a public purpose.

B. Issues Pertaining to Assignments of Error

(1) Whether RCW 35.80A.010 is void for vagueness because (a) it contains vague terms such as "threat" to public health, safety, or welfare and "associated" with illegal drug activity; (b) it explicitly delegates unfettered discretion to a city's mayor to determine what property should be condemned; and (c) it encourages arbitrary, discretionary, and subjective decisions.

(2) Whether RCW 35.80A.010 violates the separation of powers doctrine by (a) unconstitutionally delegating the legislative power

to the executive and (b) taking powers granted to the judiciary in the constitution and delegating them to a municipality's executive.

(3) Whether RCW 35.80A.010 is unconstitutionally overbroad by placing no effective limits on when a municipality's executive might decide that a property is "blighted" and therefore should be condemned.

(4) Whether RCW 35.80A.010 is unconstitutional in violation of the federal equal protection clause and article I, section 12 of the Washington Constitution because there are no parameters limiting the executive's power to condemn or not condemn similarly situated properties.

(5) Whether chapter 35.80A RCW is unconstitutional because it provides for the taking of private property for private redevelopment, rather than public use, and is being used by the City here for private redevelopment.

(6) Whether, the City's obvious ulterior motive of obtaining the Aloha Motel in order to spark private redevelopment pursuant to its Samish Way Urban Village Subarea Plan renders its condemnation of the Aloha Motel an unconstitutional taking of private property for a private purpose in this case.

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III. STATEMENT OF THE CASE

A. Procedural Background

On October 21, 2014, after specifically targeting the Aloha Motel for over 12 months to gather the statistical crime data she relied upon to condemn the property, Bellingham Mayor Kelli Linville, issued an “executive determination” that the motel constituted a threat to public health, safety and welfare. CP 21-22. On October 27, 2014, the Bellingham City Council passed a resolution and ordinance authorizing the condemnation of the Aloha Motel. CP 17-20. On December 15, 2014, the City filed a petition to condemn the Aloha Motel in Whatcom County Superior Court. CP 7-14. On February 2, 2015, the City filed a motion for a decree of public use and necessity. CP 125-126. On February 13, 2015, the trial court held a hearing on public use and necessity, thereafter deciding that the condemnation was necessary for a public use and granting the City’s order. CP 554-63. This appeal timely followed.

B. Factual Background

The Aloha Motel is located along Samish Way in Bellingham, Washington. CP 8. The City adopted The Samish Way Urban Village Subarea Plan in 2009 in order to redevelop Samish Way. CP 164-204. That plan identified the Aloha Motel as being prime for redevelopment in

5 to 15 years. CP 175.

In or about January 2013, in its effort to acquire the Aloha Motel for redevelopment, the City began to build its case against the Aloha Motel to establish that it constituted a “blight” per RCW 35.80A.010 *et seq.* CP 24. As part of that plan, the City cataloged the various instances that it was summoned to the Aloha Motel. CP 24, 32-40. The City also set up drug sting operations at the Aloha Motel, having undercover police officers rent rooms at the motel, and luring dealers from other locations to the motel. CP 205-457. In addition to purchasing drugs through their undercover operation at the Aloha Motel, the City surreptitiously and without obtaining search warrants searched the walls of ten rooms for the presence of methamphetamine residue. CP 205-532. According to Bellingham Mayor Kelli Linville, the City's crackdown on crime in the area is part of a 2009 plan to turn the area into an urban village. CP 536.

In addition to compiling crime call statistics regarding the Aloha Motel, the City collected crime call statistics for other motels in the Samish Way business district. CP 24, 41-42. The number of calls the police department responded to at the Samish Way area Motel 6 from January 1, 2013, to October 1, 2014, is statistically indistinguishable from the calls responded to at the Aloha Motel (despite the fact that no police sting operations are known to have been conducted at the Motel 6 during

that period). *Id.* None of the rooms at the Motel 6 nor any other motel in Bellingham, other than Aloha Motel and the Villa Inn, have been tested for methamphetamine residue. CP 205-457.

The City's Planning and Community Development Department has indicated that redeveloping the Samish Way business district is one of its "key initiatives" for 2015.

The City is committed to implementing the vision and goals of the Samish Way Urban Village plan which will revitalize this area. Currently, the City is leading a *coordinated strategy* to address the increasing problems of criminal activity and inappropriate housing in the Samish Way corridor, particularly regarding activities occurring at or around several motels in the area, notably the Aloha Motel.

CP 538-42 (emphasis added). The City states that "if the Aloha Motel is acquired through condemnation in the Samish Way Urban Village, the City will demolish the structures and *make that site available for redevelopment* as well." *Id.* (emphasis added).

IV. ARGUMENT

A. Applicable Standards of Review and Interpretation

"A municipal corporation does not have inherent power of eminent domain and may exercise such power only as is expressly authorized by the legislature. Statutes granting the power of eminent domain are to be strictly construed." *In re Seattle Monorail Auth.*, 155 Wn.2d 612, 622, 121

P.3d 1166 (2005) (citations omitted).

“The scope of a municipal corporation's condemnation authority is a matter of statutory interpretation, which [courts of appeal] review de novo.” *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 534, 342 P.3d 308 (2015).

The question of whether the contemplated use is really a public use is a judicial question without regard to a legislative assertion that the use is public. *City of Bellevue v. Pine Forest Properties, Inc.*, 185 Wn. App. 244, 259, 340 P.2d 938 (2014). Article I, section 16, of the state constitution states:

Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

Statutory interpretation, e.g. of RCW 35.80A.010 et seq., is a question of law and is subject to de novo review on appeal. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A statute is presumed constitutional

... unless its unconstitutionality clearly appears. *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 555, 503 P.2d 86 (1972), *dismissed*, 412 U.S. 934 (1973); *see also* *Smith v. City of Seattle*, 25 Wash. 300, 308, 65 P. 612 (1901) (“the presumption is always in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against

it; and the courts will not adjudge it invalid unless its violation of the constitution is, in their judgment, clear, complete, and unmistakable").

Olympic Pipe Line Co. v. Thoeny, 124 Wn. App. 381, 391, 101 P.3d 430 (2004).

Statutory review begins with the statute's plain language and ordinary meaning. *Davis v. Cox*, _Wn.2d_ ¶16, _P.3d_ (May 28, 2015); *Eubanks v. Brown*, 180 Wn.590, 596-97, 327 P.3d 635 (2014). The doctrine of constitutional avoidance requires a court to choose a constitutional interpretation of a statute over an unconstitutional interpretation when the statute is “genuinely susceptible to two constructions,” *Gonzales v. Carhart*, 550 U.S. 124, 154, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)); *Davis v. Cox*, _Wn.2d_ at ¶15. However, where a statute is not genuinely susceptible to alternative constructions, i.e. does not contain any ambiguity, a court may not “use the doctrine of constitutional avoidance to ‘press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.’” *Davis v. Cox*, _Wn.2d_ at ¶19 (internal quotation omitted).

B. Finding of Facts Challenged on Appeal

The Findings of Fact, Conclusions of Law, and Order of

Determination of Public Use and Necessity presented by the City and signed by the trial judge in this case contains a number of so-called findings of fact that are nothing more than baldly stated legal conclusions. Conclusions of law are subject to review de novo. See *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008).

To the extent necessary, the appellants challenge the following findings of fact (as conclusions of law):

Findings of Fact 16 through 30: These findings are simply recitations of the law, or what the City believes the law to be, or conclusory statements indicating that the Aloha Motel is “a threat to public health, safety and welfare” (No. 21.), “associated with illegal drug activity during the twelve (12) months preceding the Executive Determination” (No. 22.), and the condemnation “is a public use” (No. 23.), all of which are legal conclusions.

Finding of Fact 27-30: These findings are likewise conclusory legal statements: to wit, the City of Bellingham Mayor and the City Council did not abuse their delegated authority...or make an arbitrary decision” (No. 27.), that “[t]he evidence shows the City’s action in this case was...not for private development” (No. 28.), that the statute “provided adequate notice to the Respondents and also provided adequate standards to prevent

arbitrary enforcement” (No. 29.), and that the statute “is not constitutionally overbroad as applied to the Respondents and did not infringe on any of their constitutional rights (No. 30.).

C. RCW 35.80A.010 is Void for Vagueness and Therefore an Unconstitutional Denial of the Right to Due Process.

Courts “strictly construe statutes that delegate the State’s sovereign power of eminent domain to its cities.” *City of Tacoma v. Zimmerman*, 119 Wn. App. 738, 744, 82 P.3d 701 (2004). Both the United States and Washington constitutions mandate that no person shall be deprived “of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV amend. § 1; Wash. Const. art. I § 3. “Due process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law.” *Wash. State Commc’n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 196, 293 P.3d 413 (2013) (quoting *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008)). A statute violates this right to due process when the statute “is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *Id.* (internal quotation omitted). The purpose of the “void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law.” *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994

(1986).

“The test for evaluating the vagueness of legislative enactments contains two components: adequate notice to citizens and adequate standards to prevent arbitrary enforcement.” *City of Spokane v. Fischer*, 110 Wn.2d 541, 543, 754 P.2d 1241 (1988) (internal quotation omitted). RCW 35.80A.010 fails both these components. First, the statute contains several vague terms that prevent people from understanding when a city may condemn their property pursuant to the statute. Second, the statute does nothing to prevent arbitrary and discretionary decisions about which properties can and should be condemned. Finally, the City’s use of RCW 35.80A.010 in this particular case is an excellent example of the vagueness of the statute and how it allows arbitrary and unfettered discretionary decisions.

1. Terms in RCW 35.80A.010 Are Too Vague to Allow People to Understand the Condemnation Power it Attempts to Delegate to Cities.

RCW 35.80A.010’s use of vague terms such as “threat” to “public health, safety, or welfare” and “associated” with “illegal drug activity” make it unconstitutional. The test of void for vagueness is the “common intelligence” test. *Regal Cinemas, Inc.*, 173 Wn. App. at 196. A statute “is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its

application.” *Fischer*, 110 Wn.2d at 543 (internal quotation omitted). “It is fundamental that no ordinance which requires persons of common intelligence to guess at its meaning at the peril of life, liberty, or property may constitutionally be permitted to stand. ‘All are entitled to be informed as to what the State commands or forbids.’” *City of Seattle v. Pullman*, 82 Wn.2d 794, 798, 514 P.2d 1059 (1973) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 (1939)).

Laws have been struck down under this principle when generic, subjective terms are used that provide little if any direction to those who read the laws. For example, the Washington Supreme Court struck down a city law prohibiting an owner from keeping a dog that “disturb[s] or annoy[s] any other person or neighborhood by frequent or habitual howling, yelping or barking.” *Fischer*, 110 Wn.2d 541. The court reasoned the terms “frequent or habitual” and “disturb or annoy” gave any person the power to make a subjective determination about whether another person’s dog met these standards. *Id.* at 544–45. Thus, a dog owner could not know whether a dog’s behavior complied with the statute because that depended on someone else’s subjective tolerance for barking. *Id.* at 545. In another case, the Washington Supreme Court struck down a county law that only allowed manufacturing and processing activities “in limited degree.” *Burien Bark Supply* at 871. The court reasoned there was

no objective criteria for what “limited” meant, and thus left to the discretion of county officials which activities were prohibited and which were not. *Id.* at 871. The court stated that a “citizen should not be subjected to *ad hoc* interpretations of the law by county officials.” *Id.* at 872. The same problems exist with the language in RCW 35.80A.010.

The so-called blight statute allows a city to condemn a property if any two of the following three factors are met:

- (1) if a dwelling, building, or structure exists on the property, the dwelling, building, or structure has not been lawfully occupied for a period of one year or more;
- (2) the property, dwelling, building, or structure constitutes a threat to the public health, safety, or welfare as determined by the executive authority of the county, city, or town, or the designee of the executive authority; or
- (3) the property, dwelling, building, or structure is or has been associated with illegal drug activity during the previous twelve months.

RCW 35.80A.010. Terms in factors two and three, relied on by the City here, are vague.

The term “constitutes a threat to the public health, safety, or welfare” in factor two is beyond cognition by a person of common intelligence and therefore constitutionally vague. The statute is unclear about when a property becomes a “threat” to the public. There is no objective criteria for determining whether a property is a “threat” or not.

Like the feelings of “disturb or annoy” in the statute struck down in *Fischer*, the feeling of a “threat” is a subjective determination. Additionally, factor two is on its face entirely subjective in that “threat” is solely as “determined by the executive authority” of a city. Thus, in order for a property owner to know whether his/her property is a “threat,” the owner would have to know what is in the mind of the executive at any given time. Due process does not allow a person’s property to be taken on such entirely subjective and arbitrary standards.

Likewise, the term “associated with illegal drug activity” in factor three is so vague as to be meaningless. The statute gives no guidance as to when a property becomes “associated” with illegal drug activity. Like the term “limited” in the statute struck down by *Burien Bark Supply*, there is no objective criteria for determining what “associated” means or how “associated” a property has to be with illegal drug activity before it is a blight. It is unclear (and unknowable) whether drugs have to be *sold, used,* or merely *possessed* on a property. It is unclear how *often* activities need to occur on a property. And it is unclear whether the property *owner* has to be involved with the drugs, or if any *resident, guest, or uninvited trespasser* can suffice. Read most broadly, a person’s property could be condemned by the government if a stranger unknowingly came onto the property and accidentally dropped some drugs once. Certainly the power of

eminent domain is not that broad. But there is no basis for determining where the line is between being “associated” with drug activity and not being “associated” with drug activity. The decision is left to the whim of the executive. This vagueness and subjectivity render the statute incomprehensible. Therefore, it is unconstitutional.

2. RCW 35.80A.010 Encourages Arbitrary and Discretionary Decisions.

Secondly, the blight statute not only encourages, but *requires* arbitrary and discretionary decisions to be made. The void for vagueness doctrine is intended to limit “*arbitrary and discretionary* enforcement of the law.” *Burien Bark Supply* at 871 (emphasis added). In order to pass a void for vagueness challenge, a statute must not only provide adequate notice of what is prohibited, but must also contain “adequate standards to prevent arbitrary enforcement.” *Fischer* at 543 (internal quotation omitted). Due process is clearly violated if there can be no prior notice of a prohibition because officials have the discretion to make *ad hoc* determinations of prohibited activity. *Grant County v. Bohne*, 89 Wn.2d 953, 956, 577 P.2d 138 (1978). That is exactly what is written into RCW 35.80A.010.

RCW 35.80A.010 explicitly grants complete, unfettered discretion to the mayor of a city to determine what property to condemn. To meet

factor two in the statute, a property must be “a threat to the public health, safety, or welfare *as determined by the executive authority* of the county, city, or town, or the designee of the executive authority.” RCW 35.80A.010(2) (emphasis added). Thus, the plain language of the statute leaves the determination of threat exclusively and completely in the hands of a city’s mayor (or anyone she might delegate to make that determination). There are no objective standards for a mayor to use to determine what property is a threat and what is not. There are no safeguards for adjudicating whether a property is actually a threat or not. Simply put, if the mayor says a property is a threat, it is a threat. This gives complete discretion to a mayor to pick what property is to be condemned and taken from its owner and what property is to not to be condemned. Giving complete discretion to the mayor in this instance prevents property owners from knowing if or when their properties may be subject to condemnation under the blight statute. Thus, the statute is unconstitutionally vague.

3. The City’s Use of RCW 35.80A.010 Illustrates the Unconstitutionality of the Statute.

The City’s attempt to condemn the Aloha Motel is a perfect illustration of the unconstitutional vagueness, arbitrariness, and subjectivity of RCW 35.80A.010. The City’s evidence paints a grim

picture of the *entire* Samish Way area. Yet the Aloha Motel is the only property being targeted for condemnation.

“Blighted” conditions exist on many properties in the Samish Way business district. High police response rates exist at multiple hotels on Samish Way, including the Villa Inn and the Motel 6, as well as the Aloha Motel. CP 41-42. There “are many people walking around the neighborhood high on substances and drug deals happening in plain view.” CP 110 ¶ 8. Drug deals occur across the street from the Aloha Motel in the parking lot of Diego’s Restaurant “all hours of the day” and at the nearby car wash. *Id.* at CP 98-100 ¶ 4. Drug deals also occur at the Days Inn. CP 110-111 ¶ 10; CP 114 ¶ 6. Needles have been found at a nearby auto shop and bags of drugs have been found in the street. CP 102 ¶ 4. Used heroin needles have also been found at an apartment complex. CP 110 ¶ 8. A property manager of several properties in the neighborhood also admits that she has found used needles and condoms littering her properties. CP 114 ¶ 7. Further, another “big issue on Samish Way is prostitution.” CP 102 ¶ 6. Prostitutes are picked up and dropped off in the parking lot of Diego’s Restaurant. CP 98-100 ¶ 4. As everyone knows and as everyone can see, the problems exist throughout the Samish Way neighborhood, not just at the Aloha Motel.

However, the Aloha Motel is being singled out for condemnation.

High police response rates exist for the Motel 6 and the Villa Inn.¹ Drug deals occur at Diego's Restaurant and the Days Inn motel. Drug needles have been found at an apartment complex, auto shop, and other properties nearby. All of these properties are thus "associated" with illegal drug activity and could be considered a "threat" to public health, safety, or welfare at the complete discretion of the Mayor. But the City is not seeking to condemn any these properties.

Instead, RCW 35.80A.010 is being selectively and arbitrarily employed to condemn *only* the Aloha Motel. Not a single person has stated elimination of the Aloha Motel will solve the crime problems along Samish Way. But the City has not articulated a reason why it is condemning the Aloha Motel and not condemning other "blighted" properties in the area. Perhaps Mayor Linville does not believe these other properties are "associated" with illegal drug activity. But the City's own evidence demonstrates otherwise. Perhaps Mayor Linville does not think other properties in the area are a "threat" to public health, safety, or welfare. But the City's own evidence demonstrates that crime problems in the neighborhood are widespread. Given the condition of other properties in the neighborhood, the Aloha Motel could not have known the Mayor would only select it for condemnation and not the other properties. The

¹ While the Motel 6 and the Villa Inn have slightly lower police response rates than the Aloha, the differences are statistically insignificant.

Mayor's selection of the Aloha Motel as the only property to condemn in a neighborhood full of problems demonstrates the vagueness, arbitrariness, and subjectivity inherent in RCW 35.80A.010.

D. The Grant of Complete Discretion to the Executive in RCW 35.80A.010 Constitutes an Unconstitutional Delegation of Legislative and Judicial Authority.

“The separation of powers principle requires that the delegation of legislative power to the executive be accomplished along with standards which guide and restrain the exercise of the delegated authority.” *State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 621 P.2d 115 (1980) (internal citation omitted).

It is not unconstitutional for the legislature to delegate administrative power. In so doing, the legislature must define (a) what is to be done, (b) the instrumentality which is to accomplish it, and (c) the scope of the instrumentality's authority in so doing, by prescribing reasonable administrative standards.

....

. . . We hold that the delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that *procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.*

Barry & Barry v. State Dep't of Motor Vehicles, 81 Wn.2d 155, 158–59, 500 P.2d 540 (1972) (internal quotations and citations omitted) (emphasis

added). As has been shown above, RCW 35.80A.010(2) grants complete authority and discretion to a city's executive. Thus, the legislature has failed to provide any standard or guidelines and has failed to provide any procedural safeguards to prevent arbitrary action or abuse of discretion by the executive.

Additionally, the constitution specifically states "the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." Wash. Const. art. I § 16. "Whether a contemplated use is really 'public' is solely a judicial question." *King County v. Farr*, 7 Wn. App. 600, 610, 501 P.2d 612 (1972). However, the statute takes this power away from the judiciary by explicitly stating that condemnation pursuant to chapter 35.80A RCW "is declared to be for a public use." So long as the procedural requirements of the statute are met, the condemnation is a public use. The judiciary has no oversight. These delegations away from the judiciary and to a city's executive are unconstitutional.

E. RCW 35.80A.010 is Overbroad and Unconstitutional.

The scope of the blight statute is so broad that it infringes on the fundamental right of property ownership. "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I § 3. A person's right to substantive due process is violated if a statute "is so

broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well.”² *Blondheim v. State*, 84 Wn.2d 874, 877–78, 529 P.2d 1096 (1975) (internal citations omitted).

RCW 35.80A.010 is so broad that it is susceptible of infringing upon the constitutionally protected right to possess private property. As set forth above, RCW 35.80A.010 allows private property to be taken whenever one person (e.g. the Mayor or anyone to whom she deems to delegate this power) decides it poses a “threat” to public health, safety or welfare, and is “associated” with illegal drug activity. Since both of these “standards” are impossible to define or limit, the statute is overbroad.

F. RCW 35.80A.010 is Inherently Violative of Equal Protection.³

Unlike the community renewal law (RCW 35.81.005 et seq.), which provides a framework whereby municipalities might deal with “blighted areas” (arguably such as Samish Way in Bellingham), RCW 35.80A.010 et seq. provides a procedure whereby a municipality’s executive has unfettered discretion to cherry pick among similarly

² While a single statute may be subject to both “vagueness” and “overbreadth,” there is a recognized distinction between the doctrines. *Blondheim v. State*, 84 Wn.2d 874, 877–78, 529 P.2d 1096 (1975) (citing *Grayned v. Rockford*, 408 U.S. 104, 108-21, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)).

³ Although Appellants did not argue that RCW 35.80A.010 violated constitutional notions of equal protection in the trial court, the issue is properly before this court on appeal. See RAP 2.5(3)

“blighted” properties. The procedure for condemnation thus created by RCW 35.80A.010 is inherently violative of the federal equal protection clause and article I, section 12 of the Washington Constitution.

At the outset, it is crucial to note the different definitions of “blight” in the two chapters. RCW 35.81.015(2), the Community Renewal Law, defines “blighted areas” consistent with the common understanding of that term using clear and specific language⁴, whereas “blight” as used in RCW 35.80A.010 is simply that which is violative of the statute, e.g. “associated with drug activity” and a “threat” to public safety etc. in the mind of the executive, which is a blatant corruption of the meaning of “blight.”

In *Seattle v. Loutsis Inv. Co.*, 16 Wn. App. 158, 554 P.2d 379 (1976), Loutsis, the owner of a dilapidated hotel within the Pike Place

⁴ “Blighted area’ means an area which, by reason of the substantial physical dilapidation, deterioration, defective construction, material, and arrangement and/or age or obsolescence of buildings or improvements, whether residential or nonresidential, inadequate provision for ventilation, light, proper sanitary facilities, or open spaces as determined by competent appraisers on the basis of an examination of the building standards of the municipality; inappropriate uses of land or buildings; existence of overcrowding of buildings or structures; defective or inadequate street layout; faulty lot layout in relation to size, adequacy, accessibility or usefulness; excessive land coverage; insanitary or unsafe conditions; deterioration of site; existence of hazardous soils, substances, or materials; diversity of ownership; tax or special assessment delinquency exceeding the fair value of the land; defective or unusual conditions of title; improper subdivision or obsolete platting; existence of persistent and high levels of unemployment or poverty within the area; or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime; substantially impairs or arrests the sound growth of the municipality or its environs, or retards the provision of housing accommodations; constitutes an economic or social liability; and/or is detrimental, or constitutes a menace, to the public health, safety, welfare, or morals in its present condition and use. RCW 35.81.015(2).

Market Historical District, which district was within a 22 acre redevelopment district (created pursuant to RCW 35.81, then referred to as the Urban Renewal Law), challenged the City's condemnation of the hotel. One of Loutsis's arguments was that its property was being treated differently than other similar properties within the redevelopment district in violation of the equal protection of the laws clause of our federal constitution or the privileges and immunities clause of our state constitution. After discussing the constitutionality of urban renewal laws in general, the court rejected Loutsis's equal protection argument, reasoning as follows:

Equal protection does not require identity of treatment. *Walters v. St. Louis*, 347 U.S. 231, 237, 98 L. Ed. 660, 74 S. Ct. 505 (1954). Neither does it require things which are different in fact be treated in law as though they are the same. *Rinaldi v. Yeager*, 384 U.S. 305, 309, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966).

The [Loutsis property] is not the same as the other nearby hotels nor, obviously, does it stand in the identical location that they do. In any condemnation, boundaries must be drawn some place and decisions made as to which parcels will be taken and which ones rejected. As the United States Supreme Court has held:

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area.

Berman v. Parker, 348 U.S. 26, 35; 75 S. Ct. 98; 99 L. Ed. 27 1954.

There has been no showing that the City's classification was not a rational one nor that it was outside the bounds of the City's discretion. There was therefore no violation of the equal protection of the laws clause of the federal constitution nor of the privileges and immunities clause of our state constitution.

Id. at 165-66 (some citations omitted).

The crucial difference between *Loutsis* and the present case is that urban renew laws create boundaries within which a city might rationally exercise its discretion, whereas RCW 35.80A.010 is boundaryless. The choice of the boundary line is not the province of the courts, but the existence of a *rational* boundary is a fundamental aspect of equal protection.

Chapter 35.80A RCW is essentially an urban renewal law that has no boundaries. It applies throughout any given jurisdiction. It is limited only by the preposterously vague requirement that the property taken needs to have been “associated with illegal drug activity” (since the other factor – threat to public health welfare of safety – is left entirely to the subjective determination of the executive). Also, because Chapter 35.80A RCW applies to individual properties throughout any given jurisdiction, there is no basis for comparing one property to another, and therefore no basis for determining whether the owner of a property condemned pursuant to that statute is being afforded equal protection of the laws.

Therefore, Chapter 35.08A RCW violates the equal protection of the laws clause of the federal constitution and the privileges and immunities clause of our state constitution.

G. Chapter 35.80A RCW is Unconstitutional Because it Provides for the Taking of Private Property for Private, Rather than Public, Use.

In Washington, the government cannot take private property for a private use.

The people of this state have placed in our constitution (Art. I, § 16 (amendment 9)) two restrictions on the power of the state and its municipal subdivisions to acquire private property. Without these two restrictions, the sovereign power to take private property would literally be without limitation. One limitation is that just compensation therefor (as fixed by a jury) must first be paid to the owner, and the second limitation is that *a court must determine whether the use for which the property is sought is really a public use*. These two restrictions were placed in the constitution for the protection of private property, and each one is equally as important to the property owner as the other. In other words, it is just as important that the proposed use of the property be limited to what the court decides to be a "really public" use as it is that the property owner be given just compensation.

Hogue v. Port of Seattle, 54 Wn.2d 799, 838, 341 P.2d 171 (1959)

(emphasis added).

The constitution prohibits the taking of private property for a private use. However, this language does not create a blanket prohibition on the private use of land condemned by the State. As long as the property was condemned *for the public use*, it may also be put to a private use that is merely incidental to that public use.

Wash. State Convention & Trade Ctr. V. Evans, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998) (citations omitted).

A private use is not merely incidental where it is combined with the public use in such a way as to be inseparable. In *In re City of Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981) (*Westlake*), Seattle sought to condemn the properties that now make up the Westlake Mall. Like Bellingham's envisioned Samish Way Urban Village Subarea, Seattle intended to create an urban focal point. Seattle intended to construct a park on part of the land acquired and deed the rest of the land to a private developer, who would build a mall, a monorail terminal, and museum space. The Washington Supreme Court found the retail shops were a substantial element of the project, essential to its functioning. The Court ruled that "if a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked." *Id.* at 627 (citations omitted). The Court held the Westlake project did not constitute a public use.

Although the City has relied upon the blight statute to condemn the Aloha Motel, it is obvious that its acquisition is for the purpose of implementing the Samish Way Urban Village Subarea Plan. It is clear that the City intends to take the Aloha Motel from its current owners and

transfer the property to another private land owner for redevelopment. The statutory scheme comprising chapter 35.80A RCW allows the City to

[d]ispose of real property acquired pursuant to [chapter 35.80A RCW] to private persons only under such reasonable, competitive procedures as it shall prescribe. The county, city, or town may accept such proposals as it deems to be in the public interest and in furtherance of the purposes of this chapter. . . .

RCW 35.80A.030.

It is no secret the City intends to demolish the Aloha Motel and make the site “available for redevelopment.” See CP 164-204, 536, 538-42. And this redevelopment fits squarely within the City’s 5–15 year timeline established in 2009 to see the site of the Aloha Motel redeveloped as part of the Samish Way Urban Village Subarea Plan. CP 175. The Mayor has stated that the acquisition of the Aloha Motel is part of the City’s Samish Way Urban Village Subarea Plan. CP 536. This use of the property for private redevelopment is not “really public” and is therefore prohibited by Wash. Const. Art. I, § 16. Thus, chapter 35.80A RCW and the City’s use of it here is unconstitutional.

H. Appellants are Entitled to an Award of the Reasonable Attorney Fees and Expenses Incurred in this Appeal.

RCW 8.25.075(1)(a) provides that a condemnee is entitled an award of costs, including attorney fees, where there is a final determination that the condemnor cannot acquire the property by

condemnation. The rule provides that the superior court shall make the award. If this Court dismisses the City's petition, thus denying the condemnation, it ought to award the appellants' attorney fees and costs for this appeal and remand for a determination and award of attorney fees and costs incurred in the trial court, or simply remand with instructions that the trial court include the reasonable attorney fees and costs of appeal in its award. This request is made pursuant to RAP 18.1 and any other applicable law or rule.

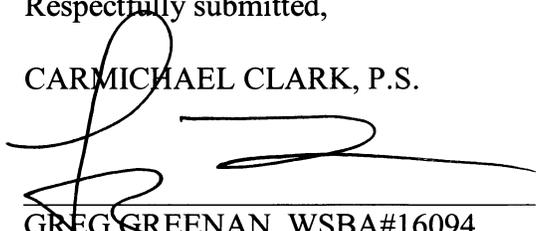
V. CONCLUSION

For any and all of the reasons set forth above, the Court ought to declare Chapter 35.80A RCW unconstitutional and dismiss the City's petition.

DATED this 6th day of July 2015.

Respectfully submitted,

CARMICHAEL CLARK, P.S.



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**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

CITY OF BELLINGHAM, a municipal corporation,
Respondent / Petitioner below,

v.

SANG T. YI and MI SUN YI, husband and wife and the marital community
thereof; SANG T. YI CORPORATION, a Washington corporation d/b/a
Aloha Motel,
Appellants / Respondents below / Third Party Plaintiffs,

and

WHIDBEY ISLAND BANK, a former Washington state-chartered bank; et
al.
Respondents below.

v.

MAYOR KELLI LINVILLE and POLICE CHIEF CLIFFORD COOK,
Third Party Defendants.

DECLARATION OF SERVICE

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

CHECKED

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of true and correct copies of the following documents:

- 1. Appellants' Opening Brief**
- 2. Verbatim Report of Proceedings**

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CARMICHAEL CLARK, P.S.



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