STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

VINCENT MILEWSKI, and
MORGANNE MACDONALD,

Plaintiffs,

vs.

Case No.: 14-CV-1482
Case Code: 30701
Declaratory Judgment

TOWN OF DOVER, BOARD OF
REVIEW FOR THE TOWN OF DOVER, and
GARDINER APPRAISAL SERVICE, LLC,

Defendants.

DEFENDANT, GARDINER APPRAISAL SERVICE, LLC'S BRIEF OPPOSING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES the Defendant, Gardiner Appraisal Service, LLC ("Gardiner"), by its attorneys, Axley Brynelson, LLP, and submits this Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment.

DISCUSSION

I. SCOPE OF PLAINTIFFS' MOTION

The Plaintiffs' Motion does not explicitly request any relief against the Defendant, Gardiner Appraisal Service, LLC. Accordingly, no order granting summary judgment as against Gardiner can be entered. To the extent that the Plaintiffs intend to pursue any relief against Gardiner for damages under 42 U.S.C. §1983, their motion for summary judgment cannot be employed to support same. Wis. Stats. §802.08(1).

II. TO THE EXTENT THE PLAINTIFFS' MOTION MAY BE DEEMED TO APPLY TO GARDINER, THE FOLLOWING FACTS AND ARGUMENTS MUST BE REJECTED BY THE COURT.

A. Gardiner did not act with motivation to retaliate or punish the Plaintiffs.

The Plaintiffs' Brief repeatedly contends that the assessments made by Gardiner were the product of "retaliation" or to "punish" the plaintiffs for denying interior access to the Plaintiffs' home. This contention is false. There is absolutely no evidence to support this contention.

The Affidavit of Gregory Gardiner, on the file in this action, specifically denies any such motivation or retaliatory action. The assessment contract between Gardiner and the Town of Dover, which is a standard assessment contract, does not allow for any greater compensation to Gardiner based on a higher assessment of particular properties, or of the entire community. (See Exhibit A, Gardiner Affidavit). The only expectation is to perform a complete assessment in accordance with Wisconsin law. What possible motivation does an independent assessment firm have to retaliate against any single property owner by increasing their assessment to an excessive level?

Further, Gardiner assesses many thousands of homes every year in many communities. To suggest, without any proof, some personal animus to raise the Plaintiffs' assessment is absurd. The only legitimate evidence is the testimony of Gregory Gardiner explaining the entirely rational and Wisconsin-law compliant effort to make a fair and reasonable estimate of the Plaintiffs' home value under circumstances where access to the home was denied.

Additionally, Plaintiffs offer inadmissible hearsay testimony of a town attorney to suggest that interior inspections are not specified by statute. ((Plaintiffs' Brief, P. 5) Moreover, that testimony is inaccurate, as §70.32(1) and §73.03(2a), and the WPAM, clearly provide otherwise.

B. The Plaintiffs' usage of "Fair Market Value" is misplaced.

Plaintiffs repeatedly cite to a "fair market value" of their home as set by the municipal appraiser. All references to that measure of value are meaningless. Wisconsin law calls for setting the Assessed Value, which is the actual value on which property tax is based. It is that Assessed Value that is relevant and comparable across properties.

In contrast, while a "fair market value" is set by the assessor, that in only an "estimated" value. It is based on an averaging of all properties in the entire municipality, including residential, commercial, and industrial. It is not intended to be an accurate measure of a property's value. *See* WPAM, Glossary of Terminology, p. G-3; *See also* 2014 Guide for Property Owners, p. 29. (*See* attachments hereto)

When the Plaintiffs cite to fair market values, and compare fair market values to assessed values, they are not engaging in an accurate analysis. For example,

1. Plaintiffs list the "prior to 2013" assessment of $273,900 and FMV of $277,761. (Plaintiffs' Brief, P. 2) Note that the last assessment was performed in 2004, so those values are really 2004 values, not 2012 values, and were out of date for comparison purposes.
2. Plaintiffs improperly compare Assessed and FMV estimates when comparing actual assessed value with "previous year's fair market value of $277,761." (Plaintiffs' Brief, P. 2) In doing so, the analysis actually compares 2004 with 2013, and compares a legitimate assessment with an averaged FMV figure. Accordingly, the 10.56% increase cited is meaningless.
3. At the top of page 6, the Brief again cites to "fair market evaluation." These "average" figures are meaningless.

C. Gardiner is not an assessor under Wis. Stats. §70.05.

Despite denying the allegation in its Answer and in its discovery answers, Plaintiffs continue to misrepresent to the Court that Gardiner is an assessor under Wis. Stats. §70.05. (Plaintiffs' Brief, P. 2) The discovery answers containing the denial are attached to the Kamenick Affidavit as Exhibit D. For unknown purposes, Plaintiffs continue to insist that Gardiner was acting under §70.05, which is false.

D. There was not a Town Policy for Inspections.

Plaintiffs' Brief argues that the "Town had a policy of requiring interior inspections ... as part of its assessments." (*See, e.g.*, Plaintiffs' Brief, P. 3, 18) There is no evidence to support that statement. Conversely, the practice of interior inspections is derived from the State of Wisconsin statutes and directed by the State's Property Assessment Manual. The Assessment Contract between Dover and Gardiner simply provides that such State law will be followed.

E. *Gardiner never "demanded" Entry in the Plaintiffs' home.*

Plaintiffs repeatedly argue that Gardiner "demanded" entry into their home. (See, e.g., Plaintiffs' Brief, P. 4, 12) This is false. All communication from Gardiner respectfully asked for an appointment to enter and assess the home; and informed the Plaintiffs of the consequences under Wisconsin law for rejection of the request to enter. That is not a "demand." *See* Affidavit of Linda Gardiner.

F. There is not an approved assessment method to "ask about" a home's interior.

Plaintiffs repeatedly contend that an assessor can just "ask the homeowner" about their interior and eliminate the need for an interior inspection. There is no policy or accepted practice in Wisconsin to assess property based on interviewing property owners. The assessor has a need to see the quality of the improvements to make a fair and accurate assessment. This is

comparable to a consumer purchasing a home without ever looking at the interior, and only relying on a description by the seller. No rational buyer would do so. That is certainly why Wisconsin law calls for inspections of the interior.

G. Gardiner did not make the statements attributed to it.

On page 5 of their Brief, Plaintiffs contend that Gardiner said the reason for an assessment increase in 2004 was "based in part on the assumption that the Plaintiffs had finished their basement." Gardiner never made such a statement. Gardiner's records never show a basement remodel. Gardiner never relied on such information. What Gardiner may have said was that, when denied interior access, they have to make an assessment based on numerous factors, including the possibility that interior improvements may have been completed but that cannot be verified. (Affidavit of Linda Gardiner).

Additionally, Mr. Milewski denies that he was allowed to speak at an open book session. (Plaintiffs' Brief, P. 5) Ms. Linda Gardiner recalls said open book and recalls speaking with Mr. Milewski. She explained to him that there could be no discussion on the merits of appraisal without an interior inspection which would provide the level of detail to engage in discussion.

H. Plaintiffs inaccurately compare the subject to other properties.

At page 6 of their Brief, Plaintiffs cite to two properties whose assessments were decreased after an inspection. The figures cited therein are wrong. For the Lotus property, the assessment changed from the prior year of $232,900 to $200,400, a change of approximately 14 percent. For the Larkspur property, the assessment changed from $242,000 to $235,600, a change of approximately 3 percent. These correct figures demonstrate that there was no uniform or punitive percentage applied, either before or after the inspections. (Affidavit of Linda Gardiner)

I. Distinction between Enter and View is misconceived.

The Plaintiffs argue that because they offered the assessor to view the property, but not to enter it, they cannot be barred from the Board of Review. (P.20) This argument ignores the clear statutory and WPAM guidance. Wis. Stats. §70.32 specifies "actual view" and directs the assessor to follow the WPAM. The WPAM clearly specifies interior view. Thus, the attempted distinction of the term "enter" is misplaced. When the entire framework of the WPAM is based on interior view, the appeal restriction to the BOR must also be based on that framework.

Plaintiffs contend they permitted Gardiner to view the premises. (Plaintiffs' Brief, P. 20) That is false. They only invited an exterior inspection. There is no real purpose in walking around the exterior of a home. As noted by Gregory Gardiner, the majority of a home's value is in the interior. Without that interior information, the assessor has insufficient data to work with. (*See* Gregory Gardiner Affidavit)

J. Timing of Certified Letter

Gardiner sent a 10/4/2013 certified letter to the Plaintiffs as directed by statute in advance of a Board of Review. (Gregory Gardiner Affidavit) Plaintiffs seem to think that their communications previously refusing access to their home are relevant. This makes no sense. The WPAM and Statutory protocol exists and was followed by Gardiner. Plaintiffs waived their rights to appeal to the BOR. It makes no difference how many times or when they said "no" to requested access.

III. PLAINTIFFS' THEORY FOR A CONSTITUTIONAL VIOLATION IS FUNDAMENTALLY FLAWED.

Ultimately, the Plaintiffs' theory that Dover and Gardiner sought to invade their home or punish them for denial of Gardiner's request to enter to assess the home is without merit. The

law in Wisconsin clearly provides for interior inspections of residences as part of the assessment process. The homeowner has the right to deny entry. The homeowner, by exercising that right, denies the assessor full information to make a complete and informed assessment. The assessor is then left to make an estimated assessment based on their professional experience and assessment practices. If the homeowner does not like his assessment, he cannot appeal it to the BOR– but he presumably knows this result when he makes the denial. This is the law in Wisconsin.

The practice of this law is not a violation of any Constitutional right against search and seizure, or any other rights. Despite the Plaintiffs' rhetoric, Gardiner was not trying to "criminally convict" the Plaintiffs or "invade" their home. Assessors have never been found in violation of a homeowner's Constitutional rights in Wisconsin by following the WPAM protocol.

Moreover, there is no caselaw cited by Plaintiffs from any jurisdiction to support their theory of a Constitutional violation. Plaintiffs misrepresent the only case cited which purported to be on point, Schlesinger v. Ramapo, 807 N.Y.S. 865, 11 Misc. 3d 697 (2006). Schlesinger is a trial court decision and of no precedence to this Court. Plaintiffs suggests that Schlesinger holds that "a property owner could not be prohibited from challenging her assessment despite refusing the assessor access to the interior of her home." (Plaintiffs' Brief, p. 14) However, Schlesinger does not address a statutory construct like Wisconsin nor the bar on appeals imposed in Wisconsin. Rather, Schlesinger dealt with an expert witnesses' right to make an inspection in litigation addressing an assessment. Schlesinger does not address the right to appeal related to a denial of an interior assessment, and is readily distinguishable. Id. at 698-99.

CONCLUSION

Based on the foregoing, the Defendant, Gardiner Appraisal Service, LLC, respectfully requests the Court deny the motion for partial summary judgment brought by Plaintiffs.

Dated this 6th day of April, 2015.

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Glossary of Terminology

Property Tax Terms

Ad valorem tax—In reference to property, a tax based upon the value of the property.

Annual Assessment Report (AAR)—A USPAP required report completed by the assessor for their client, the municipality, which explains how the assessor completed their assessment work for the year. This report must be completed within 30 days after the final adjournment of the Board of Review.

Apportionment—A proportional distribution of the levy of a taxing jurisdiction among municipalities based upon the value of the municipalities or parts of municipalities.

Assessed Value—A dollar amount assigned to the taxable property, both real (by parcel) and personal (by owner), by the assessor for the purpose of taxation. Assessed value is estimated as of January 1 and will apply to the taxes levied at the end of that year. Assessed value is called a primary assessment because a levy is applied directly against it to determine the tax due. Accurate assessed values ensure fairness between properties within the taxing jurisdiction. (See Equalized value for fairness between municipalities).

Assessment district—An assessor's jurisdiction; it may or may not be an entire tax district. Any subdivision of territory whether whole or part of a municipality where a separate assessment of taxable property is made. Such districts may be referred to as taxing districts, administrative districts, or special purpose districts. **(See sec. 70.08, Wis. Stats.)**

Assessment District—Any subdivision of territory whether whole or in part of a municipality in which a separate assessment of taxable property is made. Such districts may be referred to as taxation jurisdictions, administrative districts, special purpose districts. etc. (See sec. 70.08 Wis. Stats.)

Assessment Level—The relationship between the total assessed value and the equalized value of non-manufacturing property minus corrections for the prior year over and under charges within a municipality-town, village, or city. For example if the assessed value of all the property subject to property tax in the municipality is $2,700,000 and the equalized value in the municipality is $3,000,000 then the "assessment level" is said to be 90% ($2,700,000/$3,000,000 = .90 or 90%).

Assessment level—The ratio of the assessed value to the market value of all taxable property within a district (town, village, or city). For example if the assessed value of all the taxable property in Town "A" is $2,700,000 and the market value of all taxable property in Town "A" is $3,000,000 then the "**assessment level**" is said to be 90%.

Assessment Ratio—The relationship between the assessed value and the fair market value For example, if the assessment of a parcel which sold for $150,000 (fair market value) was $140,000, the assessment ratio is said to be 93% (140,000 divided by 150,000). The difference in the assessment level and the assessment ratio is that the level typically refers

Electronic Computer Exemption Report—The Electronic Computer Exemption Report was previously known as the Computer Exemption Report. The Computer Exemption Report is an electronically filed report filed by the assessor with the Department of

Revenue by May 1st. Amended filings can be submitted through September 1st. This report provides the value of all exempt computer and peripheral equipment, as its true cash value.

Equalized Value—The estimated value of all taxable real and personal property in each taxation district, by class, as of January 1 and certified by DOR on August 15 of each year. The value represents market value (most probable selling price), except for agricultural property, which is based on its use (ability to generate agricultural income) and agricultural forest and undeveloped lands, which are based on 50% of their full value.

Equalization—The process of establishing the January 1 market value (or use value for agricultural land) by class of real property and item of personal property for each taxation district.

Equated Value—The dollar amount placed on individual parcels of manufacturing property in a taxation district for tax collection purposes. It is calculated by multiplying the market value assessment of the property as determined by DOR times the assessment level of all other property within the taxation district.

Equity—In reference to property taxes, a condition in which the tax load is distributed fairly (or equitably), based on the concept of uniformity provided in the state constitution (i.e. each person's share of the tax is based on each property's value compared to the total value of all taxable property). Typically, this would require periodic reviews of the assessments (local revaluations) to account for the constantly changing economic factors impacting property. In practical terms, you have equity in taxes when the assessed value of each property bears the same relationship to market or use value.

In reference to value, it is the owner's financial interest in the property remaining after deducting all liens (including mortgages) and charges against it.

Estimated Fair Market Value- As found on tax bills—The assessed value of each locally assessed parcel (except those including agricultural land) divided by the entire taxation district's level of assessment (titled average assessment ratio on the tax bill). This estimate gives the property owner a basis for comparison of their perception of the market vs. what is being used to base their share of taxes on. Since the level of assessment is an average for the taxation district, and there is naturally going to be some variance in the local assessor's accuracy on every parcel. Minor differences between the estimated fair market value and the property owner's opinion of value shouldn't raise concern. Large differences require further investigation.

Exempt property—See **tax exemption.**

Expert help—Is employed when the governing body of a municipality not subject to assessment by a county assessor determines it is in the public interest to appoint such help

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Exempt property—See **tax exemption.**

Expert help—Is employed when the governing body of a municipality not subject to assessment by a county assessor determines it is in the public interest to appoint such help to aid in making the assessments in order that they may be equitably made and in compliance with the law. The expert help may be a private firm or person, or an employee of the Department of Revenue.

Field crew—The total staff assigned to a specific appraisal project, including data collectors, reviewers, staff appraisers, clerical and administrative supporting personnel.