

In The Supreme Court of Wisconsin

VINCENT MILEWSKI AND MORGANNE MACDONALD,
PLAINTIFFS-APPELLANTS-PETITIONERS,

v.

TOWN OF DOVER, BOARD OF REVIEW FOR THE TOWN OF DOVER,
AND GARDINER APPRAISAL SERVICE, LLC AS ASSESSOR FOR
THE TOWN OF DOVER,
DEFENDANTS-RESPONDENTS.

On Appeal from the Racine County Circuit
Court, The Honorable Phillip A. Kloss, Presiding,
Case No. 2014cv1482

**BRIEF OF THE STATE OF WISCONSIN
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF INTEREST	1
STATEMENT.....	2
ARGUMENT.....	6
I. Section 70.05(4m)'s Statutory Right Of Refusal Impliedly Repealed Section 70.47(7)(aa)'s Penalty For Refusal, As Applied To Real Property.....	6
II. Reading Section 70.05(4m) As Implicitly Repealing Section 70.47(7)(aa) Avoids The Constitutional Issues In This Case	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Camara v. Mun. Ct. of City and Cnty. of San Francisco</i> , 387 U.S. 523 (1967)	11
<i>Fleming v. Barry</i> , 21 Wis. 2d 259, 124 N.W.2d 93 (1963)	7, 8, 10, 11
<i>Hermann v. Town of Delavan</i> , 215 Wis. 2d 370, 572 N.W.2d 855 (1998).....	3
<i>In re Commitment of Matthew A.B.</i> , 231 Wis. 2d 688, 605 N.W.2d 598 (Ct. App. 1999).....	8, 10
<i>KW Holdings, LLC v. Town of Windsor</i> , 2003 WI App 9, 259 Wis. 2d 357, 656 N.W.2d 752	8
<i>Milwaukee Branch of NAACP v. Walker</i> , 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262	12
<i>Sausen v. Town of Black Creek Bd. of Review</i> , 2014 WI 9, 352 Wis. 2d 576, 843 N.W.2d 39	12
<i>State v. City of Oak Creek</i> , 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526.....	2
<i>State v. Gurnoe</i> , 53 Wis. 2d 390, 192 N.W.2d 892 (1972).....	7
<i>Union Cemetery v. City of Milwaukee</i> , 13 Wis. 2d 64, 108 N.W.2d 180 (1961).....	1, 7, 10

Statutes

2009 Wis. Act 68	3, 4, 9
Laws of Wis., ch. 207 (1953)	3
Wis. Stat. § 165.25.....	1
Wis. Stat. § 40.035	7
Wis. Stat. § 40.15	7
Wis. Stat. § 66.0119	4, 11
Wis. Stat. § 70.05	<i>passim</i>
Wis. Stat. § 70.10	2
Wis. Stat. § 70.32	2
Wis. Stat. § 70.47	<i>passim</i>

Wis. Stat. § 806.04	1
Wis. Stat. § 943.13	4
Other Authorities	
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (1st ed.)	7
Black’s Law Dictionary (10th ed. 2014)	10
<i>The Federalist</i> , No. 78 (Hamilton) (McLean’s ed. 1788).....	6

INTRODUCTION

In 2009, the Legislature enacted Wis. Stat. § 70.05(4m), which granted property owners the statutory right to prohibit a tax assessor from entering their real property. Yet under Wis. Stat. § 70.47(7)(aa), enacted in 1953, an owner who exercises this right is prohibited from challenging the assessment he receives in any forum. Because it “is so manifestly inconsistent and repugnant” to grant owners a statutory right under Section 70.05(4m), only to penalize them under Section 70.47(7)(aa) for exercising that right, the Legislature must have intended Section 70.05(4m) to implicitly repeal Section 70.47(7)(aa). *Union Cemetery v. City of Milwaukee*, 13 Wis. 2d 64, 71, 108 N.W.2d 180 (1961). Consistent with the constitutional-avoidance canon, the Court should resolve this case on this basis and decline to reach the constitutional issues raised by the plaintiffs.¹

STATEMENT OF INTEREST

The Attorney General, through the Department of Justice, may “appear for the state” in all matters, “civil or criminal,” pending in the Wisconsin Supreme Court “in which the state is interested.” Wis. Stat. § 165.25(1). When a law’s constitutionality is at stake, the Wisconsin Attorney General is “entitled to be heard.” Wis. Stat. § 806.04(11); *see also State v.*

¹ Accordingly, the State takes no position on the constitutional issues raised by the parties.

City of Oak Creek, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526.

STATEMENT

1. Tax assessors have the duty to ascertain the value of both real and personal property. *See* Wis. Stat. §§ 70.05, .10. An assessor must base the valuation of real property, the property at issue here, on an “actual view or [] the best information that the assessor can practicably obtain.” Wis. Stat. § 70.32(1).

After an assessor makes an assessment, the owner has the right to contest the amount of the assessment in one forum: the board of review. *See* Wis. Stat. § 70.47. In that proceeding, the “assessor’s valuation” is “presume[d]” to be “correct,” but “[t]hat presumption may be rebutted by a sufficient showing by the [owner] that the valuation is incorrect.” *Id.* § 70.47(8)(i). The owner must “present[] evidence . . . and ma[ke] full disclosure before [the] board, under oath of all that person’s property liable to assessment . . . and the value thereof.” *Id.* § 70.47(7)(a). The owner must present a written “estimate of the value of the land and of the improvements that are the subject of the person’s objection” to the assessment. *Id.* § 70.47(7)(ae). The board may also “examine under oath such persons as it believes have knowledge of the value of such property,” *id.* § 70.47(8)(c), and may “compel the attendance of witnesses” and “the production of” other evidence, *id.* § 70.47(8)(d). Only after challenging

the amount of a single parcel's assessment in front of the board may the owner challenge the amount of that assessment in court. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, ¶ 9, 572 N.W.2d 855 (1998).

In 1953, the Legislature enacted Wis. Stat. § 70.47(7)(aa), which limited property owners' right to challenge assessments in certain circumstances. *See* Laws of Wis., ch. 207 (1953). That section provides: "No person shall be allowed to appear before the board of review . . . to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property." Wis. Stat. § 70.47(7)(aa). But, in 2009, the Legislature enacted Act 68, which grants an owner the statutory right to *refuse* an assessor's entry onto "real property": "A property owner may deny entry to an assessor if the owner has given prior notice to the assessor that the assessor may not enter the property without the property owner's permission." 2009 Wis. Act 68, § 1, *codified at* Wis. Stat. § 70.05(4m). The law also states that "[e]ach taxation district assessor shall . . . maintain a database identifying all such [nonconsenting] property owners in the taxation district." *Id.* So, after Act 68, every owner has a statutory right to refuse to permit an assessor to "enter" his land. As explained below, this provision implicitly repeals Section 70.47(7)(aa) to the extent that section

penalizes owners for refusing a written request to enter their real property.²

Assessors can enter an owner’s land without that owner’s consent—including building interiors—if they obtain the appropriate warrant. Under Wis. Stat. § 66.0119, “[a] peace officer may apply for, obtain and execute a special inspection warrant . . . for inspection of personal or real properties which are not public buildings.” *Id.* § 66.0119(2). “Peace officer” includes a town agent “charged under statute . . . with powers or duties involving inspection of real or personal property.” *Id.* § 66.0119(1)(b). Assessors also have other tools, like reviewing building permits, to calculate an assessment.

2. In 2013, the Town of Dover contracted with Gardiner Appraisal Service to conduct a reevaluation of the assessments in Dover. P.App. 127. On August 20, 2013, Gardiner arrived at the home of Vincent Milewski and Morganne MacDonald and asked to view the home’s interior. *See* P.App. 128. Gardiner had previously sent a written notice

² Act 68 introduced other real-property protections as well. It requires districts to publish notices before they reevaluate assessments. 2009 Wis. Act 68, § 2, *codified at* Wis. Stat. § 70.05(b). It also created Wis. Stat. § 943.13, which governs trespass to land, exempting an assessor from liability *only if*: (1) the assessor enters the property to make an assessment; (2) during daylight; (3) spends no more than one hour on the land; (4) does not “open doors, enter . . . doors, or look into windows”; (5) leaves a notice “in a prominent place”; and (6) has not “received a notice from the owner or occupant, either orally or in writing, not to enter or remain on the premises.” 2009 Wis. Act 68, § 4, *codified at* Wis. Stat. § 943.13(4m)(d).

of its intent to “view [the] property” on this date. P.App. 127–28. MacDonald refused Gardiner entry—as was her right under Section 70.05(4m)—but was willing to allow Gardiner to enter her land to inspect the outside of the home. *See* P.App. 103–04. Gardiner declined and left the home without inspecting the outside. P.App. 104.

On October 4, 2013, Gardiner sent a second letter to the couple specifically requesting an interior inspection of the home. P.App. 128. The couple responded with their own letter, reasserting the objection to the interior inspection. P.App. 128. Gardiner then revalued the couple’s home at \$307,100, an increase of 12.12% from the last assessment, based on the belief that the home had been remodeled. P.App. 128.

On November 14, 2013, the couple filed an objection to the assessment with the Town. Two weeks later they appeared before the board of review. P.App. 129. The board denied them the right to appear pursuant to Wis. Stat. § 70.47(7)(aa) because the couple had refused, in the board’s judgment, the assessor’s “reasonable written request” to view their property. P.App. 129.

3. The couple challenged the board’s decision by filing a complaint in circuit court, arguing, among other things, that Wis. Stat. § 70.47(7)(aa) was unconstitutional. P.App.130. The court dismissed the complaint on summary judgment with an oral order, holding that the inability to seek review of

the assessment is “a consequence” when a citizen refuses to “open [his] doors” to an assessor. P.App. 111.

The court of appeals affirmed, holding that Wis. Stat. § 70.47(7)(aa) was not unconstitutional because “Plaintiffs were well informed of the repercussions of refusing Gardiner’s reasonable request to view the interior of their home,” and therefore they “chose to abandon their right to challenge the tax assessment before the [board]” by refusing Gardiner’s request. P.App. 135.

This Court granted the couple’s petition for review on October 11, 2016.

ARGUMENT

I. Section 70.05(4m)’s Statutory Right Of Refusal Impliedly Repealed Section 70.47(7)(aa)’s Penalty For Refusal, As Applied To Real Property

A. It is a principle derived from “the nature and reason” of law that “between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.” *The Federalist*, No. 78 (Hamilton) (McLean’s ed. 1788). That is, when two acts of the Legislature conflict, “the last in order of time shall be preferred to the first.” *Id.* Consistent with this principle, the Legislature may repeal an earlier statute with a later statute in two ways: explicitly or implicitly. Explicit repeal occurs when a later statute includes words of repeal, such as “hereby repealed” or “amended to read as follows.” Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* 332–33 (1st ed.) (emphasis removed).

This case involves the other type: implicit repeal. This sort of statutory repeal occurs when an “earlier act . . . is so manifestly inconsistent and repugnant to [a] later act that they cannot reasonably stand together, . . . or when the intent of the legislature to repeal by implication clearly appears.” *Union Cemetery*, 13 Wis. 2d at 71. While a judicial determination of implicit repeal is “not favor[ed],” if two acts “cannot reasonably stand together,” then the earlier act “no longer has any force and effect.” *Fleming v. Barry*, 21 Wis. 2d 259, 267, 124 N.W.2d 93 (1963); accord *State v. Gurnoe*, 53 Wis. 2d 390, 406, 192 N.W.2d 892 (1972).

This Court’s decision in *Fleming* illustrates the proper application of the implicit-repeal doctrine. In *Fleming*, this Court held that Wis. Stat. § 40.035, which made the “operation of a high school mandatory in every school district,” was implicitly repealed by Wis. Stat. § 40.15, which allowed for the dissolution of some high schools. 21 Wis. 2d at 262, 264–65, 267. This Court was not persuaded by an attempted harmonious reading of the statutes that would have required “the state superintendent upon making the order of dissolution under sec. 40.15 . . . [to] make other orders” assigning a new high school to the district in which the dissolution occurred. *Id.* at 266. Rather, this Court held that the provisions were in “direct conflict”: Section 40.15 “authorizes the dissolution” of some high schools, thereby

leaving some school districts without a high school, while Section 40.035 “forbids any school district to exist independent of a . . . high school.” *Id.* at 267. Therefore, the later statute implicitly repealed the earlier. *Id.*

Two court of appeals decisions are also instructive. In *KW Holdings, LLC v. Town of Windsor*, the court of appeals concluded that an ordinance requiring a public hearing, along with other procedures, before a final plat could be approved was implicitly repealed by a later ordinance that expounded on the other procedures but omitted the public-hearing requirement. 2003 WI App 9, ¶¶ 26–29, 259 Wis. 2d 357, 656 N.W.2d 752. And in *In re Commitment of Matthew A.B.*, the court of appeals held that a statute allowing the admission of juvenile-delinquency adjudications into evidence implicitly repealed an earlier statute that excluded such adjudications except in specific circumstances. 231 Wis. 2d 688, ¶¶ 27–28, 605 N.W.2d 598 (Ct. App. 1999).

B. In the present case, Section 70.05(4m) is manifestly inconsistent with and repugnant to the earlier-enacted Section 70.47(7)(aa), as applied to an assessor’s request to physically enter real property. Hence, Section 70.47(7)(aa) is implicitly repealed.

Section 70.47(7)(aa), enacted in 1953, provides that “[n]o person shall be allowed to . . . contest the amount of any assessment of real or personal property if the person has refused a reasonable written request . . . of the assessor to view such property.” Wis. Stat. § 70.47(7)(aa). The plain

import of this language—as applied to real property—is that a property owner that declines a reasonable written request to view the property cannot contest the assessment. Yet Section 70.05(4m), enacted in 2009, gives an owner the right to refuse to permit an assessor to *enter* real property, which necessarily applies even when the assessor makes a reasonable written request: “[a] property owner may deny entry to an assessor if the owner has given prior notice to the assessor that the assessor may not enter the property without the property owner’s permission.” Wis. Stat. § 70.05(4m).

Act 68, Section 1 of which was codified as Section 70.05(4m), is designed to provide greater protection for property rights. 2009 Wis. Act 68; *see supra* p. 4 & n.2. Indeed, taxing districts must keep a database of owners who have exercised their right to refuse entry, which shows that the Legislature wanted taxing districts to respect property rights *proactively*. There is no suggestion in the text or logic of Section 70.47(7)(aa) that the Legislature, after Act 68, still desired to penalize property owners who excluded assessors by taking away their right to challenge an assessment.

Put another way, Section 70.47(7)(aa) imposes a penalty on property owners who choose to exclude tax assessors from their property. But Section 70.05(4m) enshrines that choice to exclude as a statutory right. It is inconsistent to penalize an owner for denying access to the assessor, as Section 70.47(7)(aa) does, while simultaneously giving the owner the right to deny the assessor permission to

enter the property. The most reasonable reading is that, once the Legislature made the choice to exclude (recognized in Section 70.47(7)(aa)) a statutory right in Section 70.05(4m), it implicitly repealed Section 70.47(7)(aa) as applied to real property. Indeed, without concluding that Section 70.05(4m) implicitly repeals Section 70.47(7)(aa)'s penalty for refusal, it is difficult to explain why the Legislature wrote that an "owner *may* deny entry to an assessor" in Section 70.05(4m) (emphasis added). "May" is best read to mean the Legislature has "permitted," as a matter of statute, owners to deny assessors entry. MAY, Black's Law Dictionary (10th ed. 2014). Permission is incompatible with a penalty.

While this Court must adopt a harmonious reading of the two statutes if it can before concluding the earlier has been implicitly repealed, no "reasonabl[e]" reading allows the statutes to "stand together" here. *Fleming*, 21 Wis. 2d at 267. Indeed, the only way to retain both statutes would be for this Court to conclude that owners may be penalized for exercising their specific statutory right to refuse entry to an assessor. While such a conclusion is not *impossible*—like giving force to statutes that simultaneously prohibit and permit admission of a piece of evidence, *Matthew A.B.*, 231 Wis. 2d at 707—it is certainly "inconsistent and repugnant," *Union Cemetery*, 13 Wis. 2d at 71. Impossibility is not the standard: this Court in *Fleming* refused to adopt a similarly repugnant statutory reading, one that would have required a superintendent to alter school-district lines every time he exercised his duty to

dissolve a high school. 21 Wis. 2d at 266–67. This Court should likewise refuse to adopt a reading that penalizes owners every time they exercise their statutory right to refuse entry.

A conclusion that Section 70.05(4m) implicitly repealed Section 70.47(7)(aa) would not leave assessors without the means to fulfill their statutory duties. Assessors retain a variety of tools to value real property: Most importantly, assessors may obtain the consent of the owner to view the property, which owners give in the vast majority of cases. They can also review building permits issued on the property where available. In addition, an assessor can obtain an inspection warrant under Section 66.0119 to view the interior of a home,³ as Milewski and MacDonald concede. Milewski Opening Br. 43 (stating that “the government is always free to seek a warrant” and citing Section 66.0119).

Finally, the board of review proceedings prevent a property owner from subverting the tax-assessment regime through refusing an assessor’s entry. If an owner challenges the assessor’s valuation in front of the board of review after refusing entry to an assessor, the owner bears the burden of proving that the assessor’s valuation is incorrect. *See* Wis. Stat. § 70.47(8)(i); *see also Sausen v. Town of Black Creek Bd.*

³ The use of such warrants was approved as consistent with the Fourth Amendment by the Supreme Court of the United States in *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 538–40 (1967).

of Review, 2014 WI 9, ¶¶ 15–37, 352 Wis. 2d 576, 843 N.W.2d 39. The owner must provide a justifiable valuation of his real property to the board, Wis. Stat. § 70.47(7)(a), (ae), and the board may call and examine witnesses and gather other evidence, *id.* § 70.47(8)(c)–(d).

C. In the present case, the couple exercised their statutory right under Section 70.05(4m) to exclude the assessor from their real property. When the assessor valued the couple’s property higher than they thought appropriate, they attempted to challenge the assessment in front of the board of review. However, the board, based on Section 70.47(7)(aa), refused to hear the challenge. Since Section 70.05(4m) implicitly repealed Section 70.47(7)(aa), the board erred in refusing to hear the couple’s challenge.

II. Reading Section 70.05(4m) As Implicitly Repealing Section 70.47(7)(aa) Avoids The Constitutional Issues In This Case

“[W]hen [this Court] determine[s] that there is a statutory flaw that may have constitutional significance, [this Court] ascertain[s] whether the . . . statute[s] can be interpreted in a manner that will avoid a constitutional conflict.” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262. Indeed, “where a saving construction is fairly possible, the [C]ourt will adopt it.” *Id.* ¶ 63 (citations omitted). The couple has identified serious constitutional issues with Section 70.47(7)(aa)’s stripping of the right to challenge an assessment when an

owner refuses an assessor's request to view his property. *See* Milewski Opening Br. 34, 42, 45–48. Since Section 70.05(4m) can be reasonably read to implicitly repeal Section 70.47(7)(aa), the constitutional-avoidance canon directs this Court to adopt that reading and avoid the constitutional issues raised here.

CONCLUSION

The decision of the court of appeals should be reversed.

Dated this 14th day of December, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,993 words.

Dated this 14th day of December, 2016.

KEVIN M. LEROY
Deputy Solicitor General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of December, 2016.

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