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**STATE OF WISCONSIN
SUPREME COURT
No. 2015AP1523**

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.

Appeal from the Circuit Court of Racine County
Honorable Phillip A. Koss Presiding
Case No. 14-CV-1482

**AMICUS CURIAE BRIEF FOR THE
WISCONSIN REALTORS® ASSOCIATION**

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TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	iii
OVERVIEW	1
ARGUMENT	3
I. PROHIBITING A PROPERTY OWNER FROM APPEALING A PROPERTY TAX ASSESSMENT, UNDER WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a), IS UNCONSTITUTIONAL	3
A. The Opportunity To Be Heard Is a Fundamental Due Process Requirement.	3
B. Denying The Right to Appeal Assessments Is Unnecessarily Burdensome On The Due Process Rights of Property Owners ..	5
II. A PROPERTY OWNER’S RIGHT TO APPEAL AN ASSESSMENT IS A NECESSARY SAFEGUARD TO ENSURE ACCURATE AND UNIFORM APPRAISALS.	8
CONCLUSION	11

TABLE OF AUTHORITIES

FEDERAL COURT CASES

<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	3
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985)	3, 4
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	5
<i>Frank v. Magnum</i> , 237 U.S. 309 (1915).	3
<i>Kusper v. Pontikes</i> , 414 U.S. 51 (1973)	6
<i>Lassiter v. Dept. of Social Services of Durham County, N.C.</i> , 452 U.S. 18 (1981).	1
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).	1
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	3

WISCONSIN CASES

<i>Allright Props., Inc. v. City of Milwaukee</i> , 2009 WI App 46, 317 Wis. 2d 228, 767 N.W.2d 757	6
<i>Hermann v. Town of Delavan</i> , 215 Wis. 2d 370, 572 N.W.2d 855 (1998)	4
<i>Marsh v. Board of Sup'rs of Clark County</i> , 42 Wis. 502 (1877)	10
<i>Milewski v. Town of Dover</i> , 2016 WI App 50, 370 Wis. 2d 262, 881 N.W.2d 539	6
<i>Noah's Ark Family Park v. Board of Review of the Village of Lake Delton</i> , 210 Wis. 2d 310, 565 N.W.2d 230 (1997)	9
<i>Neylan v. Vorward</i> , 124 Wis.2d 85, 368 N.W.2d 648 (1985)	4

<i>Semple v. Langlade County</i> , 75 Wis. 354, 44 N.W. 79 (1890)	10
<i>State ex rel. Brighton Square v. City of Madison</i> , 178 Wis. 2d 577, 504 N.W.2d 436 (Ct. App. 1983).	7
<i>State ex rel Hensel v. Town of Wilson</i> , 55 Wis. 2d 101, 197 N.W.2d 794 (1972)	1
<i>State ex rel. Kimberly-Clark Co. v. Williams, City Clerk.</i> , 160 Wis. 648, 152 N.W. 450 (1915)	7
<i>State ex rel. Levine v. Board of Review</i> , 191 Wis. 2d 263, 528 N.W.2d 424 (1995)	1, 9
<i>State ex rel. North Shore Development v. Axtell, City Clerk</i> , 216 Wis. 153, 256 N.W. 622 (1934).	7
<i>State ex rel. Sonneborn v. Sylvester</i> , 26 Wis. 2d 43, 132 N.W.2d 249 (1965) . . .	3
<i>U.S. Oil Co., Inc. v. City of Milwaukee</i> , 2011 WI App. 4, 331 Wis.2d 407, 794 N.W.2d 904	9
<i>Three T's Trucking v. Kost</i> , 2007 WI App 158, 303 Wis. 2d 681, 736 N.W.2d 239	11
<i>Walgreen Co. v. City of Madison</i> , 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687	7, 9

CASES FROM OTHER JURISDICTIONS

<i>State ex rel. Blaisdell v. Billings</i> , 57 N.W. 794 (Minn. 1894)	1
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STATUTES

Wisconsin

Wis. Stat. § 70.32 1

Wis. Stat. § 70.46 10

Wis. Stat. § 70.47(7)(a) 4

Wis. Stat. § 70.47(7)(aa) 2, 3, 5, 6, 12

Wis. Stat. § 70.47(13) 4

Wis. Stat. § 70.49(2) 6

Wis. Stat. § 70.57 10

Wis. Stat. § 70.85(1) 4

Wis. Stat. § 70.85(4)(b) 4

Wis. Stat. § 74.37 4, 5

Wis. Stat. § 74.37(3) 5

Wis. Stat. § 74.37(4)(a) 2, 3, 5, 6, 12

U.S CONSTITUTION

Fourteenth Amendment 3

WISCONSIN CONSTITUTION

Article I, Section 1 3

MISCELLANEOUS

1 Wisconsin Property Assessment Manual, (2017) 8, 9

OVERVIEW

Article VII, Section 1, of the Wisconsin Constitution requires the method of taxing real property to be uniformly applied to all classes of property. To ensure a uniform method of taxation, assessors are required to assess real estate at its fair market value, using the best information the assessor can practicably obtain. *State ex rel. Levine v. Board of Review*, 191 Wis. 2d 263, 372, 528 N.W.2d 424 (1995); *see also*, Wis. Stat. § 70.32. “The fundamental equity of the entire real estate property tax system is based on the fairness of the assessment procedures, both as to the evaluation and the subsequent assessment.” *State ex rel Hensel v. Town of Wilson*, 55 Wis. 2d 101, 109, 197 N.W.2d 794 (1972).

Fairness is also a fundamental principle of the due process protections provided to property owners under the Due Process Clause of the Fourteenth Amendment. *See Lassiter v. Dept. of Social Services of Durham County, N.C.*, 452 U.S. 18, 24 (1981). The Due Process clause requires that a property owner whose interests have been affected by a government action be given both notice and an opportunity to be heard so that the property owner has a meaningful opportunity to make his case. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). As the Minnesota Supreme Court aptly recognized, “‘due process of law’ [is one of those] fundamental rights which our system of jurisprudence has always recognized, which not even the legislature can disregard.” *State ex rel. Blaisdell v. Billings*, 57 N.W. 794, 794-95 (Minn. 1894).

By prohibiting property owners from challenging their assessments if they deny the assessor entry into their home, Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a)¹ deprives property owners of their fundamental due process rights. In doing so, the statutes also jeopardize the accuracy and uniformity of Wisconsin's property tax system, which relies on property owners to identify inaccuracies. For these reasons, this Court should declare Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a) to be unconstitutional, in violation of the Due Process Clause of the Fourteenth Amendment.

¹ Wis. Stat. § 70.47(7)(aa) states “[n]o person shall be allowed to appear before the board of review, to testify to the board by telephone or 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. § 74.37(4)(a) states “[n]o claim or action for an excessive assessment may be brought under this section unless the procedures for objecting to assessments under s. 70.47, except under 70.47(13), have been complied with.”

ARGUMENT

I. PROHIBITING A PROPERTY OWNER FROM APPEALING A PROPERTY TAX ASSESSMENT, UNDER WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a), IS UNCONSTITUTIONAL.

The Due Process Clause of the Fourteenth Amendment prohibits government from depriving “any person of life, liberty, or property without due process of law.”² U.S. Const. amend. XIV, § 1. “‘Property’ cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process ‘is conferred, not by legislative grace, but by constitutional guarantee.’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). “An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for [a] hearing appropriate to the nature of the case.’” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, (1950). As stated by Justice Oliver Wendell Holmes, Jr., “[whatever disagreement there may be as to the scope of the phrase ‘due process of law’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.” *Frank v. Magnum*, 237 U.S. 309, 347 (1915).

A. The Opportunity To Be Heard Is a Fundamental Due Process Requirement.

The fundamental requirement of the Due Process Clause is “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,” *Boddie v. Connecticut*, 401 U.S. 371, 279 (1971)(emphasis in original).

² Wisconsin courts have interpreted Article I, Section 1 of the Wisconsin Constitution to be substantially the same as the due-process clause of the fourteenth amendment to the United States Constitution. *See State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49, 132 N.W.2d 249 (1965).

“The essential requirements of due process [] are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why [a] proposed action should not be taken is a fundamental due process requirement.” *Cleveland Bd. of Educ.*, 470 U.S. at 546 (citations omitted). Procedural due process requires that a party whose rights may be affected by government action be given “an opportunity to be heard upon such notice and proceedings are adequate to safeguard the right for which the constitutional protection is invoked.” *Neylan v. Vorward*, 124 Wis.2d 85, 90, 368 N.W.2d 648 (1985)(citations omitted).

Wisconsin’s property tax assessment system provides numerous opportunities for property owners to exercise their due process rights and challenge a property tax assessment they believe to be inaccurate. Upon receiving notice of a new property tax assessment, a property owner may appeal to a board of review. Wis. Stat. § 70.47(7)(a). A property owner also may bypass the board of review by paying the tax and filing a claim in circuit court for an excessive tax assessment. *See* Wis. Stat. § 74.37.

Once the board of review makes a decision regarding the property tax assessment, a property owner may appeal the assessment in one of three ways. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 379-80, 572 N.W.2d 855 (1998). First, the property owner can appeal the board’s determination by a *certiorari* action to the circuit court. *See* Wis. Stat. § 70.47(13). Second, a property owner may submit a written complaint to the department of revenue requesting the department of revenue revalue the property. *See* Wis. Stat. §§ 70.85(1) and 70.85(4)(b). Third, the

property owner can pay the tax on the assessment and then file a claim for excessive assessment against the taxing district or the county, depending upon which entity collected the tax. *See Wis. Stat. § 74.37*. If this claim is denied, the property owner then may file a claim with the circuit court to recover the amount of the claim not allowed. *See Wis. Stat. § 74.37(3)*.

However, property owners who refuse to allow a tax assessor to enter and inspect their property are prohibited from challenging their tax assessments. *See Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a)*. They lose all of the opportunities for appeal afforded to other property owners. Regardless of how unreasonable they believe the assessment to be, the property owners are forced to make a tax payment without having an opportunity to be heard and providing reasons as to why they believe the tax assessment is incorrect. Thus, they are denied the fundamental protections guaranteed by the Due Process Clause.

B. Denying The Right to Appeal Assessments Is Unnecessarily Burdensome On The Due Process Rights of Property Owners.

In pursuing a substantial state interest, a state cannot choose a means which unnecessarily burdens or restricts constitutionally protected activity. *Dunn v.*

Blumstein, 405 U.S. 330, 343 (1972). As the Supreme Court has stated,

“For even when pursuing a legitimate state interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. ‘Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.’ If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.”

Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973)(citations omitted).

In this case, the court of appeals determined that Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a) provided a reasonable regulatory scheme in light of the state's requirement to comply with the Wisconsin Constitution's uniformity clause.

Milewski v. Town of Dover, 2016 WI App 50, ¶ 19, 370 Wis. 2d 262, 881 N.W.2d 539. Specifically, the court held, "Wisconsin law regarding tax assessments is a reasonable statutory scheme" because the state's interest in complying with the uniformity clause outweighs the "relatively low intrusion on the homeowner." *Id.* In reaching this conclusion, the court determined that the viewing of the interior of the home was "one of the most important pieces of evidence that the tax assessor must consider" when assessing a home, and that "no other means are as effective to provide an accurate valuation." *Id.*

However, as part of its analysis, the court did not consider whether the state's interest in achieving an accurate and uniform assessment of property could have been accomplished through a means less damaging to a property owner's due process rights. If it had conducted such an analysis, the court would have likely concluded that the state's current burden-shifting framework for challenging a property tax assessment alone is a sufficient means to accomplish that objective. Under this framework, if a property owner challenges an assessment, the assessor's assessment is presumed to be correct. *See* Wis. Stat. § 70.49(2); *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶ 12, 317 Wis. 2d 228, 767 N.W.2d 757. Moreover, on

appeal to the board of review, the assessors valuation “[is] prima facie correct and [is] binding on the board of review in the absence of evidence proving it to be incorrect.” *State ex rel. Kimberly-Clark Co. v. Williams, City Clerk.*, 160 Wis. 648, 649, 152 N.W. 450 (1915)(citations omitted). Even if the property owner provides evidence that the assessment was too high, the board of review must uphold the assessor’s opinion of value “[i]f there is credible evidence before the [b]oard that may in any reasonable view support the assessor’s valuation.” *State ex rel. North Shore Development v. Axtell, City Clerk*, 216 Wis. 153, 157, 256 N.W. 622 (1934). If the property owner then decides to appeal to the circuit court, the findings of the board of review will be upheld if the evidence presented in favor of the assessment furnishes a substantial basis for the valuation. *State ex rel. Brighton Square v. City of Madison*, 178 Wis. 2d 577, 582, 504 N.W.2d 436 (Ct. App. 1983).

The assessor’s opinion of value is given tremendous deference by both the board of review and a reviewing court on appeal. The only way a property owner can overcome this presumption of correctness is to present significant evidence showing the assessor was incorrect. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 17, 311 Wis. 2d 158, 752 N.W.2d 687 (citations omitted). In situations like the present case, where a homeowner refuses to allow an assessor to enter the property and the assessor provides an opinion of value absent an inspection of the interior of the home, the assessor’s opinion of value is presumed to be correct and the property owner must provide significant evidence demonstrating that the assessor was incorrect. Thus, if a property owner refuses to allow the assessor into the home and the assessor values the

home on the basis that the home has four bedrooms, two baths, and a kitchen with granite counter tops, high-end appliances, and hardwood floors, the property owner wishing to appeal the assessment will have to provide significant evidence showing that the home does not have these amenities.

While developing a property assessment regulatory scheme that is both accurate and uniform is a legitimate state interest, so too is protecting the due process rights of property owners. Wisconsin's current burden-shifting framework for challenging a property tax assessment strikes a reasonable balance between both state interests and the court of appeals erred by not considering it.

II. A PROPERTY OWNER'S RIGHT TO APPEAL AN ASSESSMENT IS A NECESSARY SAFEGUARD TO ENSURE ACCURATE AND UNIFORM APPRAISALS.

In Wisconsin, the assessor is given tremendous authority and responsibility in the property assessment system. The assessor is responsible for discovering, listing and valuing all taxable real and personal property within the taxing district. 1 Wisconsin Property Assessment Manual, 1-15 (2017). In addition, the assessor is responsible for ensuring the property is valued in a uniform manner. *Id.* In determining the assessed value of the property, the assessor is required to consider, among other things, the current market conditions, neighborhood characteristics, zoning, topography, physical factors (location, appearance, traffic, etc.), and physical characteristics (size, construction quality, age, condition, and special features) of the property. *Id.* at 9-20. After gathering the information about the property, the

surrounding neighborhood, and the market conditions, the assessor must analyze the data and provide an opinion of the property's value using one or more of the three approaches to value (the sales-comparison approach, the cost approach, and the income approach). *Id.* at 9-22. Each approach to value requires a detailed analysis of various characteristics of the property and, in the case of the sales-comparison approach, other similar properties in the same market. *See id.* at 9-22 to 9-23. The assessment process is simple in theory, but “extraordinarily difficult in its application.” *Id.* at 9-42.

Property tax assessments are opinions of value. Assessors are human and humans make mistakes. Because of the complexity of property tax assessments, assessors can make mistakes based upon a variety of factors including erroneous information about a property, using the wrong comparables to determine fair market value, or applying an incorrect valuation methodology. *See e.g., Noah's Ark Family Park v. Board of Review of the Village of Lake Delton*, 210 Wis. 2d 310, 565 N.W.2d 230 (1997)(property owner successfully challenged a property tax assessment that used an incorrect assessment methodology); *U.S. Oil Co., Inc. v. City of Milwaukee*, 2011 WI App. 4, 331 Wis.2d 407, 794 N.W.2d 904(property owner successfully challenged property tax assessment on the basis that it violated Wisconsin's Uniformity Clause); *Walgreen Co.*, 311 Wis. 2d 158(property owner successfully challenged a property tax assessment that used above-market leases when determining fair market value); *State ex rel. Levine*, 191 Wis. 2d 363 (a property owner successfully challenged a property tax assessment that used an incorrect assessment

methodology by applying different valuation standards to old and new residential properties). In some cases, assessors have intentionally assessed a property incorrectly by ignoring appraisal standards in the law for personal reasons. *See e.g., Semple v. Langlade County*, 75 Wis. 354, 44 N.W. 79 (1890)(intentionally ignoring state statutes requiring assessment and taxation of improvements upon government homesteads). As this Court has noted,

[A]ssessments are as liable to error as other processes. Assessors may commit errors of judgment and mistakes of fact. So that these are exceptional and happen in good faith, not affecting the principle or the general equality of the assessment, they will not vitiate it. . . . [T]he court has also frequently held that violations or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or by fraud in fact, which go to impair the general equality and uniformity of the assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax.

Marsh v. Board of Sup'rs of Clark County, 42 Wis. 502, 510 (1877)(citations omitted).

Under Wisconsin's property tax system, the primary safeguard to ensure the accuracy and uniformity of assessors' opinions of value is the ability of property owners to appeal assessments they believe to be inaccurate. While the Wisconsin Department of Revenue and local boards of review oversee assessors and the assessment process, they are generally not in a position to determine whether individual assessments are erroneous. *See Wis. Stat. §§ 70.57 and 70.46.* Moreover, because individual property taxpayers generally do not have standing to challenge a tax assessment of another property owner, a challenge from a third party is highly

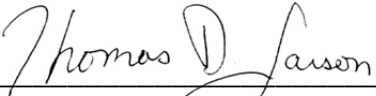
unlikely. See *Three T's Trucking v. Kost*, 2007 WI App 158, ¶ 16, 303 Wis. 2d 681, 736 N.W.2d 239 (stating that only those who have suffered some injury because of something someone has done or not done has legal standing to file a lawsuit). Any challenge to a property tax assessment, therefore, must likely come from the affected property owner.

By eliminating the ability of property owners to challenge assessments if they refuse to allow assessors to enter their home, Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a) remove the primary means to ensure that assessments are accurate and performed uniformly in accordance with the Uniformity Clause.

CONCLUSION

A ruling by this Court to uphold the constitutionality of Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a) would continue to deprive property owners of their fundamental right to due process. Without providing property owners an opportunity to appeal a property tax assessment, mistakes in assessments, whether intentional or unintentional, will likely go undetected. A property owner's right to a fair trial with an opportunity to be heard are fundamental components of the due process protections guaranteed by the Constitution and cannot be taken away by legislation. Accordingly, the Wisconsin REALTORS® Association respectfully requests this Court to declare Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a) to be unconstitutional.


Dated this 23rd day of December, 2016.


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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2877 words.



Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

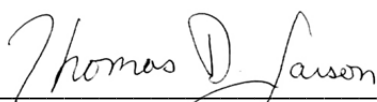
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I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 23rd day of December, 2016.



Thomas D. Larson

CERTIFICATE OF SERVICE

I hereby certify that:

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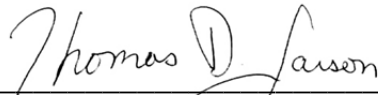
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A handwritten signature in cursive script that reads "Thomas D. Larson". The signature is written in black ink and is positioned above a horizontal line.

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