



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 28, 2016

RECEIVED
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Ms. Diane M. Fremgen
Clerk of the Supreme Court
110 East Main Street, Suite 215
Madison, WI 53703

Re: *Vincent Milewski and Morganne MacDonald v. Town of Dover, Board of Review for the Town of Dover, and Gardiner Appraisal Service, LLC as Assessor for the Town of Dover*, No. 15AP1523

Dear Ms. Fremgen:

On December 22, 2016, Defendants-Respondents Town of Dover and the Board of Review for the Town of Dover (“the Town”) asked this Court to reconsider its December 19, 2016 grant of the State’s motion to file a brief as amicus curiae in the above-referenced case. Alternatively, the Town requested leave to file a brief and the grant of extra time at oral argument in order to address the issues raised in the State’s amicus brief. Town’s Mot. ¶ 8. The State submits that the Town’s request for reconsideration should be denied, but does not oppose the Town’s request to file a brief responding to the amicus brief or for extra time at oral argument.

The Town’s arguments in support of its request for reconsideration are premised upon a misunderstanding of the law and the Attorney General’s duties in representing the State.

First, the Town claims that “the *amicus* brief does not *defend* the constitutionality of the statutory section at issue,” Town’s Mot. ¶ 2, because the amicus brief argues that Wis. Stat. § 70.47(7)(aa) has been impliedly repealed by Wis. Stat. § 70.05(4m), see State’s Amicus Br. 6–12. Therefore, the Town claims that this Court should reject the State’s amicus brief because the Attorney General does not “ha[ve] standing and authority to do anything but *defend* the constitutionality of [the] statute.” Town’s Mot. ¶ 2 (citing *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526). As an initial matter, the position in the State’s amicus brief *does* defend the constitutionality of State law—just not in the manner the Town would like. If Section

70.47(7)(aa) has been impliedly repealed by Section 70.05(4m), as the State argues, then there would be no constitutional deficiencies, even arguable ones, in State law. See State's Amicus Br. 12–13 (citing *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 63–64, 357 Wis. 2d 469, 851 N.W.2d 262). In any event, the Attorney General's authority to file an amicus brief on behalf of the State does not depend upon defending the constitutionality of the law in question. The Attorney General is "entitled to be heard" whenever "a statute . . . is alleged to be unconstitutional." Wis. Stat. § 806.04(11).*

Second, the Town claims that "the Department of Justice does not have any unique perspective or expertise to share with the Court beyond defending the constitutionality of the statute." Town's Mot. ¶ 3. The Attorney General has the constitutional duty to represent the State in all legal proceedings, see Wis. Const. Art. 6, § 3; Wis. Stat. § 165.25(1); *City of Oak Creek*, 232 Wis. 2d 612, ¶¶ 34–35, and has the statutorily recognized right "to be heard" in cases—such as this one—where "a statute . . . is alleged to be unconstitutional," Wis. Stat. § 806.04(11). Notably, the Attorney General engaged in significant consultation with the Department of Revenue before filing the amicus brief in this case and has submitted the brief on behalf of the entire State, which includes the Department of Revenue.

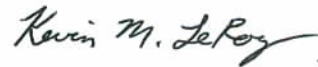
Third, the Town claims that the "proposed amicus [b]rief [] raises an issue and argument the [parties] never raised before," Town's Mot. ¶ 4, and therefore the "issue" presented in the amicus brief "should be treated as forfeited," Town's Mot. ¶ 6 (citing *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 45, 327 Wis. 2d 572, 786 N.W.2d 177). The application of the forfeiture doctrine falls within the discretion of this Court and is meant to protect "judicial administration." See *Schill*, 327 Wis. 2d 572, ¶ 45 n.21. By explaining that the relevant statute has already been repealed by the Legislature, the amicus brief offers an avenue for this Court to fully resolve this case without confronting the difficult constitutional issues raised by the parties, see State's Amicus Br. 12–13, which is the generally preferred course, *Walker*, 357 Wis. 2d 469, ¶¶ 63–64. Indeed, the State submits that this Court should not rule on the constitutionality of a statute without first deciding whether that statute has already been repealed.

* Even absent this statute, the Attorney General could have filed as an amicus without a showing of standing. Compare *City of Oak Creek*, 232 Wis. 2d 612, ¶ 17, with Wis. Stat. (Rule) § 809.19(7).

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For all of these reasons, the Town's motion for reconsideration should be denied.

Sincerely,



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