STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2015-AP-1523

Vincent Milewski and Morganne MacDonald,

Plaintiffs-Appellants-Petitioners,

and

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
Circuit Court Case No. 14-CV-1482
The Honorable Phillip A. Koss, Presiding

Brief of Defendants-Respondents Town of Dover and Board of Review for the Town of Dover in Opposition to Brief of the State of Wisconsin as Amicus Curiae Supporting Petitioners

---

Dustin T. Woehl (1036759)
Jason P. Gehring (1061084)
Kasdorf Lewis & Swietlik, SC
One Park Plaza, #500, 11270 W. Park Place
Milwaukee, WI 53214
Phone: 414.577.4000, Fax: 414.577.4400
dwoehl@kasdorf.com

Table of Contents

Table of Authorities

Argument

I. Finding repeal by implication is disfavored.

Although the state cites the applicable standard, its argument presumes a much more lenient standard. The position that the Legislature repealed a statute by implication is not favored in Wisconsin law. *Manthe v. Town Bd.*, 204 Wis.2d 546, 554, 555 N.W.2d 167, 171 (Ct. App. 1996). A court should only resort to finding implicit repeal when the two provisions are "so contrary to or irreconcilable with one another that only one of the provisions may remain in force." *In re Commitment of Matthew A.B.*, 231 Wis.2d 688, ¶ 24, 605 N.W.2d 598 (1999) (internal quotation omitted).

"The earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together." *Heaton v. Independent Mortuary Corp.*, 97 Wis.2d 379, 392-93, 294 N.W.2d 15, 22 (1980).The courts "must reasonably construe statutes to avoid conflicts, and when statutes do conflict, [they] must attempt to harmonize them." *In re Commitment of Matthew A.B.*, 231 Wis.2d 688, ¶ 24.

The state's argument turns these rules of construction on their head.

II. The statutes are perfectly harmonious.

A. There is no indication the legislature intended 2009 Wis. Act 68 to change the rules for challenging assessments.

In its efforts to portray Wis. Stat. § 70.05(4m) and Wis. Stat. § 70.47(7)(aa) as mutually repugnant, the state mischaracterizes Act 68. The language of the Act itself demonstrates that its main purpose was not "to provide greater protection for property rights" as the state argues. (Br. p. 9). Rather, Act 68 is an Act "relating to: partially exempting an assessor and an assessor's staff from liability for trespassing, creating immunity from civil liability, and changing the notice requirements related to the revaluation of property by an assessor." 2009 Wisconsin Act 68.

The Act facilitated and expanded the assessors' ability to enter private property to perform assessments. Assessors are now expressly permitted to enter property-owner's land without permission. To balance those expanded rights and provide additional due process to homeowners, the Act adds several safeguards similar to those typically found in a warrant, including a limitation on the number of times an assessor can enter the land in one year and a requirement that the municipality publish information on its website regarding the assessment and the authority of the assessor. 2009 Wis. Act 68, Section 1 and 2. Act 68 also provides that 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." Id., Section 1. The ability to withhold permission for an assessor to enter a property-owner's land was clearly not the main purpose of the Act, but was, rather, a limitation on the expanded authority the Act provided to assessors to enter private property without permission.

In fact, it appears that the provision, which the state trumpets as a "Statutory Right of Refusal" does nothing more than expressly preserve an existing right in the face of legislation expanding the ability of assessors to enter private property. As was explained in our Response Brief, the longstanding procedure in Wisconsin is that the assessor sends a certified letter requesting to view the property and explaining that the homeowner may refuse a view of the property, but would then lose the right to contest the assessment. (Respondents' Br. p. 1). There is no indication that prior to 2009 Wis. Act 68, assessors had the authority to enter private property over a homeowner's express objection. Indeed, the property-owners in the present case argue that their decision to grant the assessor access to the exterior of their property should have been enough. (Petitioners' Br. p. 6).

The state provides no reasonable explanation why the Legislature, being fully aware of the longstanding application of the waiver rule, would not have amended § 70.47(7)(aa) or any of the subsections in Chapter 70 relating to challenging assessments, if it had intended to give property owners a new right

to contest their assessments even after refusing to allow the assessor to view their property. Such a drastic change to longstanding Wisconsin law would not be undertaken by the Legislature *sub silentio* or implicitly, but would have been addressed directly. Cases cited by the state are distinguishable in that they involve subsequent legislation that addressed the same issues covered by the legislation held to have been implicitly repealed. *See, e.g., In re Commitment of Matthew A.B.*, 231 Wis.2d 688, ¶¶ 27-28, 605 N.W.2d 598 (Ct. App. 1999) (statute allowing admission of juvenile-delinquency adjudications necessarily repealed earlier statute that excluded them with only limited exceptions); *Manthe v. Town Bd. of Windsor*, 204 Wis.2d 546, 551, 555 N.W.2d 167 (Ct. App. 1996) (holding that by "comprehensively addressing" the same procedures addressed in the prior law, but omitting reference to a public hearing, subsequent statute demonstrated an intent not to require that hearing.)

B. The right of a property-owner to deny an assessor access to his or her property is consistent with the longstanding rule that a property-owner who does not fully disclose the property being assessed and allow a reasonable view of that property thereby waives the right to contest the assessment.

There is absolutely nothing inconsistent with allowing a property-owner to require an assessor to ask permission before entering their land and also providing that if the property-owner refuses a reasonable request to view the property, then the property-owner waives the right to contest the assessment.

The state's entire argument rests on the fallacy that the right to do something means an absolute and unfettered right to do it free of any consequences and without any conditions. The state does not cite a single legal authority for that faulty proposition. To the contrary, no right is absolute. *See, e.g., United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012) (discussing limitations on Second Amendment right to bear arms). The law is replete with examples of rights that are conditioned, limited, or that have consequences when invoked. The right to a jury trial can be conditioned on paying a jury fee, the right to free speech does not immunize one who cries

"fire" in a crowded theatre. People have a right to keep their medical records private, but a personal injury plaintiff cannot refuse to disclose his or her medical records and also sue for bodily injury. *See, e.g.*, Wis. Stat. § 804.10 and § 905.04(4)(c); *Johnson v. Rogers Mem'l Hosp., Inc.,* 2005 WI 114, ¶158, 283 Wis. 2d 384, 700 N.W.2d 27 (parents put deceased child's medical records at issue by filing suit).

Similarly, while property-owners may deny assessors access to their property, they do not have the right to challenge an assessment while withholding the most crucial evidence upon which the assessment depends—an actual view of the very property being assessed. There is nothing inconsistent with the Legislature allowing the property-owner to refuse the assessor access to the property, whilst maintaining the longstanding rule that a property-owner must disclose this crucial and relevant evidence *if* the property owner wants to challenge the assessment.

The state's argument is belied by decades of Wisconsin precedent. The alleged inconsistency has been the law for decades. The homeowner's ability to refuse a view is nothing new, and it has historically resulted in waiver of the right to challenge the assessment under § 70.47(7)(aa). The constitutionality of that combination is the crux of this case. Constitutionality aside, it is clear that the Legislature does not believe that allowing a homeowner to refuse a view is so incompatible with a resultant waiver of the ability to challenge the assessment that the two cannot stand together—they have coexisted for years prior to 2009 Wis. Act 68. As we explained in our Response Brief, the Wisconsin tax assessment scheme has never forced property owners to allow an assessor to view their property—interior or exterior. That is why there is no "search" here and the Fourth Amendment does not apply. Instead of using a warrant or other means to forcibly compel property owners to allow assessors to view their property, Wisconsin's tax assessment scheme gives property owners the option of refusing to allow the assessor to view the property with the consequence, explained in advance, that the property owner thereby forfeits the right to challenge the assessment.

These two provisions work in tandem. Instead of forcing a view, Wisconsin has always allowed a refusal that waives the right to challenge the assessment. At the very least, they are by no means so mutually repugnant that instead of harmonizing them, the Court should infer that the Legislature intended to repeal the waiver rule.

C. The state's position should be rejected because it would lead to absurd results.

The state's position is that the provision in the Act giving property owners the right to refuse entry onto their property also automatically gives them the right, previously nonexistent, to contest their assessment without allowing the assessor to view the exterior of their home and, by necessary implication, to view the interior of their home.

Under the state's argument, a property-owner could force an appraiser to appraise property without ever viewing it, but then still attack the appraisal while possessing superior knowledge. The state's argument that the assessor has other methods he or she can use to try to come up with a fair assessment of the full value of the property is disingenuous. While an appraisal based on circumstantial evidence of value is possible, it is not the best evidence of the value, and it would be patently unfair to force an assessor to defend such an appraisal against a property owner who possesses and withholds the best evidence.

Even if § 70.47(7)(aa) did not exist, any property owner who wanted to challenge the assessment before a Board of Review is still required to make a "good faith" "full disclosure" of all the property being assessed. Section 70.47(7) provides in part that "[n]o person shall be allowed in any action or proceedings to question the amount or valuation of property unless such written objection has been filed and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath of all of that person's property liable to assessment in such district and the value thereof." Wis. Stat. §70.47(7). Does the right to prevent the assessor from entering property also mean that this

part of § 70.47(7) was repealed and a property owner must be allowed to challenge an assessment without making full disclosure of the property assessed? It is absurd to think that the legislature would have overturned a century of precedent in such an oblique fashion.

Conclusion

While at first blush, the state's argument might appear to present a convenient alternative to addressing the constitutional issues raised by the Petitioners, it ultimately falls short as a plausible interpretation of the Legislative intent. This case presents the Court with the constitutionality of Wisconsin's longstanding rule requiring homeowners to grant an assessor's reasonable written request to view the property as a precondition to being able to later challenge the assessment.

Given the longstanding application of the waiver rule, it simply cannot be inferred that the Legislature intended that the ability to refuse an assessor's request to view one's property is incompatible with waiving the right to challenge the assessment by so refusing.

Dated this 10th day of January, 2017.

KASDORF, LEWIS & SWIETLIK, S.C.
Attorneys for Defendants-Respondents Town of Dover and Board of Review for the Town of Dover

/s/ Dustin T. Woehl
Dustin T. Woehl (SBN 1036759)
Jason P. Gehring (SBN 1061084)
Ph: 414.577.4000 / Fax: 414.577.4400
dwoehl@kasdorf.com,
One Park Plaza, Suite 500
11270 W. Park Place
Milwaukee, WI 53224

Form and length certification

I certify that this brief meets the form requirements of Rule 809.19(8)(b) and (c), for a brief produced with **proportional serif font**:

> Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text.

The length of this Brief is **1912** words.

Dated this 10th day of January, 2017.

KASDORF, LEWIS & SWIETLIK, S.C.
Attorneys for Defendants-Respondents Town of Dover and Board of Review for the Town of Dover

/s/ Dustin T. Woehl
Dustin T. Woehl (SBN 1036759)
Phone: 414.577.4000
Facsimile: 414.577.4400
Electronic mail: dwoehl@kasdorf.com
One Park Plaza, Suite 500
11270 W. Park Place
Milwaukee, WI 53224

Electronic certification under § 809.19(12)

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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 10th day of January, 2017.

KASDORF, LEWIS & SWIETLIK, S.C.
Attorneys for Defendants-Respondents Town of Dover and Board of Review for the Town of Dover

/s/ Dustin T. Woehl
Dustin T. Woehl (SBN 1036759)
Phone: 414.577.4000
Facsimile: 414.577.4400
Electronic mail: dwoehl@kasdorf.com,
One Park Plaza, Suite 500
11270 W. Park Place
Milwaukee, WI 53224

Affidavit and certificate of service and filing by mail

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

I hereby certify, affirm, and swear under oath that on January 10, 2017, pursuant to Wis. Stat. § 809.19(8)(a)(2), § 809.19(12)(d), and § 809.80(3)(b) & (4), I served twenty-two (22) copies of this Brief upon the Supreme Court of Wisconsins by placing them on that date for delivery by prepaid Overnight UPS Delivery, and three (3) copies of the same upon all counsel, postage prepaid, first class US mail to their address of record:

Thomas C. Kamenick, Esq. Wisconsin Institute for Law & Liberty 1139 E. Knapp Street Milwaukee, WI 53202 Kevin LeRoy, Esq. Deputy Solicitor General Wisconsin Department of Justice 17 W. Main Street Madison, WI 53707 Thomas Larson, Esq. Wisconsin Realtors Association 4801 Forest Run Road, Suite 201 Madison, WI 53704	Mitchell R. Olson, Esq. Axley Brynelson LLP 2 E. Mifflin St., Ste. 200 P.O. Box 1767 Madison, WI 53701-1767 Lee U. McGrath, Esq. Megan A. Forbes, Esq. Institute for Justice 520 Nicollet Mall, Suite 550 Minneapolis, MN 55402 Dana J. Erlandsen, Esq. General Counsel Wisconsin Department of Revenue 2135 Rimrock Road Madison, WI 53708

Dated this 10th day of January, 2017.

KASDORF, LEWIS & SWIETLIK, S.C.
Attorneys for Defendants-Respondents Town of Dover and Board of Review for the Town of Dover

/s/ Dustin T. Woehl
Dustin T. Woehl (SBN 1036759)