STATE OF WISCONSIN | CIRCUIT COURT | RACINE COUNTY

Vincent Milewski, *et al.*,

Plaintiffs,

v.

Town of Dover, *et al.*,

Case No. 14-CV-1482

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

In *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), the United States Supreme Court declared that warrantless administrative inspections of homes were impermissible under the Fourth Amendment. Yet the Town of Dover has a policy requiring its assessor to enter into and inspect the homes of private citizens, with no warrant.

Vincent Milewski and Morganne MacDonald refused to permit the Town's appraiser, Gardiner Appraisal Service, LLC, to enter their home and search it without a warrant. For exercising their Fourth Amendment rights, their home was assessed at an unusually high amount, substantially higher than dozens of properties in the same subdivision who did consent to such a search. Moreover, the Town's Board of Review refused to permit the Plaintiffs to challenge their unfair assessment, under their interpretation of state law. The Plaintiffs then paid the disputed tax for 2013 under protest.[1]

The Plaintiffs seek judicial review of the conduct of the Town and its assessor and seek relief for the violation of their rights. In this motion, the Plaintiffs request partial summary

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[1] The Plaintiffs have also paid the disputed tax under protest for 2014, and intend to amend the Complaint to include that amount once the Town disallows their § 74.37 claim or the 90-day period for the Town to allow or disallow their § 74.37 claim expires, which will be at the end of April.

judgment on three issues: (1) whether the Board of Review ("BOR") violated their statutory rights by refusing to permit them to challenge their assessment; (2) whether §§ 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied to the Plaintiffs; and (3) whether the Town's and BOR's policies deprived the Plaintiffs of their constitutional rights in violation of 42 USC § 1983. Rulings on these legal issues will determine whether Plaintiffs can challenge their assessment under Wis. Stat. § 74.37 and/or seek damages under § 1983 and § 70.501. Other issues involving factual disputes would remain for trial, including whether Gardiner valued the Plaintiffs' property at a higher value than was proper in retaliation for the exercise of their Fourth Amendment rights.

STATEMENT OF UNDISPUTED FACTS

The Plaintiffs, husband and wife, own a home at 1232 Linden Lane (the "Property"), which is located in Lorimar Estates subdivision within the Town of Dover. (Compl. ¶¶4-6, 26; Town & BOR Ans. ¶¶4-6, 26; Gardiner Ans. ¶¶4-6; Milewski Aff. ¶¶2-3.) Prior to 2013, the Property was assessed at $273,900, with a fair market value of $277,761. (Kamenick Aff. Ex. A, Gardiner00060.)

In 2012, the Town decided to perform a new assessment of all real property within the Town for the 2013 tax year. (Compl. ¶13; Defs'. Ans. ¶13; Kamenick Aff. Ex. A, Gardiner 00005-00007.) The Town had previously appointed Gardiner as its "assessor"[2] as that term is used in Wis. Stat. § 70.05 and the rest of chapter 70. (Compl. ¶10; Town & BOR Ans. ¶10;

[2] Although in its responses to Requests for Admission, Gardiner denied being the Town's "assessor" (Gardiner Resp. to Request for Adm. #1 (Kamenick Aff. Ex. D)); *see also* Gardiner Ans. ¶10), the Town admitted that "Gardiner Appraisal Service, LLC was appointed [as the assessor] by the Town Board" at an unknown time (Town & BOR Resp. to Interr. #6, Kamenick Aff., Ex. B; *see also* Town & BOR Ans. ¶10), two "assessment contracts" between Gardiner and the Town identify Gardiner as "such an assessor," (Kamenick Aff. Ex. A, Gardiner00002, 00011) and a May 1, 2013 letter from Gardiner to the Town stated, "It has been a pleasure serving the Town over the past years as the appointed assessor." (*id.*, Ex. A, Gardiner00001).

Town & BOR Resp. to Request for Adm. #6 (Kamenick Aff. Ex. B); Kamenick Aff. Ex. A, Gardiner00001-00004, 00011-00013.) On July 9, 2012, the Town signed a contract with Gardiner to perform "an appraisal of all specified real property parcels within the Town of Dover." (Kamenick Aff. Ex. A, Gardiner 00005-00007.)

The Town had a policy of requiring interior inspections, even of residential buildings, as part of its assessments. The Town's July 9, 2012 revaluation contract with Gardiner required Gardiner to "view the exterior and interior of all structures unless denied access after mailing a request to owner by certified mail." (*Id.*, Gardiner00006.) Contracts appointing Gardiner as assessor required Gardiner to "note detailed interior and exterior information on field cards" when inspecting property. (*Id.*, Gardiner00002, 00011.)

On or about August 14, 2013, the Plaintiffs received in the mail a notice indicating that "An assessor will stop to view your property on Tues, Aug 20 at 6:10 pm." (Kamenick Aff. Ex. A, Gardiner 00014.) The notice was from "Gardiner Appraisal Service, LLC, Assessors." (*Id.*) On August 20, 2013, when an employee of Gardiner Appraisal, Bruce Gardiner, arrived at the Property, Ms. MacDonald told him that he was welcome to view the Property from the exterior, but was not allowed entry inside the house. (MacDonald Aff. ¶¶2-3.) Specifically, she offered to open the gate to their yard and allow the Gardiner employee access to the entire exterior of the Property. (*Id.* at ¶4.) When the Gardiner employee asked to reschedule a time to inspect the interior of the house, Ms. MacDonald told him that they would reschedule a visit at any time to view the exterior of the house, but that at no time would he be allowed access to the interior of their home. (*Id.* at ¶5.) The Gardiner employee commented that he was writing them down as a refusal. He left without accepting Ms. MacDonald's offer to enter into the yard and view the exterior of the property, and without questioning her about the interior of the property. (*Id.* at

¶¶4, 6; Kamenick Aff. Ex. A, Gardiner00042; Gardiner Resp. to Request for Adm. #6 (Kamenick Aff. Ex. D); Gardiner Resp. to Interr. #5 (Kamenick Aff. Ex. D).)

On October 4, 2013, Gardiner sent the Plaintiffs a certified letter indicating that it had not "viewed the interior of your buildings" on the Property and asking the Plaintiffs to schedule a time for viewing. (Kamenick Aff. Ex. A, Gardiner 00015.) The letter noted that a failure to respond would be considered a refusal, and result in the loss of the Plaintiffs' ability to appear before the Board of Review. (*Id.*) On or about October 8, 2013, the Plaintiffs wrote a letter to the Town Board explaining their objection to allowing "an unknown stranger entry into [their] private and secure residence" and objecting to the Town's policy requiring interior viewing. (Kamenick Aff. Ex A, Gardiner00008-00009;[3] Milewski Aff. ¶7, Ex. B.) Gardiner did not schedule another viewing (Compl. ¶20; Gardiner Ans. ¶20; Milewski Aff. ¶8; MacDonald Aff. ¶7), and ultimately valued[4] the Property at $307,100, a 12.12% increase from the previous year's assessment of $273,900 and a 10.56% increase from the previous year's fair market value of $277,761, (Kamenick Aff. Ex. A, Gardiner00048-00049, 00060). At no time did Gardiner interview the Plaintiffs or otherwise seek information about the interior of the Property from the Plaintiffs other than by writing letters demanding entry. (Milewski Aff. ¶9; MacDonald Aff. ¶8; Gardiner Resp. to Interr. #6[5] (Kamenick Aff. Ex. D).)

The Plaintiffs had objected to interior inspections well before the 2013 revaluation. During October and November 2012, Mr. Milewski (a member of the Town Plan Commission)

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[3] A handwritten note on this copy of the documents indicate that the Town of Dover provided Gardiner with a copy of this letter.

[4] Throughout, this brief uses "value" or "valuation" to refer to the property value assigned by the assessor, and "assessment" or "assessed at" to refer to the property value formally adopted by the Town.

[5] Interrogatory #6 to Gardiner asked "Describe any and all attempts by you to obtain information about the Property for purposes of assessing the Property in 2013." Gardiner's response pointed to written correspondence produced in response to document requests. Communications between Gardiner and the Plaintiffs relating to the assessment of the Property were produced in response to document requests #3 and #8 and were labeled Gardiner00014-00037. None of those documents, other than the October 4, 2013 letter and August 14, 2013 notice referenced above and a July 11, 2014 letter demanding entry, contain any attempt to obtain information about the Property.

had several conversations with Town officials, including Town attorney Peter Ludwig, challenging whether interior inspections were necessary or appropriate and requesting that the Town have Gardiner do only exterior inspections. (Milewski Aff. ¶¶4-6, Ex. A.) Ludwig confirmed Mr. Milewski's understanding that interior inspections were not required by statute, but told him the Town Board decided against making that change because they had already signed the contract with Gardiner calling for interior inspections. (Milewski Aff. Ex. A.)

Gardiner has a history of retaliating against the Plaintiffs for refusing to permit interior inspections of their Property. In 2004, when Gardiner was doing a similar revaluation (Town & BOR Resp. to Request for Adm. #6 (Kamenick Aff. Ex. B)), the Plaintiffs initially refused to permit interior inspection. Gardiner then increased the valuation of their Property by approximately 28%. (Milewski Aff. ¶10.) Gardiner told the Plaintiffs that its dramatically increased valuation was based in part on the assumption that the Plaintiffs had finished their basement, when Gardiner had no evidence the Plaintiffs had in fact done so and in fact they had not. (*Id.* at ¶11.) Mr. Milewski went to the open book session to discuss the valuation, but was told they would not even speak to him and he would be unable to challenge the valuation until they permitted an interior inspection of their house. (*Id.* at ¶12.) The Plaintiffs eventually acquiesced to Gardiner's demand for an interior inspection, and their valuation was lowered. (*Id.* at ¶13.)

Suspecting that in 2013 Gardiner had again retaliated against them for refusing to permit an interior inspection, Mr. Milewski researched the changes in valuations for the other homes in the Lorimar Estates subdivision. (*Id.* at ¶14.) He went to the Town's open book session and obtained the changed valuations for the Lorimar parcels, comparing those valuations to the previous years' based on information from Racine County's GIS online site. (*Id.* at ¶¶15.) Of 43

parcels in the subdivision, only four (including the Plaintiffs' Property) had not been subject to an internal inspection by Gardiner, either because the owners' refused interior viewing or other circumstances stood in the way. (*Id.* at ¶¶16-18, Exs. C, D; Gardiner Resp. to Interr. #21 (Kamenick Aff. Ex. D); Kamenick Aff. Ex. A, Gardiner000068-000069.) Gardiner's "fair market" evaluation of those four parcels all had increased, at an average rate of 10.01%; the "fair market" values of the 39 remaining parcels in the subdivision had all decreased, at an average rate of 5.81%. (*Id.* at ¶16, Ex. C.)

Two of the four parcels whose interiors had not been inspected were later inspected by Gardiner, which then lowered their valuations consistent with other parcels in the subdivision. (Gardiner Resp. to Interr. #21-22 (Kamenick Aff. Ex. D); Kamenick Aff. Ex. A, Gardiner000068-000069.) One parcel, located at 24219 Lotus, decreased from $257,700 to $200,400, or 22.24%. (*Compare* Milewski Aff. Ex. C *with* Kamenick Aff. Ex. C, P002/007.) The other, located at 1248 Larkspur, decreased from $270,300 to $235,600, or 12.84%. (*Compare* Milewski Aff. Ex. C *with* Kamenick Aff. Ex C., P005/007.)

On or about November 14, 2013, the Plaintiffs filed an Objection Form for Real Property Assessment with the Town. (Milewski Aff. ¶19, Ex. E; Kamenick Aff. Ex. A, Gardiner00023.) They objected on the basis that Gardiner had raised the valuation of their Property and every other property that Gardiner did not internally inspect while lowering the valuation of every other property in their subdivision. (*Id.*) On November 25, 2013, Mr. Milewski appeared at the Board of Review ("BOR") hearing, attempting to object to his assessment. (Milewski Aff. ¶20.) The BOR, after substantial discussion, voted unanimously to refuse him the right to appear and contest his assessment, concluding that, under Wis. Stat. § 70.47(7)(aa), he had "refused a reasonable request by certified mail of the assessor to view [his] property." (*Id.* at ¶22.) At the

BOR hearing, Mr. Milewski argued that § 70.47(7)(aa) did not bar him from challenging his assessment because (1) the request to view the interior of the Property was per se unreasonable; and (2) he had not refused the assessor the ability to view the Property from the exterior, and the statute does not require an interior view. (*Id.* at ¶21.) The BOR rejected that argument, and refused to allow him to appear and contest his assessment. (*Id.* at ¶22; *see generally* Compl. ¶¶31-35; Defs' Anss. ¶¶31-33; Town & BOR Ans. ¶¶34-35; Kamenick Aff. Ex. A, Gardiner 00023 (handwritten note – "11/25/13 No hearing not sworn in").) An internal Town memorandum indicates this was done on the advice of the Department of Revenue. (Kamenick Ex. A, Gardiner 00059.)

The Plaintiffs paid the taxes due on the Property on December by January 30, 2014. (Milewski Aff. ¶23; Kamenick Aff. Ex. C, P003/010; Compl. ¶36; Town & BOR Ans. ¶36.) On January 30, 2014, the Plaintiffs served on the Town Clerk a Notice of Claim and Claim under Wis. Stat. § 74.37 against the Town, alleging that their assessment was excessive and violated their Fourth Amendment rights. (Milewski Aff. ¶24, Ex. F; Compl. ¶37; Town & BOR Ans. ¶37.) The Town of Dover did not deny or allow the Claim within 90 days after the Claim was filed. (Compl. ¶38; Town & BOR Ans. ¶38.) This case is ripe for decision.

ARGUMENT

I. The Standard for Summary Judgment.

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08. Moreover, at the summary judgment stage the defendants may not stand on their pleadings but must set forth admissible evidence that places some

material fact in dispute. *See* Wis. Stat. § 802.08(3) ("When a motion for summary judgment is made . . . , an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits [or other admissible evidence], must set forth specific facts showing that there is a genuine issue for trial.").

II. Statutory Framework

A town's assessor must assess all property every year. Wis. Stat. § 70.10. Generally speaking, the assessor must do a more thorough assessment every five years to assess all property to its full, fair market value. *See* §§ 70.05(5)(a)2., (b), 70.57(1). Under § 70.32(1), "[r]eal property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefore at private sale."

While performing assessments, assessors are limited in their ability to enter onto private property. An assessor may not enter onto real property more than once per year without the owner's consent, and a property owner may refuse entry altogether by giving prior notice to the assessor. § 70.05(4m). Although assessors are exempted from statutory liability for trespass, that exemption does not extend to entering *buildings*. § 943.13(4m)(d). Nor does it extend to entering any part of the property if the owner has given notice refusing entry. § 943.13(4m)(d)5. Thus, if an assessor enters a building without the express consent of an owner, or enters any portion of the property after having received notice not to enter, that assessor is guilty of trespass.[6] If a property's assessment is changed, the property owner must be notified. § 70.365. The notice must contain the amount of the new assessment, the time, date, and location of the

[6] The assessor could be guilty of a Class A misdemeanor (if a dwelling is entered, § 943.16), or a Class B forfeiture (in any other circumstance, § 943.15(1m)).

local BOR meeting, and a description of the procedure for objecting. *Id.* The owner has the ability to meet with the assessor or attend an "open book" session to challenge his or her assessment. § 70.45. Failing that, property owners then may formally object to their assessment before the BOR. § 70.47(7). However, "[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." § 70.47(7)(aa).

Once the board of review process has been completed, a property owner has three options for continuing to challenge their assessment: (1) an appeal to the Department of Revenue, § 70.85 (whose decision can be reviewed under certiorari by a circuit court); (2) certiorari review of the board of review decision to a circuit court, § 70.47(13); or (3) *de novo* claim on excessive assessment to a circuit court, § 74.37. *See Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, ¶¶8-10 & n. 8, 332 Wis. 2d 85, 796 N.W.2d 717. To proceed under any of those three options, the property owner must have complied with all of the BOR requirements. § 70.85(2) ("A complaint under this section may be filed only if the taxpayer has contested the assessment of the property for that year under s. 70.47."); § 70.47(13) ("Except as provided in this subsection and in ss. 70.85 and 74.37, appeal from the determination of the board of review shall be by an action for certiorari . . . ."); § 74.37(4)(a) ("No 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.").

As noted above, the Plaintiffs attempted to comply with the provisions of § 70.47 by appearing before and contesting their assessment at the BOR meeting. The BOR did not permit them to do so. All of the remaining requirements of § 74.37 have been satisfied. The disputed

tax has been timely paid. § 74.37(4)(b). Payment was made "on or before January 31." § 74.11(2)(a). And on or before January 31, the plaintiffs filed a claim for excessive assessment with the taxation district (in this case, the Town). § 74.37(2). The Town took no action, thus disallowing their claim 90 days later. The Plaintiffs then commenced this action within 90 days of that disallowance.

III. Wis. Stat. §§ 70.47(7)(aa) and 74.37(4)(a) Are Unconstitutional as Applied to the Plaintiffs

The Town's BOR prohibited the Plaintiffs from challenging their assessment at the BOR meeting because they refused to consent to a government search of the interior of their home under Wis. Stat. § 70.47(7)(aa). The Town and its BOR assert that this also prevents the Plaintiffs from filing a claim in circuit court challenging the excessive assessment of their Property under § 74.37(4)(a). (*See* Def. Town of Dover and Board of Review for the Town of Dover's Brief in Support of Motion for Judgment on the Pleadings and/or for Summary Judgment at 5 ("Because the plaintiffs did not comply with the procedures necessary for contesting the assessment, Wis. Stat. § 74.37(4)(a) prohibits the plaintiffs from maintaining this suit.")).

If § 70.47(7)(aa) is read that way and § 74.37(4)(a) prohibits the Plaintiffs from filing this suit, both of those statutes are unconstitutional as applied to the Plaintiffs for two reasons. First, because they punish the Plaintiffs for exercising their Fourth Amendment right to be free from unreasonable searches. Second, because they deprive the Plaintiffs of property without due process of law.

A. The Statutes Are Unconstitutional as Applied to the Plaintiffs Because they Punish the Plaintiffs for Exercising their Fourth Amendment Rights

The Fourth Amendment to the United States Constitution states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The rights protected by the Fourth Amendment have been incorporated against the states via the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Furthermore, Article I, Section 11 of the Wisconsin Constitution reads identically, save one punctuation change, and Wisconsin courts ordinarily "construe[] the protections of these provisions coextensively." *State v. Artic*, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430.

The United States Supreme Court has made clear that "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 587 (1980). "[T]he Fourth Amendment," the Court has held, "has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. Homeowners therefore have a constitutional right to refuse to consent to a government search of their property, and once refused, the government cannot enter without obtaining a warrant unless faced with an emergency situation. *See Donovan v. Dewey*, 452 U.S. 594, 598, n. 6 (1981) ("Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant."); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (finding that even bringing a dog onto a porch to sniff is a "search," stating "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred.") (citation omitted).

The right to be free of warrantless searches of one's home is not limited to those accused of committing a crime. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530-31 (1967) (it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"). Administrative searches, no less than searches for evidence of a crime, "are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.* at 534.

In *Camara*, municipal inspectors demanded entry without a warrant into a private home in order to inspect the premises for possible violations of San Francisco's building code. *Id.* at 525-26. The renter who resided in the home refused to permit entry, and he was charged with a misdemeanor for violating a city ordinance authorizing city employees "to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." *Id.* at 526. The court found the ordinance unconstitutional because no government interest justified the warrantless, non-emergency search. *Id.* at 534. "[W]e therefore conclude that [the renter] had a constitutional right to insist that the inspectors obtain a warrant to search and that [he] may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540. Even though the Court concluded that the inspection of all homes in an area without probable cause to believe a violation existed was a "reasonable" way to ensure compliance with building codes, they still could not be done without a warrant. *Id.* at 533-38.

Camara's holding demonstrates why the Town's policy of insisting on warrantless searches of private property is unconstitutional. *Id.* If a warrant is required before looking for health and safety violations that can be detected in no other way, then it must certainly be

required before looking for interior improvements that can be detected in much less intrusive ways such as by a review of building permits or an interview with homeowners.

That the Plaintiffs are being penalized at a lesser degree than criminal prosecution for insisting on their constitutional freedom does not matter. "'It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . Constitutional rights would be of little value if they could be . . . indirectly denied.'" *Dunn v. Blumstein*, 405 U.S. 330, 341, (1972) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540, (1965)). *Dunn* held that a year's residency requirement to vote was an unconstitutional punishment levied both on the right to vote and the right to travel. *Id.* at 340-41, 60. *Harman* held that individuals may not be punished by having to complete and file a burdensome certificate for exercising their right to vote without paying a poll tax. 380 U.S. at 542-44. Conditioning a benefit, or imposing a penalty, for the exercise of constitutional rights constitutes and "unconstitutional condition" and runs afoul of a large body of precedent. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not condition privilege of unemployment compensation on relinquishment of First Amendment right to refuse to work on the Sabbath); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) (Congress may not condition privilege of cheaper postage on relinquishment of First Amendment right of free speech); *Lawson v. Housing Auth. of City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955) (city may not condition privilege of subsidized housing on relinquishment of First Amendment right of association with "subversive" organizations).

Other courts have struck down penalties on the exercise of the Fourth Amendment right to refuse to consent to warrantless searches of a home. In *Black v. Village of Park Forest*, the District Court for the Northern District of Illinois struck down a $60 fee imposed on people who

refused to consent to an administrative search of their home. The $60 fee was intended to defray the government's cost of obtaining a search warrant for the premises. In other words, citizens who exercised their right of privacy were required to pay the government's costs for getting leave from the court to invade it. Not surprisingly, the fee was struck down by the court. 20 F. Supp. 2d 1218, 1230-31 (N.D. Ill. 1998). The court reasoned:

> [The cases cited by the individuals] support the general principle that the government may not penalize individuals for exercising their constitutional rights. The $60 fee is not a routine inspection fee, which would of course be constitutional. Rather the fee is charged only if the tenant or landlord exercises his or her Fourth Amendment right to require the Village to obtain a search warrant. The Village asserts that the fee bears a reasonable relationship to the cost of obtaining a warrant and that plaintiffs have not demonstrated that the fee has in fact chilled the plaintiffs or anyone else from exercising their Fourth Amendment rights. However, the plaintiffs need not establish that the fee is unreasonable or that it has already chilled the exercise of Fourth Amendment rights. Rather the mere threat that the fee may deter the exercise of Fourth Amendment rights is sufficient.

Id. at 1230.

Applying *Camara*, at least one court has held that a property owner could not be prohibited from challenging her assessment despite refusing the assessor access to the interior of her home. *See Schlesinger v. Town of Ramapo*, 807 N.Y.S.2d 865, 11 Misc. 3d 697 (S. Ct. Rockland Co., NY 2006). In *Schlesinger*, the government sought a court order commanding the property owner to permit an interior inspection in order to perform a complete market appraisal. 11 Misc. 3d at 698. The court noted that the Fourth Amendment prohibited it from compelling the inspection, and reasoned that the appraiser had many other tools at its disposal in order to obtain information about the property's interior. *Id.* at 700-01.

Section 70.47(7)(aa) states that "[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." If interpreted as it has been by the Town, this Section punishes citizens who exercise their constitutional right to refuse to consent to a government search of their home. It punishes them initially by eliminating their first, simplest, and cheapest method of challenging their property tax assessment. They cannot present the BOR with any evidence of recent sales or the assessments of comparable properties. No matter how arbitrary, capricious, erroneous, or even intentionally punitive and discriminatory the assessment might be, a property owner cannot challenge the assessment before the BOR.

And this punishment extends beyond the denial of access to an administrative proceeding before the BOR. If property owners like the Plaintiffs are not permitted to appear before the BOR, they lose the right to challenge their assessment in any other way. Wis. Stat. § 74.37(4)(a) prohibits such a property owner from bringing a *de novo* action for excessive assessment. Wis. Stat. § 70.85(2) prohibits such a property owner from bringing a complaint to the Department of Revenue. Certiorari review under § 70.47(13) requires there to be a decision of the board of review for the court to review. All of these avenues of relief are unavailable to property owners who exercise their Fourth Amendment right to deny the government entry into their home without a warrant. They cannot appear before the BOR and they have no day in court.

Like the renter in *Camara*, the Plaintiffs exercised their Fourth Amendment rights by refusing to permit Gardiner to search their home without a warrant. The BOR prohibited them from challenging their unlawful assessment under § 70.47(7)(aa). They therefore may be prohibited from challenging their unlawful assessment before the Department of Revenue or a court. If that is their effect, Sections 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied to the Plaintiffs because those sections punish them for exercising their Fourth Amendment right

to refuse to consent to a search of their home. The Plaintiffs should be permitted to bring their § 74.37 claim for excessive assessment.

B. The Statutes Are Also Unconstitutional as Applied to the Plaintiffs Because they Deprive the Plaintiffs of the Due Process of Law

The United States Constitution mandates that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. The Wisconsin Supreme Court interpreted this clause as a protection of due process and has held that "[w]hile the language used in the two constitutions [Wisconsin's and the United States'] is not identical . . . the two provide identical procedural due process protections." *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

Meaningful access to the courts is a fundamental right. *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). In *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 473-74, 565 N.W.2d 521, 530 (1997), the Wisconsin Supreme Court described the right of access to the courts as follows:

> It entitles the individual to a fair opportunity to present his or her claim. Bell v. City of Milwaukee, 746 F.2d 1205, 1261 ([7th Cir.] 1984) (citing Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). Such a right exists where the claim has a "reasonable basis in fact or law." Bell, 746 F.2d at 1261 (citing Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)). Judicial access must be "adequate, effective, and meaningful." Bounds v. Smith, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495, 52 L. Ed. 2d 72 (1977).

It would be unconstitutional to deprive taxpayers of the opportunity to challenge their assessments. The Town's excessive taxation of the Plaintiffs' Property has deprived them of their property (the additional tax payment) without due process of law. Due process requires that

they have a "fair opportunity" to receive "adequate, effective, and meaningful" access to the courts to argue their claim that the assessment of their Property was improper.

Section 70.47(7)(aa), combined with § 74.37(4)(a) and the other statutes requiring completion of the board of review process before the claim may be brought to court, deprive the Plaintiffs of that fair opportunity. Section 70.47(7)(aa) is not at all similar to procedural requirements, such as statutes of limitations and notices of claim, that a State may constitutionally impose on litigants as a condition to court access.[7] Section 70.47(7)(aa), as applied by the Defendants, subjects the Plaintiffs to a deprivation – an increased assessment resulting in higher taxes – without *any* opportunity to challenge it.

That the Plaintiffs could have kept their due process rights if they had submitted to a warrantless search of their home does not remedy the problem. Section 70.47(7)(aa), as applied by the Defendants, requires property owners to give up their Fourth Amendment rights in order to assert their Fourteenth. It is like a law that would require criminal defendants to waive all challenges to the admissibility of evidence in order to secure a trial. Such a "Sophie's choice" between fundamental rights is impermissible. *See Dunn*, 405 U.S. at 341-42 (government may not force individuals to choose between the "unconditional personal right" to travel and the right to vote).

Sections 70.47(7)(aa) and § 74.37(4)(a) violate the Plaintiffs' right to due process of law. In fact, they leave them with no process at all. Plaintiffs should be permitted to make their § 74.37 claim for excessive assessment.

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[7] *See, e.g., Terry v. Anderson*, 95 U.S. 628 (1877) (government may establish statute of limitations on claim even where none existed before); *C. Coakley Relocations Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶22, 310 Wis. 2d 456, 750 N.W.2d 900 ("While a plaintiff's right to access the court system is important, we must respect 'a governmental entity's fundamental right to invoke a statute of limitations, as well as its legislatively mandated right to have a claim presented to it before it is forced into costly and expensive litigation.'") (quoting *Colby v. Columbia County*, 202 Wis. 2d 342, 349-50, 550 N.W.2d 124 (1996)).

IV. The Town's and BOR's Policies Deprived the Plaintiffs of their Constitutional Rights in Violation of 42 USC § 1983

Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." A municipality can be a "person" for purposes of § 1983 and will be liable if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated." *Monell v. Dep't of Soc. Services of City of New York*, 536 U.S. 658, 690 (1978). A municipality can also be liable "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Id.* at 691.

The Town has a policy or custom of requiring assessors to view the interiors of the properties they assess, a policy not required by state statute. The Town required Gardiner, by contracts signed by the Town Chairman and the Town Clerk, to perform interior inspections of properties during its assessments. When questioned whether to abandon that policy of requiring interior inspections by Mr. Milewski, the Town Board decided to continue it.

Enforcement of that policy deprived the Plaintiffs of their constitutional rights to be free from unreasonable search and seizure and due process of law. If the Town had not insisted on interior inspections without a warrant, the Plaintiffs would not have had to refuse such an inspection, and they would have been permitted to challenge their assessment at the BOR

meeting and later in court. Instead, they were punished for exercising their Fourth Amendment rights and deprived of the right to challenge their assessment in court.

The BOR has a policy or custom of not permitting property owners who refuse interior inspections (even if they permit exterior inspections) to challenge their assessments. This is evidenced by the BOR's decisions, in 2013 and in 2004 (the last time a town-wide assessment was performed) to refuse to permit the Plaintiffs to challenge their assessment for those reasons.

Enforcement of that policy deprived the Plaintiffs of their constitutional rights to be free from unreasonable search and seizure and due process of law. Absent that policy, the Plaintiffs would have been permitted to challenge their assessment at the BOR meeting and later in court. Instead, they were punished for exercising their Fourth Amendment rights and deprived of the right to challenge their assessment in court.

Therefore, the Town and the BOR have deprived the Plaintiffs of their constitutional rights in violation of 42 USC § 1983. The Plaintiffs have suffered damages as a result, including the excess taxes collected by the Town for 2013 and 2014, which they intend to prove up at a later date.

V. The BOR Violated the Plaintiffs' Statutory Rights by Failing to Permit them to Appear at the Board of Review Hearing

However, the Plaintiffs do not agree with the Town and its BOR's reading of Wis. Stat. §§ 70.47(7)(aa). The Plaintiffs therefore first ask this Court to determine whether the BOR properly refused to allow the Plaintiffs to challenge their tax assessment. If the Court determines the refusal was improper, the Court may consider and resolve their § 74.37 claim for excessive assessment without having to decide whether §§ 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied to the Plaintiffs.

Section 70.47(7)(aa) prohibits property owners from appearing or testifying at a BOR meeting or objecting to their assessment if they refused a "reasonable written request by certified mail of the assessor to view such property." Importantly, the statute does not refer to a request to "enter" the property, but to "view" it. The legislature knew how to use "enter" with regard to the assessment of property, *see* §§ 70.05(4m) and 943.13(4m)(d), so it should be presumed to have intended a different meaning when it used "view" in § 70.47(7)(aa). *See Pawlowski v. American Family Mut. Ins. Co.*, 2009 WI 105, ¶22, 322 Wis. 2d 21, 777 N.W.2d 67 ("When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings.").

The BOR misinterpreted § 70.47(7)(aa) when it refused to permit Mr. Milewski to appear and challenge his assessment, for two reasons. First, because the Plaintiffs *did* permit Gardiner to "view" the property. Second, because if the request to "view" a property includes a demand for an interior inspection, it is not a "reasonable" request.

A. The Plaintiffs Permitted Gardiner to View their Property

The Plaintiffs permitted Gardiner to view their Property. When Bruce Gardiner arrived at the Property, Ms. MacDonald told him that he was welcome to view the Property from the exterior, and invited him into the yard to look at all sides of the house. Gardiner refused that invitation.

Section 70.47(7)(aa) does not state that the assessor must view "all" of the property, or even the "interior" of the property. The assessor certainly may ask to view such things, but the law does not state that the refusal to permit such an interior inspection results in the loss of the right to challenge an assessment at the board of review. The BOR had no right to punish the Plaintiffs for refusing to consent to an inspection that goes beyond the scope of § 70.47(7)(aa).

To do so would permit assessors to make extreme and unnecessary demands for information under threat of losing appeal rights.

B. The Request to View the Interior of the Property Was Not Reasonable

As noted above, the statute prohibits challenges only if a *reasonable* request is refused. Wisconsin statutes, reflecting the constitutional right of the people to be secure in their houses against unreasonable searches, provide strong protections for the privacy of landowners against the government. The request of a stranger to intrude into a person's private home on behalf of the government is not reasonable, particularly where that person has already refused consent to such a search.

The statutes give property owners the express right to not only refuse to permit an assessor to enter any building on their property, but also to refuse to permit an assessor to enter on their land at all. §§ 70.05(4m), 943.13(4m)(d). It is not reasonable for the government to demand that property owners give up that right or be penalized. Even if a property owner has not prohibited entry, an assessor is not permitted to enter a building, § 943.13(4m)(d), or even "open doors . . . or look into windows of structures on the land," § 943.13(4m)(d)4. Assessors who violate these restrictions are subject to forfeitures and even criminal penalties. §§ 943.13(1m), 943.14. As discussed more fully in the next Part, property owners have constitutional rights to refuse consent to a government search of their property as well.

The certified letter Gardiner sent to the Plaintiffs came *after* the Plaintiffs had already exercised their right to give Gardiner notice that they refused to let the assessors enter their home. On August 20, 2013, Ms. MacDonald told Bruce Gardiner that he and his assessors would not be permitted to enter their home. Gardiner's October 4, 2013 letter demanding they

give Gardiner access to the interior of their home or lose the right to challenge their assessment was not reasonable.

The Defendants may argue that the Wisconsin Property Assessment Manual ("WPAM") calls for assessors to inspect the interiors of homes, and that because the statutes state that assessment shall be done in the manner set forth in the WPAM, § 70.32(1), a request to view the interior of a home is *per se* reasonable. This argument ignores both the statutory limitations on assessors' ability to enter private residences and more importantly the constitutional rights of the owners of those homes. As explained above, a threat to revoke owners' appeal rights if they do not submit to an interior inspection is unconstitutional and therefore *per se unreasonable*. Section 70.32(1) does not and cannot grant the Department of Revenue license to create unconstitutional procedures.

Therefore, the BOR wrongfully refused to let the Plaintiffs challenge their assessment. The Plaintiffs did not refuse a reasonable request to view their Property. To remedy this statutory violation, this Court should permit the Plaintiffs to challenge their assessment as excessive under § 74.37.

CONCLUSION

The undisputed facts present an obvious pattern. Deny the Town assessor entry into your home without a warrant and be punished by a higher assessment. Give up your Fourth Amendment rights and have your assessment lowered. Deny the Town assessor entry into your home without a warrant, lose your right to challenge your assessment. Give up your Fourth Amendment rights in order to assert your Fourteenth.

The Plaintiffs respectfully request that this court enter summary judgment in their favor. The Plaintiffs request that the summary judgment permit them to proceed to proving the proper

assessment for their Property under § 74.37, either by declaring that the BOR wrongfully prohibited them from challenging their assessment under § 70.47(7)(aa), or by declaring that §§ 70.47(7)(aa) and § 74.37(4)(a) are unconstitutional as applied to them. The Plaintiffs also request that the summary judgment declare that the Town and the BOR deprived them of the constitutional rights in violation of 42 USC § 1983 and permit them to prove damages thereunder.

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