STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

Vincent Milewski, *et al.*,

Plaintiffs,

v.

Town of Dover, *et al.*,

Defendants.

Case No. 14-CV-1482

PLAINTIFFS' BRIEF IN OPPOSITION TO TOWN OF DOVER'S AND BOARD OF REVIEW FOR THE TOWN OF DOVER'S MOTIONFOR JUDGMENT ON THE PLEADINGS AND/OR FOR SUMMARY JUDGMENT

INTRODUCTION

The brief of the Town of Dover and the Board of Review for the Town of Dover (collectively the "Town") addresses one, and only one, of the issues presented in this case – may a citizen be punished if the citizen does not consent to a warrantless entry into the citizen's home by a Town Assessor? The Town says "yes," the Plaintiffs say "no." The Plaintiffs urge this Court to conclude that the Fourth Amendment prevents the Town from punishing a citizen under these circumstances.

In support of its motion, the Town argues that under the Wisconsin Statutes a citizen may lawfully be punished (by losing their appeal rights) if they refuse to consent to a warrantless search by an Assessor. Because the Plaintiffs would not consent to such a search, the Town asks for summary judgment dismissing all of the Plaintiffs' claims. The Court should deny the Town's motion for three reasons. First, because it seeks to have all of the Plaintiffs' claims dismissed while making arguments against only one of the Plaintiffs' five claims. Second, because the issue of whether the Plaintiffs' § 74.37 claim for excessive assessment should be dismissed for failure to comply with § 70.47(7)(aa) and § 74.37(4)(a) is not ripe for decision

until this Court rules whether those two sections may constitutionally be applied to the Plaintiffs. And third, because a demand to permit government inspectors to enter your house without consent upon penalty of losing your appeal rights is not a "reasonable request."

STANDARD OF REVIEW

Nowhere in their brief does the Town set forth the applicable standard for a judgment on the pleadings or for summary judgment, but they ask this Court to grant one of those remedies anyway. As the Town submitted no affidavits or other evidence in support of their motion, and the Plaintiffs are not doing so in opposition to it, the motion should be considered one for judgment on the pleadings. Wis. Stat. § 802.06(3).

In considering such a motion, the Court must accept the allegations of the Complaint, and all reasonable inferences from those allegations, as true. *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205 (citing *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 24, 288 N.W.2d 95 (1980)). Furthermore, pleadings are to be liberally construed. *Id.* The complaint need not state all the ultimate facts constituting the cause of action, but rather the complaint should be dismissed as legally insufficient only if there are *no conditions* under which the plaintiff can recover. *Id.*

BACKGROUND

The Plaintiffs have no objection to the factual statements contained within the "Background" section of the Town's Brief. For a fuller recitation of the facts pertinent to this case, please see pages 2-7 of the Plaintiffs' Brief in Support of Motion for Partial Summary Judgment. In brief, the Town performed a revaluation of all real property within its boundaries for the 2013 tax year, paying its appointed assessor, Gardiner Appraisal Service, LLC, to do the work. (Complaint, ¶¶13-14.) The Plaintiffs refused to permit an employee of Gardiner to enter

into their home, and Gardiner assessed their Property at $307,100, which the Plaintiffs believe is excessive. (Complaint, ¶¶16, 20.) Plaintiff Milewski attempted to challenge the assessment at the Town's Board of Review ("BOR") hearing, but the BOR refused to permit him to appear, citing Wis. Stat. § 70.47(7)(aa), which 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." (Complaint, ¶¶32-33.) Plaintiffs timely paid the disputed tax and timely filed a claim with the Town, which was disallowed through inaction. (Complaint, ¶¶36-38.) Plaintiffs then filed this action.

ARGUMENT

I. The Town Asks to Dismiss the Entire Case But Makes No Arguments in Support of Dismissing Four of the Plaintiffs' Five Claims

The Plaintiffs raised five claims in their Complaint: (1) a declaratory judgment claim challenging the constitutionality of § 70.47(7)(aa) as applied to them; (2) a § 1983 claim for the deprivation of their constitutional rights against *all* the Defendants; (3) a declaratory judgment claim challenging the uniformity of their property tax assessment; (4) a § 74.37 action against the Town of Dover for an excessive assessment; and (5) a § 70.501 action for fraudulent valuation by an assessor against Defendant Gardiner Appraisal Service, LLC.

The Town's Motion seeks to have the entire suit dismissed. They state in their brief, "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*. The Town and the Board are entitled to judgment, *and the plaintiffs' Complaint should be dismissed.*" (Town Br. at 5 (emphasis added).)

But the Town's Brief is devoted entirely to just one of the Plaintiffs' claims, arguing only that their § 74.37 claim against the Town should be dismissed. Nowhere does the Town explain why the Plaintiffs' claims against Gardiner should be dismissed (or why the Town is in the proper position to even make that argument). Nor does it explain why the constitutional challenges to the statute and the assessment should be dismissed, or why the § 1983 claim against the Town should be dismissed.

Arguments raised but not briefed or argued are deemed abandoned, and arguments unsupported by references to legal authority will not be considered. *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990). Therefore, this Court should consider the Town's Motion as a Motion to dismiss only the Complaint's Fourth Claim – the § 74.37 action for an excessive assessment against the Town of Dover.

II. Plaintiffs' Have Challenged the Constitutionality of Statutes the Town Relies On in its Argument

The Town argues that the Plaintiffs' § 74.37 action should be dismissed because they refused to permit Gardiner to enter the interior of their home, which required the Board of Review to reject their challenge under § 70.47(7)(aa). That rejection, the Town argues, prohibits the plaintiffs from bringing their § 74.37 action, because § 74.37(4)(a) requires plaintiffs to first comply with the "procedures for objecting to assessments under s. 70.47." (*See* Town Br. at 5.) Thus, the Town's argument relies on the application of § 70.47(7)(aa) and § 74.37(4)(a) to the facts of this case.

But the Plaintiffs have challenged the constitutionality of those statutes as applied to the facts of this case. The Plaintiffs argue that § 70.47(7)(aa) cannot be applied to bar them from challenging their assessment at the Board of Review and that § 74.37(4)(a) cannot be applied to bar them from challenging their assessment here in court, because acting together, they punish

the Plaintiffs for exercising their Fourth Amendment right to refuse to consent to a government search of their home and deprive them of their Fourteenth Amendment right to due process of law before being deprived of their property via taxation.

This Court cannot rule that § 70.47(7)(aa) and § 74.37(4)(a) bar the Plaintiffs from bringing this claim without first determining that § 74.37(4)(a) and § 70.47(7)(aa) can constitutionally be applied to them.

The Town did not address the constitutionality of these statutes in its brief. The Plaintiffs fully briefed the constitutional issue in the Plaintiffs' Brief in Support of Motion for Partial Judgment. (*See* Pl. Br. at 10-17.) Homeowners 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). 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.

Homeowners may not be punished for exercising this constitutional right. "'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. 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. 20 F. Supp. 2d 1218, 1230-31 (N.D. Ill. 1998).

Yet sections 70.47(7)(aa) and 74.37(4)(a) punish people like the Plaintiffs who exercise their constitutional right to refuse to consent to a government search. Those statutes (if read as the Town reads them) prevent such people from challenging their assessments at the Board of Review, and further from challenging their assessments in court. The Town views the Plaintiffs' exercise of their constitutional rights as a nuisance. This is clear from the first sentence in the Town's brief – "This would be a run-of-the-mill property tax assessment if the plaintiffs would have just let the Town of Dover's assessor, Gardiner Appraisal Service, LLC. ("Gardiner") do its job." From the Town's perspective, the Plaintiffs' decision to invoke their constitutional rights makes the Town's job a little harder. But so what? The Bill of Rights is designed to protect people from government, and necessarily make everything the government wants to do a little (or sometimes a lot) more difficult. That difficulty is not a license to ignore constitutional requirements.

That denial of access to the courts also deprives the Plaintiffs of their Fourteenth Amendment right to due process of law. The government has deprived the Plaintiffs of their property (the excessive taxes that they paid) and has stripped them of any right to redress that injury. They cannot be forced to give up their Fourth Amendment rights in order to assert their

Fourteenth. *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).

Neither § 70.47(7)(aa) nor § 74.37(4)(a) can be constitutionally applied to bar homeowners who assert their Fourth Amendment rights from challenging their property tax assessments. This is not a nuisance, it is a constitutional command. Therefore, this Court should deny the Town's Motion to dismiss the Plaintiffs' § 74.37 action for an excessive assessment.

III. The Plaintiffs Did Not Refuse a "Reasonable" Request to View the Interior of their Home

Sections 70.47(7)(aa) and § 74.37(4)(a) cannot be constitutionally applied to the Plaintiffs. But even if they could, they do not apply in these circumstances. 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" (emphasis added). The Plaintiffs did not refuse a *reasonable* request to *view* their property.

The BOR misinterpreted § 70.47(7)(aa) when it refused to permit Mr. Milewski to appear and challenge his assessment, for two reasons. First, 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."). Second, if the request to "view" a property includes a demand for a warrantless 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 to do an appraisal, Ms. MacDonald told him 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, (1) the statutes prohibit challenges only if a *reasonable* request is refused, and (2) the statutes do not mandate an entry into the property. The Town's sole argument as to why the demand to enter the Plaintiffs' home under threat of significant penalty is "reasonable" is that the Wisconsin Property Assessment Manual (the "Assessment Manual") calls for assessors to inspect the interiors of homes. (Town Br. at 2-5.) But the Assessment Manual is not law. The Assessment Manual is a guide written by employees of the Department of Revenue. It is not even subject to the formal rulemaking process.

Moreover, the Assessment Manual's call for an interior inspection is contrary to the Wisconsin statute prohibiting trespass. Wisconsin's criminal trespass statute has an exception for assessors but only to enter upon the land of another, and not a building. Wis. Stat. §

943.13(4m)(d). An assessor is not permitted to enter a building, 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. These provisions are inconsistent with the Town's argument.

Under the Town's reading, the Wisconsin Statutes would both protect citizens from unreasonable searches of their homes by assessors under § 943.13(4m)(d) and punish citizens for refusing to consent to such searches under § 70.47(7)(aa). That makes no sense. The Plaintiffs' reading of the statutes, however, harmonizes both sections (and the Fourth Amendment). Assessors may come on a person's *land* to view the property and are not trespassing when they do so. § 943.13(4m)(d). If access to the *land* is prohibited by the homeowner, then the homeowner may not appeal the assessment. § 70.47(7)(aa). An assessor may only enter a building on that land with the permission of the owner. § 943.13(4m)(d)4.

The Assessment Manual is a thin reed upon which to support an alternative conclusion. A demand is not "reasonable" simply because a group of Department of Revenue employees say that it is. Suppose, for example, that the Assessment Manual says that citizens must report to the Town's police department to answer questions about their property for the Assessor? Or that the Assessor may take pictures of the interior of the property and that those pictures become public records? Would these then be lawful requirements which citizens must follow or be punished for not doing so? How far can the Assessment Manual go with respect to invading the privacy of citizens? How far can the Assessment Manual go in changing Wisconsin's statute on trespass?

These are questions that this Court must answer in deciding the Town's motion. This Court must independently determine whether a Town may demand an interior inspection of property (over the owner's objection) based solely on the Assessment Manual. In doing so, the

Court must take into consideration that: (1) § 70.47(7)(aa), itself, does not require an interior inspection; (2) Wisconsin's criminal trespass statute expressly applies to assessors and permits them only to enter upon land and not a building; and (3) punishing a citizen for exercising a constitutional right is a denial of that right. A "request" to give up your constitutional right to be free from unreasonable searches (or be punished for not doing so) is not a reasonable request.

CONCLUSION

The Plaintiffs did not refuse a reasonable request to view their home. As a result, the Town's Board of Review wrongfully prohibited the Plaintiffs from challenging their assessment and the Plaintiffs respectfully request that this Court deny the Town's Motion for Judgment on the Pleadings and/or Summary Judgment.

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