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## Property Assessment Post-Dover and 2017 Act 68

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2018 Municipal Attorneys Institute  
Wisconsin Dells | June 21, 2018  
Wisconsin Dept of Revenue

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### Presenters

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**Michelle Drea, JD**  
City Assessor  
Madison, Wisconsin

**Kelly Altschul**  
Attorney  
Office of General Counsel

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### Topics of Discussion

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- Milewski v. Town of Dover
- Special Inspection Warrants
- Expectations of Privacy
- Open Field and Curtilage
- Trespass
- 2017 Act 68
- Board of Review

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**Milewski v. Town of Dover**

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**Milewski v. Town of Dover**

- Wisconsin Supreme Court Decision (July 7, 2017)
- Property owners alleged excessive assessment and challenged procedure to appeal assessor's value
- Lead opinion held:
  1. Owners had due process right to contest assessor's valuation
  2. Assessor who enters a home for an interior view occupies private property to obtain information is conducting a 4th amendment search
  3. Statutory scheme governing practices for appealing assessor's valuation was unconstitutional as applied to property owners

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**Milewski v. Town of Dover (cont.)**

- Court held that assessors were government agents conducting searches subject to US Constitution's Fourth Amendment protections when collecting data by inspecting the interior of residences
- Relevance of Fourth Amendment to this discussion

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**Milewski v. Town of Dover (cont.)**

**Methodology of Valuation**  
 Impact to Assessors and Municipalities

- Follow 70.32, develop assessments at full value based upon actual view of the property or the best information available
- Interior and exterior view provides the most accurate information for developing assessments
- If written request for interior and/or exterior view is refused:
  - Assessor generally should not enter the property
  - Base the assessment on the best information available

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**Milewski v. Town of Dover (cont.)**

Impact to Assessors and Municipalities, cont.

- Following lists sources of information to consider with the best sources listed first:
  1. Request an interior view of the property
  2. Request an onsite view of the property's exterior
  3. View the property from a public area such as a road
  4. Request from property owner, e.g. construction contracts, leases, operating expenses, receipts, blueprints, video and/or photographs of the improvements, etc.
  5. Obtain other information, e.g. sales listing information and building permit

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**Milewski v. Town of Dover (cont.)**

Impact to Assessors and Municipalities, cont.

- If these sources do not allow development of a value, determine if compelling facts require an interior view
- Example: property has no known improvement inspection, there is no view of the property from a public area and the property owner has provided no information
- Assessor with Municipality may request special inspection warrant (66.0119)

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**Milewski v. Town of Dover (cont.)**

**Wis. Stat. § 66.0119**

- Statute provides basis for warrants to conduct "searches" based on inspection purposes including, but not limited to, building, housing, electrical, plumbing, heating, gas, fire, safety, environmental pollution, water quality, and property assessment
- Use only when necessary
- Court identified 3 requirements for special inspection warrant

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**Milewski v. Town of Dover (cont.)**

**Three Requirements**

1. Best information available leaves assessor with insufficient data to build constitutionally-sound valuation
2. Warrant will advise homeowner of lawful basis for inspection
3. Description of search's proper limits including identification of the assessor as one with the authority to search

- Obtaining special inspection warrant requires 2 items:
  1. affidavit detailing facts for warrant (3 requirements above)
  2. special inspection warrant itself

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**Milewski v. Town of Dover (cont.)**

**Impact to Assessors and Municipalities, cont.**

- Obtaining special inspection warrant:
  - The completed affidavit and warrant is brought to a local magistrate
  - Local magistrate will determine whether or not facts exist to support the issuance of the warrant
  - If so, the warrant will be signed by the magistrate
  - Assessor and peace officer or sheriff execute search with official paper work completed and filed by the peace officer or sheriff
- Special inspection warrants are discussed in the 2018 WPAM in Chapter 9 and an example provided in the Appendix (municipal attorneys indispensable in this process)

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**Milewski v. Town of Dover (cont.)**

US Constitution's Fourth Amendment

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized

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**Reasonable Expectation of Privacy**

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**Reasonable Expectation of Privacy (cont.)**

- Fourth Amendment protections have evolved primarily in the criminal law arena – that context and language may make it strange to consider that it applies to assessment work
- It is important to keep in mind that:
  - Government Official = Assessor
  - Search = Data Collection (through interior view)

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**Open Field and Curtilage**

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**Open Field and Curtilage**

**Curtilage**

- Curtilage concept originated at common law to extend to area immediately surrounding dwelling house the same protection under law of burglary as was afforded the house itself
- The curtilage is actually considered part of the home itself for Fourth Amendment purposes and is defined at common law as "the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life."

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**Open Field and Curtilage (cont.)**

**Curtilage – Four Factor Test**

- Is the area claimed to be curtilage so intimately tied to the home itself that it should be placed under the home's "umbrella" of protection?
- Four Factor Test:
  1. The proximity of the area to the home
  2. Whether the area is within an enclosure surrounding the home
  3. The nature and uses to which the area is put
  4. The steps taken by the resident to protect the area from observation of passersby

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**Open Field and Curtilage (cont.)**

Open Field

- The protections of the 4th Amendment do not attach to land beyond the curtilage of the home
- Such land includes public areas and what has been described as "open fields"
- An individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers

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**Open Field and Curtilage (cont.)**

Open Field

- Open fields are not "effects" within the meaning of the Fourth Amendment, the term "effects" being less inclusive than "property" and not encompassing open fields
- Constitutional protection does not extend to the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable

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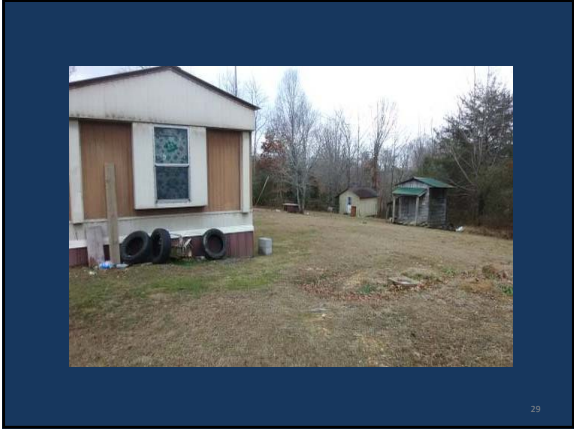
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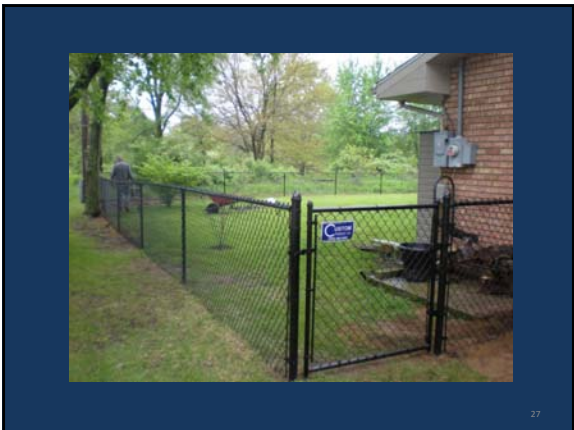
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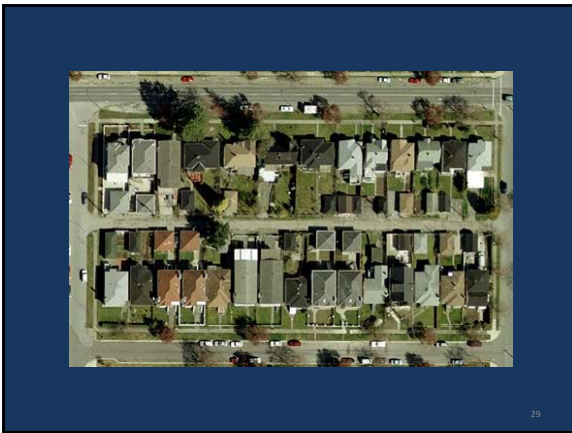
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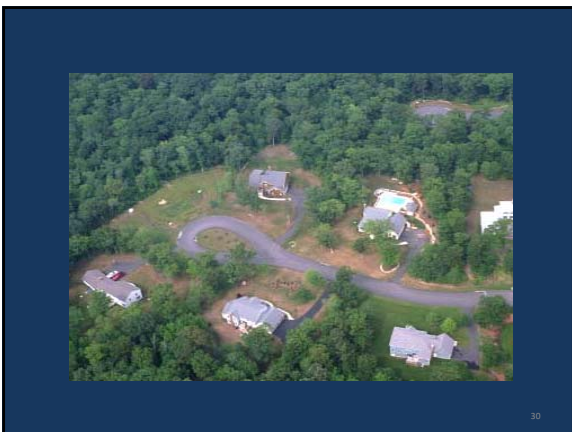
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**Open Field and Curtilage (cont.)**

- Curtilage is protected as if it is inside the home
- Four factor test to determine curtilage:
  1. Proximity of the area to the home
    - o Closer to the home the more likely to be curtilage (measuring the home)
  2. Whether the area is within an enclosure surrounding the home
    - o Is there a fence? If yes, it is most likely to be curtilage (fenced backyards)
  3. Nature and uses to which the area is put
    - o Is it a residence? Is it isolated? Do others visit the property (sanitation, postal)?
  4. Steps by resident to protect area from observation of passersby
    - o Evaluate facts on scene. Where is the mailbox? Is there a hedge? Is there a fence? Is there a gate? Where do the garbage cans get emptied?

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**Trespass**

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**Trespass**

- State law 943.13 (4m)(am) – restrictions do not apply to assessor entering land, other than building, agricultural land or pasture, or livestock area if all of the following apply:
  - o Enter in order to make an assessment for political subdivision
  - o Enter on weekday during daylight or time agreed upon with owner
  - o Spend no more than one hour on the land.
  - o Do not open doors, enter through open doors, or look into windows of structures
  - o Leave on principal building on the land, or on land if there is not a building, a notice informing owner that the assessor entered the land and give assessor contact information

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**Trespass (cont.)**

- State law 943.15 – exempts assessor from trespass on construction site if requirements are met:
  - Enters site to make an assessment on behalf of political subdivision
  - Enters site on weekday during daylight or time agreed upon by owner
  - Spends no more than one hour on site
  - Do not open doors, enter through open doors, or look into windows of structures
  - Leave on principal building at site, or on land if there is not building, a notice informing owner that the assessor entered the site and give assessor contact information
  - Has not received a notice from owner (oral or written) not to enter

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**Trespass (cont.)**

- Review state law requirements through US Constitution regarding curtilage and open fields that establish minimum protections not maximum
- State law cannot mandate less than Fourth Amendment protections

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**Trespass (cont.)**

- Fourth Amendment considerations when viewing property:
  - *Florida v. Jardines*, 569 U.S. 1 (2013):  
"This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window."
  - This places the statutory language in a particular light: "Look into windows of structures on the land" is targeting both the fact that the inside of the residence is off limits and that if you are close enough to do so---it is problematic as you would likely be in the curtilage

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**2017 Act 68**

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**2017 Act 68**

Impact to assessment practices:

- Property owner notice for request to view interior
- Income approach deadline
- BOR begins the fourth Monday in April
- Minimum 7 days between Open Book (2 hour) and BOR

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**2017 Act 68 (cont.)**

Property owner notice for request to view interior

- State law 70.05(4m)
- Assessor may not enter a person's real property for conducting an assessment more than once in each year except if the property owner consents
- A property owner may deny assessor entry to interior of the owner's residence if the owner has given prior notice to the assessor that the assessor may not enter the interior of the residence without the property owner's permission

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### 2017 Act 68 (cont.)

- State law 70.05(4m)
- Each assessor shall create and maintain a database identifying all such property owners in the taxation district
- A property owner's refusal to allow the assessor to enter the interior shall not preclude the property owner from appearing before the board of review
- Assessor may not increase the property's valuation based solely on the property owner's refusal to allow entry

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### 2017 Act 68 (cont.)

- State law 70.05(4n)
- If a taxation district assessor is requesting to view the interior of a residence, the assessor shall provide written notice to the property owner of the property owner's rights regarding the inspection of the interior of the owner's residence

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### 2017 Act 68 (cont.)

The notice shall be in substantially the following form:

**PROPERTY OWNER RIGHTS**

*You have the right to refuse entry into your residence pursuant to section 70.05 (4m) of the Wisconsin statutes. Entry to view your property is prohibited unless voluntarily authorized by you. Pursuant to section 70.05 (4m) of the Wisconsin statutes, you have the right to refuse a visual inspection of the interior of your residence and your refusal to allow an interior inspection of your residence will not be used as the sole reason for increasing your property tax assessment. Refusing entry to your residence also does not prohibit you from objecting to your assessment pursuant to section 70.47 (7) of the Wisconsin statutes. Please indicate your consent or refusal to allow an interior visual inspection of your residence.*

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**2017 Act 68 (cont.)**

**WPAM 5-10 recommended practice-initiating contact**

- When requesting view of a property for purposes of data collection, assessors must provide notice to property owner
  - DOR recommends a letter (Request to View Property Notice - PR 300) sent through regular mail, allowing 14 calendar days for a response
- In addition, during revaluation, contact may be supplemented with notice in local paper or notice with recent tax bill
  - This supplementary contact during revaluation also helps assessors avoid criminal trespass

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**2017 Act 68 (cont.)**

**WPAM 5-10 recommended practice-no consent/denial**

- If property owners remain who have not responded with an affirmative consent or denial, options are available:
  - Consider next best information (WPAM Chapter 9) to establish a supportable value
  - Use special inspection warrant (WPAM Appendix has template) to view if next best information is insufficient for a supportable value
  - Note the lack of response and opportunity to view the property at the board of review, if applicable
  - Right to enter a property may be exercised once per year if the statutory requirements in the section ("Avoiding Trespass") are met

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**2017 Act 68 (cont.)**

**Income Approach**

- State law 70.47(7)(af)
- If the income approach is used by the assessor or the objector – all income and expense information is due to the assessor seven days prior to the first meeting of the BOR

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### 2017 Act 68 (cont.)

#### BOR Dates

- State law 70.47(1) Time and place of meeting
- The board of review shall meet annually at any time during the 45-day period beginning on the 4th Monday of April, but no sooner than 7 days after the last day on which the assessment roll is open for examination under s. 70.45

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### 2017 Act 68 (cont.)

#### BOR Dates

- BOR meets annually during the 45-day period starting the 4th Monday in April
  - In 2018, initial BOR meeting must be held between April 23 – June 6
- 7 day interim between Open Book (two hour period wherein assessor is available with the roll) and initial BOR
  - If the assessor elects not to sign the affidavit, changes may be made to the roll during the interim

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### 2017 Act 68 (cont.)

#### Open Book – 70.45

- Assessment roll is complete and delivered to the clerk (or when a date is anticipated)
- A class 1 notice or posted notice (whatever is required) be published at least 15 days prior to the first day the assessment roll is open for examination (open book)
- **Note:** the notice requirement is a minimum standard – publishing earlier than that date is compliant with the statute

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### 2017 Act 68 (cont.)

#### BOR Notices – Meet to Adjourn 70.47(3)(a)

- Assessment roll will not be completed during the 45 day period beginning the fourth Monday in April
  - BOR must hold an initial meeting and adjourn
  - BOR initial meeting notice requirements listed above must be met
- BOR clerk posts a written notice on the outer door of the place of meeting when the BOR will resume
  - Take into account required 7 day period between Open Book and BOR
  - Date on which the roll will be or is anticipated to be completed determines when clerk needs to notice open book period

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### 2017 Act 68 (cont.)

#### BOR Notices – Maintenance year timeline

- Notice first BOR meeting published 15 days prior to the date
- Clerk must post written notice on outer door of place of meeting when BOR will resume. This date must include the open book period including notice requirements and the mandatory 7 day interim period
  - Example: if open book notices have NOT been sent by "BOR Meeting to Adjourn," the minimum 15 day notice for the completed assessment roll to be open for examination (open book) and 7 day interim period between open book and "Adjourned BOR" set the date to resume a minimum of 22 days after the meeting to adjourn

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### 2017 Act 68 (cont.)

#### BOR Notices

- The notice for the first BOR meeting wherein business will be conducted and BOR date on Notice of Assessment (NOA) must be the same
- Notice Open Book – minimum 15 days prior to first date
- 7 Day Mandatory Interim
- Date BOR resumes

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### 2017 Act 68 (cont.)

#### BOR Access – Recommended Practice

- 2017 Act 68 allows BOR to deny a hearing to a property owner who does not allow the assessor to complete an exterior view
- WI Supreme Court expressed due process concerns regarding a similarly worded statute in Milewski v. Town of Dover
- DOR recommends allowing BOR hearing even if owner denied an interior or exterior view
- Lack of view and credibility of evidence can be managed as an evidentiary issue at BOR rather than denying access to BOR

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### Impact to BOR

Fourth Amendment and due process provide that the Fourth Amendment right to be free from unreasonable searches and seizures (assessor = government agent; data collection through interior view = search) should not have to be ceded in order to gain Fifth Amendment due process protections

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### Impact to BOR (cont.)

- Evidentiary consequence rather than an access issue
- BOR, as a quasi-judicial body, required to weigh evidence presented that may be seen by only the property owner
- Example: property owner denies interior inspection but allows an exterior inspection. At BOR, attempts to introduce testimonial evidence that the assessor was not allowed to view. What should the BOR do in weighing the credibility and relevance of that evidence?

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**Impact to BOR (cont.)**

- Assessor is presumed correct
- Markarian hierarchy remains applicable
- Questions could be asked of owner in this scenario:
  1. What impact does the evidence offered have to overall valuation?
  2. If no demonstrable impact, further questions might not be necessary
  3. If the evidence viewed by property owner only, can the evidence be documented? Example: are verifiable photos or recordings available?
  4. Is there a recent sale of the property? If not, are there sales of comparable properties justifying a change to the assessor's value?
  5. What adjustments were made to the comparables?
  6. Was an appraisal conducted? If so, what was the result?

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**Impact to BOR (cont.)**

- Note: the bars to BOR that relate to form, with no constitutional implication, remain intact
- 70.47(7)(ad): removal of BOR member notice requirement
- 70.47(7)(ae): land and improvement value estimate and foundational information
- 70.47(7)(af): provision of income method information

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**Resources**

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**Resources (cont.)**

- Wisconsin Property Assessment Manual: [revenue.wi.gov/html/govpub.html#property](http://revenue.wi.gov/html/govpub.html#property)
- Publications: [revenue.wi.gov/html/pubs.html](http://revenue.wi.gov/html/pubs.html)
- Reports: [revenue.wi.gov/report/index.html](http://revenue.wi.gov/report/index.html)
- Common questions: [revenue.wi.gov/faqs/index-pt.html](http://revenue.wi.gov/faqs/index-pt.html)
- Annual calendar: [revenue.wi.gov/slf/cotvc/tvccal.pdf](http://revenue.wi.gov/slf/cotvc/tvccal.pdf)

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**Thank you!**

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