COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0577 **Cir. Ct. No. 00-CV-1433**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LORI A. JOHNSON,

PLAINTIFF-RESPONDENT,

V.

CITY OF WAUKESHA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. The City of Waukesha appeals from the order of the circuit court which reversed the City's decision to rescind the rooming house license issued to Lori A. Johnson. The City argues on appeal that its action rescinding Johnson's license was not arbitrary, capricious and unreasonable, and

the circuit court's order should be reversed. We agree with the circuit court that the City's action was unreasonable. We affirm the order of the circuit court.

¶2 Johnson owns a multi-family residential property in Waukesha. The City issued a license to Johnson authorizing her to operate a rooming house on the second floor of the property. The building also has two apartments on the first floor and in the basement. In December 1998, the City issued six citations to Johnson for municipal code violations on this property. The City also began proceedings to revoke Johnson's rooming house license.

¶3 In June 1999, the City and Johnson entered into a stipulation whereby four of the six citations were dismissed. Johnson agreed to return the building to compliance with City and State codes within sixty days.

¶4 In December 1999, the City again inspected the property. The City found three separate sleeping areas and two additional bedrooms on the first floor. The two additional bedrooms were accessible only from the basement apartment and not from the other first floor apartment. Johnson told the City that these two bedrooms were part of the basement apartment which was rented by a father and son.

¶5 In December 1999, the City voted not to renew Johnson's rooming house license. The City determined, among other things, that the two additional bedrooms on the first floor meant there was a rooming house on that floor, and Johnson had not obtained a license to operate a rooming house on that floor. Johnson requested and received a hearing on the matter, but the decision was made not to renew her license.

¶6 Johnson sought certiorari review of the matter in the circuit court. The circuit court concluded that the City's decision not to renew the license was unreasonable. The court concluded that the first floor and basement apartments conformed to the stipulation entered into by Johnson and the City in June 1999. The court concluded that since the apartments conformed to the stipulation, the City's decision not to renew Johnson's rooming house license was unreasonable. The court reversed the City's decision and ordered it to reinstate Johnson's rooming house license. The City appeals from that order.

¶7 When an appeal is taken from a circuit court order in a certiorari proceeding, we review the decision of the agency, not the circuit court. ***Richland Sch. Dist. v. DILHR***, 166 Wis. 2d 262, 273, 479 N.W.2d 579 (Ct. App. 1991), *aff'd*, 174 Wis. 2d 878, 498 N.W.2d 826 (1993). Although we do not defer to the opinion of the circuit court, that court's reasoning may assist us. ***Id.*** Certiorari review is limited to whether: "(a) the agency kept within its jurisdiction; (b) the agency acted according to law; (c) the action was arbitrary, oppressive or unreasonable; and (d) the evidence presented was such that the agency might reasonably make the decision it did." ***Merkel v. Village of Germantown***, 218 Wis. 2d 572, 578, 581 N.W.2d 552 (Ct. App. 1998).

¶8 We agree with the circuit court that the City's action was unreasonable. Further, we conclude that the stipulation controls, and that the City is precluded from contesting the stipulation under the doctrine of judicial estoppel. Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings. ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). In this case, the City entered into a stipulation in the action in the Waukesha municipal court. The stipulation provides in pertinent part that:

> With regard to the basement apartment, the parties agree that the apartment is designated as an "efficiency apartment," and that the defendant shall not rent the apartment to more than three (3) individual renters unless:
>
> (1) A rooming house license is properly obtained permitting more than three (3) unrelated persons to rent rooms on that level;
>
> (2) The level is rented out to persons who otherwise meet the definition of "family," as set forth in Waukesha Municipal Code Ordinance Section 22.04(29) (1987); or
>
> (3) The rooms are rented out to more than three (3) unrelated persons in compliance with applicable Federal or State law.

Johnson complied with that stipulation. The property has not materially changed since the City agreed to the terms of the stipulation. The second floor is still a rooming house. The first floor has one apartment, and separate and inaccessible rooms which form part of the basement apartment. Further, it is undisputed that Johnson rented the apartment to two related people.

¶9 The City argues that the stipulation refers to an "efficiency" apartment in the basement and that the basement apartment cannot be an efficiency because it has separate bedrooms on the first floor. The apartment's configuration, however, has not changed since the City entered into the stipulation. The record establishes that at the time she entered into the stipulation, Johnson believed the basement apartment to include those two rooms. Further, in the stipulation the City required Johnson to obtain building permits for walls she had built, including the wall which separated those two rooms from the rest of the first floor. It is reasonable to infer, therefore, that at the time the City entered into the stipulation, it knew of the configuration of the basement apartment. The use of the word "efficiency" in the stipulation to describe that apartment then, does not

change the facts. The word must be defined by what the parties understood at the time of the stipulation. *Cf.* ***Cummings v. Klawitter***, 179 Wis. 2d 408, 415, 506 N.W.2d 750 (Ct. App. 1993), *overruled on other grounds by* ***Johnson v. ABC Ins. Co.***, 193 Wis. 2d 35, 532 N.W.2d 130 (1995) (stipulations are contractual in nature and when the language of a stipulation is ambiguous, the court may consider extrinsic evidence to determine the parties' intent).

¶10 Johnson has complied with the terms of the stipulation. The City cannot now object to something it agreed to in the previous litigation. We affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.