

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

FLOAT-RITE PARK, INC.,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF SOMERSET,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Float-Rite Park, Inc., appeals an order affirming the Village of Somerset's modification of Float-Rite's interim conditional use permit. Float-Rite argues that: (1) the Village changed Float-Rite's interim conditional use permit into a conditional use permit, thereby removing the Village's right to

unilaterally rescind or change the permit; and (2) the circuit court erred by dismissing Float-Rite's estoppel claim. We disagree and affirm the order.

BACKGROUND

¶2 Float-Rite operates an innertube rental business and campground in the Village of Somerset. In 1996, Float-Rite applied for and was granted an interim conditional use permit for the purpose of holding concerts on its property, pursuant to VILLAGE OF SOMERSET, WIS., ORDINANCES § 9.12(IV)(7), (8), (9) and (10) (1996). The permit contained an expiration date of October 1, 2001, and stated, "The Village of Somerset has the right to relinquish the interim conditional use permit if the following conditions are not met." Number 8 of the conditions stated: "Permit Review by the Village Board - Interim Conditional Use Permit to be reviewed by the Village Board with Float-Rite representatives on a yearly basis and subject to changes by the board upon review."

¶3 In 1997, the Village modified the interim conditional use permit. The Village removed the expiration date of October 1, 2001, and replaced it with "reviewed annually."

¶4 In 1998, the Village again modified the permit. The Village deleted the language "and subject to changes by the board upon review" from condition No. 8, so that the condition read: "Permit Review by the Village Board - Interim Conditional Use Permit to be reviewed by the Public Safety Committee and Village Board with Float-Rite representatives on a yearly basis."

¶5 Subsequently, the Village received complaints from the City of Stillwater, the local School District, and citizens regarding Float-Rite's interim conditional use permit. In 2000, the Village again modified the terms of the

interim conditional use permit over Float-Rite's objections. Among other changes, the Village changed the concluding time for concerts from 11 p.m. to 10 p.m., reduced the number of ticket sales from 40,000 to 30,000, specified one police officer per 1,000 concert patrons, and required that \$1 from each ticketholder will be paid to reimburse law enforcement.

¶6 Float-Rite brought a writ of certiorari seeking reversal of the Village's 2000 modifications. Float-Rite argued that the 1997 and 1998 modifications changed the interim conditional use permit into a conditional use permit, thereby removing the Village's right to unilaterally rescind or change the permit.

¶7 The circuit court concluded that the permit was still interim in nature. Based on VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(10) (1996),¹ the court held that the permit was still subject to annual review. At the annual review, the Village possessed the right to rescind or change any part of the permit. The court affirmed the Village's modification. This appeal followed.

STANDARD OF REVIEW

¶8 We review the record before the Village to determine whether: (1) the Village kept within its jurisdiction; (2) it acted according to law; (3) its

¹ VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(10) (1996), reads as follows:

Interim conditional use permits will be reviewed annually. During the review process the Village Board has the right to rescind or change any part of the interim conditional use permit. If one year lapses without an interim conditional use permit the process will start from the beginning by obtaining a conditional use permit.

action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that the Village might reasonably make the determination in question. *See State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjust.*, 131 Wis. 2d 101, 119-20, 388 N.W.2d 593 (1986).

¶9 In applying this standard, we must "accord a presumption of correctness and validity" to the Village's decision. *Kapischke v. County of Walworth*, 226 Wis. 2d 320, 327-28, 595 N.W.2d 42 (Ct. App. 1999). Float-Rite carries the burden of overcoming this presumption of correctness. *See Miswald v. Waukesha County Bd. of Adjust.*, 202 Wis. 2d 401, 408-09, 550 N.W.2d 434 (Ct. App. 1996). If a reasonable view of the evidence would sustain the findings of the Village, the findings are conclusive. *Clark v. Waupaca County Bd. of Adjust.*, 186 Wis. 2d 300, 304-05, 519 N.W.2d 782 (Ct. App. 1994). We may not substitute our discretion for the Village's. *Id.* at 305.

DISCUSSION

I. INTERIM CONDITIONAL USE PERMIT

¶10 Float-Rite contends that the Village's elimination of the expiration date on the interim conditional use permit in 1997 and the elimination of "subject to changes by the board upon review" from condition No. 8 in 1998 changed its interim conditional use permit to a regular conditional use permit. According to Float-Rite, because of those modifications, the Village lacked authority to unilaterally rescind or change the permit in 2000 because Float-Rite did not violate any of the permit conditions.

¶11 Float-Rite’s argument centers around the difference between “expiration date” and “annual review.” According to Float-Rite, “the way an expiration date functions is that, upon the expiration, the holder of the permit must reapply for a new permit.” When the permit expires, the Village can either issue or deny a new permit. Hence the term, interim conditional use permit. Float-Rite further contends that an annual review “is the time during which the Board addresses the compliance of the holder with the terms of an unexpired [conditional use permit].”

¶12 Float-Rite argues that the 1997 and 1998 modifications changed the permit to a regular conditional use permit. Since the permit was no longer subject to an expiration date and the language in condition No. 8., Float-Rite concludes that the Village intended to issue a conditional use permit.

¶13 In its brief, Float-Rite cites *State ex rel. Brooks v. Hartland Sportsman’s Club, Inc.*, 192 Wis. 2d 606, 531 N.W.2d 445 (Ct. App. 1995), to argue that a municipality may revoke a conditional use permit only when the holder of the permit violates its terms. Float-Rite also relies on numerous cases outside Wisconsin.²

¶14 However, these cases are distinguishable. They deal with the rescinding of conditional use permits. After reviewing the record, we conclude that the 1997 and 1998 modifications did not change Float-Rite’s permit to a conditional use permit. At all times, Float-Rite possessed an interim conditional

² Float-Rite cites *Malibu Mtns. Rec., Inc. v. County of Los Angeles*, 67 Cal. App. 4th 359, 367 (Cal. App. 1998), and *Nigh v. City of Savannah*, 956 S.W.2d 451, 453 (Mo. Ct. App. 1997), to argue that the Village cannot revoke a conditional use permit without proving non-compliance.

use permit. Therefore, the Village had the authority to unilaterally rescind or change the interim conditional use permit at the 2000 annual review, pursuant to the VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(10) (1996).

¶15 Ordinance § 9.12(IV)(10) regarding interim conditional use permits states in relevant part that: “Interim conditional use permits will be reviewed annually. During the review process the Village Board has the right to rescind or change any part of the interim conditional use permit.” The ordinance thus explicitly states that interim conditional use permits are subject to review on a yearly basis, at which time the Village has the right to rescind or change any part of the permit. Interim conditional use permits are the only permits subject to annual review under the Village ordinances. Float-Rite’s interim conditional use permit states that it is subject to annual review.

¶16 We are unpersuaded by Float-Rite’s argument that changing the permit’s expiration date to an annual review changed the nature of the permit. Float-Rite does not offer any evidence indicating that the Village intended to issue a conditional use permit. Further, Float-Rite does not cite any legal authority to support its argument regarding the difference between “expiration date” and “annual review.”

¶17 Modifying the “expiration date” to an “annual review” did not affect the nature of the interim conditional use permit. Neither modification affected the ordinance’s application to Float-Rite’s interim conditional use permit. At all times, the permit was subject to annual review and the Village had the power to unilaterally rescind or change the permit. The 1997 and 1998 modifications simply reflected a continuous evolution between Float-Rite and the Village. At

the annual reviews, Float-Rite's interim conditional use permit was reviewed and changes were made to address any unanticipated problems.

¶18 The Village ordinance allows an interim conditional use permit to be revoked or modified at annual reviews. VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(10) (1996). Here, the Village issued an interim conditional use permit to Float-Rite so that the Village could make yearly changes to the permit and to choose how to deal with security and emergency service problems as needed. Issuing a conditional use permit would prevent flexibility in addressing those concerns.

¶19 Further, Float-Rite never applied for a conditional use permit. The ordinance contains procedures for applying for a conditional use permit. Float-Rite was required to submit an application to the Village clerk along with a fee of \$150 and an explanation regarding the conditional use permit. Float-Rite took none of these steps. Nor did the Village follow the required procedures for issuing a conditional use permit, such as mailing notices to land owners within 100 feet of the premises, reviewing the site and holding a public hearing. VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(2) and (3) (1996).³

³ VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(2) and (3) (1996) reads as follows:

(continued)

¶20 We conclude the Village did not issue a conditional use permit by modifying the interim conditional use permit at the 1997 and 1998 annual reviews. As a result, VILLAGE OF SOMERSET, WIS. ORDINANCES § 9.12(IV)(10) applied to Float-Rite's interim conditional use permit, and the Village had the authority to unilaterally rescind or change the permit. We conclude that a reasonable review of the evidence sustains the Village's findings. We may not substitute our discretion for the Village's. Therefore, the Village properly modified Float-Rite's interim conditional use permit.

II. ESTOPPEL

¶21 Float-Rite argues that the circuit court improperly dismissed Float-Rite's estoppel claims. Float-Rite contends that it entered into long-term contracts and made capital improvements based on the elimination of the Village's right to

(2) Application for conditional use permit shall be submitted to the Village Clerk on forms provided by the Village and shall be accompanied by a plan showing the location, size, and shape of the lot(s) involved, any proposed structures, the existing and proposed use of each structure, the lot, and a fee of \$150.00. In addition to the Class two notice under chapter 985, Wisconsin Statutes, the Village Clerk shall mail notices to the owners of record of all land within the area included in the application and within 100 feet of any of the building or premise affected not less than 10 days prior to the Plan Commission hearing and Village Board Hearing. The fees associated with conditional use permits shall be established by the Village Board.

(3) The Plan Commission shall review the site, existing and proposed structures, architectural plans, neighboring uses, parking areas, driveway locations, highway access, traffic generation, and circulation, drainage, sewage, and water systems, and their proposed operation, and such factors as the Plan Commission may deem appropriate.

“non-renew or cancel the permit.” As a result, the Village improperly modified the permit in 2000.

¶22 Float-Rite fails to show that the circuit court erred when it applied the doctrine of equitable estoppel. Equitable estoppel is not applied against governmental agencies as freely as against private parties. *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 344, 515 N.W.2d 328 (Ct. App. 1994). A party attempting to invoke equitable estoppel against a state agency must establish that the agency’s acts amounted to a fraud or a manifest abuse of discretion. *Ryan v. DOR*, 68 Wis. 2d 467, 470-71, 228 N.W.2d 357 (1975). Before estoppel may be applied to a governmental unit, it must also be shown by clear and convincing evidence that the government’s conduct would work a serious injustice and the public interest would not be unduly harmed. *See DOR v. Moebius Printing Co.*, 89 Wis. 2d 610, 638, 279 N.W.2d 213 (1979).

¶23 Equitable estoppel does not apply here. The Village did not “non-renew or cancel the permit.” Float-Rite cannot argue that the Village is equitably estopped from making changes to the interim conditional use permit because Float-Rite’s only claim is that it detrimentally relied upon the Village giving up its right to “non-renew or cancel the permit.” Here, the Village did not either cancel the permit or non-renew it. Therefore, we conclude that the circuit court properly dismissed Float-Rite’s estoppel claim.

By the Court.—Order affirmed.

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

