

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS	2
ARGUMENT	3

Proposition of Law:

To perfect an administrative appeal, R.C. 2505.04 requires nothing more than actual delivery of a notice of appeal, however accomplished, to the court of common pleas and the administrative agency within the time permitted for appeal3

- I. R.C. 2505.04 requires only timely, actual delivery of a notice of appeal3
- II. “Service” of a notice of appeal on an administrative agency is the same as “filing” with that agency5
- III. Policy considerations favor requiring nothing more than actual, timely delivery of a notice of administrative appeal7

CONCLUSION	9
CERTIFICATE OF SERVICE	10

APPENDIX	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court (April 8, 2010)	1
Notice of Certified Conflict (May 13, 2010)	4
Opinion of the Twelfth District Court of Appeals (February 22, 2010)	12
Judgment Entry of the Twelfth District Court of Appeals (February 22, 2010)	55
R.C. 2505.04	56

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Capital Loan & Sav. Co. v. Biery</i> (1938), 138 Ohio St. 333, 16 N.E.2d 450.....	7
<i>City of Zanesville v. Rouse</i> , 126 Ohio St.3d 1, 2010-Ohio-2218, 929 N.E.2d 1044	4
<i>Dudukovich v. Lorain Metropolitan Housing Auth.</i> (1979), 58 Ohio St.2d 202, 389 N.E.2d 1113	<i>passim</i>
<i>Evans v. Greenview Local School District</i> (Jan. 4, 1989), Greene App. No. 88 CA 40, 1989 WL 569	3
<i>Hanson v. City of Shaker Heights</i> (8th Dist.), 152 Ohio App.3d 1, 2003-Ohio-749, 86 N.E.2d 487	8
<i>Hughes v. Ohio Dep't of Commerce</i> , 114 Ohio St. 3d 47, 2007-Ohio-2877, 868 N.E.2d 246	5
<i>King v. Penn</i> (1885), 43 Ohio St. 57, 1 N.E. 84	4
<i>Price v. Margareta Township Board of Zoning Appeals</i> , Erie App. No. E-02-029, 2003-Ohio-221.....	3
<i>Richards v. Industrial Comm.</i> (1955), 163 Ohio St. 439, 127 N.E.2d 402	7
<i>Riedel v. Consolidated Rail Corp.</i> , 125 Ohio St.3d 358, 2010-Ohio-1926, 928 N.E.2d 448.....	3
 <u>STATUTES:</u>	
Ohio Revised Code 119.12.....	5
Ohio Revised Code 2505.04.....	<i>passim</i>
Ohio Revised Code 2505.07.....	2, 3, 4

INTRODUCTION

This case involves the proper interpretation of the requirement of R.C. 2505.04 that a notice of appeal be “filed” with the agency from which the appeal is taken. Thirty-one years after this Court’s decision in *Dudukovich v. Lorain Metropolitan Housing Auth.* (1979), 58 Ohio St.2d 202, 389 N.E.2d 1113, holding that the statute requires only timely, actual delivery of the notice of appeal, some lower courts continue to erect artificial obstacles to the perfection of administrative appeals.

There is no dispute in this case that the notices of appeal at issue were in the proper form. There is no dispute that the court of common pleas received the notices of appeal before the statutory deadline. And there is no dispute that the agency from which the appeals were taken received the notices of appeal before the statutory deadline. The Twelfth District nonetheless held that the appeals were jurisdictionally defective, drawing picayune – and untenable – distinctions based on *who* delivered the notices of appeal to the agency. (Appx. 17.) The Twelfth District is not alone, as other courts of appeals have dismissed administrative appeals based on *how* an otherwise timely notice of appeal was received.

These distinctions lack any support in the statute or *Dudukovich*, which was sound when decided and remains so today. The statute does not specify any particular means of delivery for a notice of an administrative appeal, and this Court held in *Dudukovich* that nothing more than actual, timely delivery is required. Nothing more *should* be required, because the purpose of a notice of appeal – notice to other affected parties that an appeal is being taken – is satisfied regardless of the particular method of delivery. The judgment of the Twelfth District should be reversed.

STATEMENT OF FACTS

In late 2004, appellant Welsh Development Company entered contracts to purchase land in Warren County owned by the individual appellants. (Supp. 4.) Welsh Development intended to develop a subdivision of single-family homes. (Supp. 12.) Welsh Development submitted a preliminary plat application for the first phase of this project to appellee Warren County Regional Planning Commission in early 2005. (Appx. 13, Supp. 6.) The Commission denied the application. (Appx. 13, Supp. 7.) Shortly thereafter, Welsh Development submitted a preliminary plat application for the second phase of the project. (Appx. 13, Supp. 22.) The Commission conditionally approved this application, but the conditions imposed were impractical and unacceptable to Welsh Development. (Supp. 24-25.)

Welsh Development filed notices of appeal from both decisions with the Warren County Court of Common Pleas, within the 30-day limit under R.C. 2505.07. (Appx. 13; Supp. 2-17 and 19-33.) By way of praecipes, Welsh Development instructed the clerk of common pleas court to send copies of the notices of appeal to the Commission. (Appx. 13.) The clerk did so by certified mail, and the Commission received both notices and time-stamped each of them within the 30-day limit. (Appx. 13, Supp. 1 and 18.) There is no dispute that both the court of common pleas and the agency received actual and timely delivery of the notices of appeal.

On the Commission's motion, the court of common pleas dismissed the appeals as untimely. (Appx. 14.) Over a lengthy dissent, the Twelfth District affirmed. The court of appeals held that R.C. 2505.04 requires timely "filing" of the notice of appeal with the administrative agency, and that all that Welsh Development accomplished was "service" of the notice of appeal on the agency. (Appx. 17.) The court of appeals offered a cramped reading of this Court's *Dudukovich* opinion, finding a meaningful distinction between the appellant having

personally mailed the notice of appeal in *Dudukovich* and the appellants having directed the court clerk to do so here. (Appx. 17.)

On the appellants' motion, the Twelfth District certified a conflict between its decision and two decisions from the Second and Sixth Districts. (Appx. 9-10.) See *Price v. Margaretta Township Board of Zoning Appeals*, Erie App. No. E-02-029, 2003-Ohio-221; *Evans v. Greenvew Local School District* (Jan. 4, 1989), Greene App. No. 88 CA 40, 1989 WL 569. The issue certified (as recast by the Twelfth District) is as follows:

Is a service of summons by a clerk of courts upon an administrative agency, together with a copy of a notice of appeal filed in the common pleas court, sufficient to perfect an administrative appeal pursuant to R.C. 2505.04 as long as the agency receives the notice within the time prescribed by R.C. 2505.07?

(Appx. 10.) This Court agreed with the existence of the conflict and accepted the certified conflict case for review. 6/23/2010 Case Announcements, 2010-Ohio-2753. This Court also accepted the appellants' discretionary appeal for review. *Id.*

ARGUMENT

Proposition of Law: To perfect an administrative appeal, R.C. 2505.04 requires nothing more than actual delivery of a notice of appeal, however accomplished, to the court of common pleas and the administrative agency within the time permitted for appeal.

The interpretation of R.C. 2505.04 is a pure question of law and is therefore reviewed *de novo*. See *Riedel v. Consolidated Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, at ¶ 6, 928 N.E.2d 448.

I. R.C. 2505.04 requires only timely, actual delivery of a notice of appeal.

Section 2505.04 of the Revised Code provides the basic requirements for perfecting an appeal from a local (e.g., county, city, school district) agency:

An appeal is perfected when a written notice of appeal is filed . . . in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved.

R.C. 2505.04. The notice of appeal must be filed within 30 days of a final order. R.C. 2505.07.

The Revised Code does not define “filed” as that term is used in R.C. 2505.04.

This Court defined that term more than a century ago. “When a paper is in good faith delivered to the proper officer to be filed, and by him received to be kept in its proper place in his office, it is ‘filed.’” *King v. Penn* (1885), 43 Ohio St. 57, 61, 1 N.E. 84. The officer’s endorsement or stamp is evidence of the completed filing. *Id.*; see also *City of Zanesville v. Rouse*, 126 Ohio St.3d 1, 2010-Ohio-2218, at ¶ 9, 929 N.E.2d 1044 (same), *reconsideration granted in part on other grounds*, 2010 WL 3272400.

The Court again considered the meaning of “filed” in *Dudukovich v. Lorain Metropolitan Housing Auth.*, 58 Ohio St.2d 202, 389 N.E.2d 1113 (1979), this time specifically in the context of an administrative appeal under R.C. 2505.04. *Dudukovich* timely filed a notice of appeal from the agency decision with the court of common pleas, and sent a copy of the notice by certified mail to the agency. *Id.* at 204. This Court held that the appeal was perfected because the agency received the notice of appeal within thirty days. The Court held that the agency’s receipt of the notice of appeal by mail within the 30-day period was sufficient to perfect the appeal. “[T]he term ‘filed,’” the Court reasoned, “requires actual delivery [N]o particular method of delivery is prescribed by the statute. Instead . . . any method productive of certainty of accomplishment is countenanced.” *Id.* (internal quotations and citations omitted).

After *Dudukovich*, it should have been clear that R.C. 2505.04 requires only “actual delivery” within the prescribed period. 58 Ohio St.2d at 204. The statutory text certainly requires nothing more; it does not specify who must deliver the notice or how it must be

delivered. Had the General Assembly intended to impose additional requirements, it certainly could have done so. The General Assembly did so in Chapter 119 of the Revised Code, which applies to appeals from *state* agencies (in contrast to R.C. 2505.04, which applies to appeals from *local* agencies). R.C. 119.12, for example, requires that an original notice of appeal be filed with the agency and that a “*copy* of such notice of appeal . . . be filed *by the appellant* with the court.” R.C. 119.12 (emphasis added); see *Hughes v. Ohio Dep’t of Commerce*, 114 Ohio St. 3d 47, 2007-Ohio-2877, at ¶ 16, 868 N.E.2d 246. The General Assembly’s failure to include any similar specific requirements in R.C. 2505.04 indicates that no such requirements exist. The statute requires only timely, actual delivery of the notice of appeal.

II. “Service” of a notice of appeal on an administrative agency is the same as “filing” with that agency.

Despite timely, actual delivery of the notices of appeal at issue to the Warren County Regional Planning Commission, the Twelfth District held that the appeals were not properly perfected. (Appx. 16-17.) The court of appeals majority began with the indisputable proposition that “[t]he right to appeal is conferred by statute and can be perfected only in the manner prescribed by the statute.” (Appx. 16.) Ignoring this Court’s directive that the statute prescribes “any method” resulting in actual delivery, the court of appeals held that “service” of a notice of appeal on the agency is insufficient. (Appx. 17.) The court of appeals majority never explained why the method of delivery at issue was “service” rather than “filing”; that cornerstone of the opinion below rests on nothing more than the majority’s *ipse dixit*.

In any event, the court of appeals majority distinguished *Dudukovich* by noting that there the party who had originally appealed “herself mailed a copy of the notice of appeal directly to the administrative agency.” (Appx. 17.) Here, in contrast, the appellants directed the common pleas clerk to send a copy of the notice of appeal to the administrative agency. Why this should

make the slightest difference is anyone's guess, because the court of appeals never offered any rationale other than question-begging semantics.

The distinction between "filing" and "service" makes sense in some contexts. In trial court litigation, documents are filed with the court and served on other parties to the litigation. The Civil Rules, for example, prescribe who must be served, when, and how in connection with documents that are filed with a court. See Civ. R. 5.

In this context, however, the distinction makes no sense and is the ultimate exultation of form over substance. The import of the Twelfth District's reasoning is that the right to appeal turns on *who* mails the notice of appeal to the agency. Clearly it is acceptable for the appellant herself to mail the notice of appeal; those are the facts of *Dudukovich*. But in the Twelfth District, it is not acceptable for the appellant to instruct a court clerk to mail the notice of appeal. Why should this matter? And why should the preservation or loss of the right to appeal depend on this kind of distinction?

The Twelfth District's reasoning makes R.C. 2505.04 mean different things depending on the type of appeal involved. The statute used the term "filed" for both administrative appeals and appeals from courts of common pleas to courts of appeals. A common pleas clerk will accept and "file" a notice of appeal regardless of who hand delivers or mails it. Under the Twelfth District's logic, however, the same word in the same statute means something different when an agency is the recipient of the notice. That cannot be a correct statutory interpretation.

Furthermore, the Twelfth District's distinction between "filing" and "service" is wholly unclear. Must the appellant herself mail the notice of appeal? What about a courier or messenger? May an agent – such as counsel – do it for her? And if an agent is acceptable, why cannot the court clerk be considered the appellant's agent for this purpose? The Twelfth

District's decision invites sideshow litigation over these distinctions – none of which can be found in the statute itself; none of which is based on this Court's decision in *Dudukovich*; and none of which should matter to the preservation of appellate rights.

Moreover, this Court saw no such distinction in *Dudukovich*. Indeed, the Court there characterized the appellant's act of mailing her notice of appeal as a "method of *service*" and held that "simply because the manner of delivery is unusual does not make it illegal." *Dudukovich*, 58 Ohio St.2d at 204 (emphasis added). Under R.C. 2505.04, "service" is "filing" so long as there is actual delivery. The unmistakable lesson of *Dudukovich* was that it makes no difference how an otherwise timely notice of appeal reaches the agency from which the appeal is taken. All that matters is that the notice of appeal is actually delivered on time.

III. Policy considerations favor requiring nothing more than actual, timely delivery of a notice of administrative appeal.

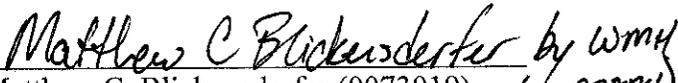
There are strong policy reasons for *not* requiring anything more than actual, timely delivery of a notice of an administrative appeal under R.C. 2505.04. First, "the primary objective of a notice of appeal is to make it known that an appeal is being taken." *Richards v. Industrial Comm.* (1955), 163 Ohio St. 439, 446, 127 N.E.2d 402. This objective is satisfied no matter how the notice of appeal is delivered: notice informs an agency of an impending appeal, whether hand-delivered, dropped in a mailbox by a would-be appellant, delivered by a third-party delivery service, or dropped in a mailbox by a common pleas clerk. There is absolutely no prejudice to the agency arising from the fact that, here, the return address was the clerk's office rather than the appellants' counsel's office. See also *Capital Loan & Sav. Co. v. Biery* (1938), 138 Ohio St. 333, 339, 16 N.E.2d 450 (there is no prejudice when there is actual notice of an appeal).

Second, R.C. 2505.04 is *intentionally* flexible as to the manner of delivery of the notice of appeal. This statute applies to a wide variety of administrative appeals from local administrative officers, agencies, boards, departments, tribunals, commissions, and other governmental instrumentalities. Each of these local governmental entities has its own method of accepting filings. Many of these entities operate informally and have no formalized rules of practice that would inform citizens how to “file” a document with the entity. As the Eighth District explained, the “General Assembly cannot address the sundry details of administrative organization in political subdivisions across the state and, therefore, the statute must be interpreted with the liberality implied by the actual delivery rule of *Dudukovich*.” *Hanson v. City of Shaker Heights* (8th Dist.), 152 Ohio App.3d 1, 2003-Ohio-749, at ¶ 14, 786 N.E.2d 487. Section 2505.04 and *Dudukovich* therefore provide these governmental entities with the flexibility to handle these matters as each of them see fit. But this flexibility is also supposed to inure to the benefit of citizens who seek to take administrative appeals. This is why R.C. 2505.04, as interpreted by this Court, requires “no particular method of delivery.” *Dudukovich*, 58 Ohio St.2d at 204.

CONCLUSION

Under the correct standard, the appeals here were timely perfected. Both the common pleas court and the agency received actual delivery of the notices of appeal within the 30-day limit. The judgment of the court of appeals should be reversed, and this case should be remanded with instructions to reinstate these administrative appeals.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Merit Brief of Appellants Welsh Development Company, Inc., Daniel Proeschel, Angela Proeschel, Robert Proeschel, Mary Proeschel, Jeraldine Hoffer, and Karl Hoffer was served by ordinary U.S. mail, postage prepaid, on August 30, 2010 on the counsel listed below:

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APPENDIX

	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court (April 8, 2010)	1
Notice of Certified Conflict (May 13, 2010)	4
Opinion of the Twelfth District Court of Appeals (February 22, 2010)	12
Judgment Entry of the Twelfth District Court of Appeals (February 22, 2010)	55
R.C. 2505.04	56

IN THE SUPREME COURT OF OHIO

Case No. _____

10-0611

WELSH DEVELOPMENT COMPANY,
INC., *et alia*,

Appellants,

v.

WARREN COUNTY REGIONAL
PLANNING COMMISSION,

Appellee.

On Appeal from the Warren County Court
of Appeals, Twelfth Appellate District

Court of Appeals Case No. CA2009-07-101

NOTICE OF APPEAL OF APPELLANTS WELSH DEVELOPMENT
COMPANY, INC., DANIEL PROESCHEL, ANGELA PROESCHEL,
ROBERT PROESCHEL, MARY PROESCHEL, JERALDINE HOFFER,
AND KARL HOFFER

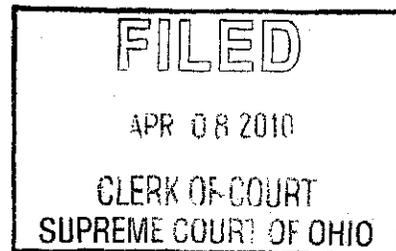
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Notice of Appeal of Appellants Welsh Development Company, Inc., Daniel and Angela Proeschel, Robert and Mary Proeschel, Jeraldine Hoffer, and Karl Hoffer

Appellants Welsh Development Company, Inc., Daniel Proeschel, Angela Proeschel, Robert Proeschel, Mary Proeschel, Jeraldine Hoffer, and Karl Hoffer hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Warren County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case No. CA2009-07-101 on February 22, 2010.

This case is one of public or great general interest.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

Case No. _____

10-0858

WELSH DEVELOPMENT COMPANY,
INC., et alia.

Appellants,

On Appeal from the Warren County Court
of Appeals, Twelfth Appellate District

Court of Appeals Case No. CA2009-07-101

WARREN COUNTY REGIONAL
PLANNING COMMISSION,

Appellee.

APPELLANTS' NOTICE OF CERTIFIED CONFLICT

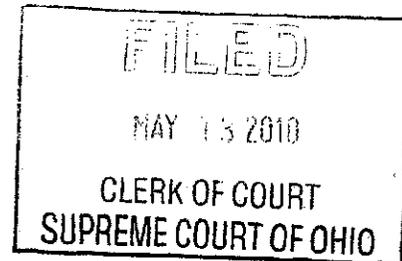
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Hoffer*



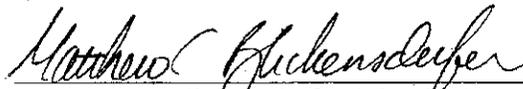
Pursuant to Sup. Ct. Prac. R. 4.1, appellants Welsh Development Company, Inc., Daniel Proeschel, Angela Proeschel, Robert Proeschel, Mary Proeschel, Jeraldine Hoffer, and Karl Hoffer provide notice of the order of the Warren County Court of Appeals, Twelfth Appellate District, certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. The issue certified is as follows:

Is a service of summons by a clerk of courts upon an administrative agency, together with a copy of a notice of appeal filed in the common pleas court, sufficient to perfect an administrative appeal pursuant to R.C. 2505.04 as long as the agency receives the notice within the time prescribed by R.C. 2505.07?

A copy of the court of appeals order certifying the conflict is attached as Exhibit A. A copy of the certifying court's opinion is attached as Exhibit B. Copies of the conflicting court of appeals opinions - *Price v. Margareta Township Board of Zoning Appeals*, Erie App. No. E-02-029, 2003-Ohio-221, and *Evans v. Greenview Local School District* (Jan. 4, 1989), Greene App. No. 88 CA 40, 1989 WL 569, are attached as Exhibits C and D, respectively.

The appellants also have pending a motion for discretionary review (Case No. 2010-0611), which presents an issue somewhat broader than the issue as framed by the court of appeals. The appellants respectfully request that that motion be granted and these appeals be consolidated for briefing and argument.

Respectfully submitted,



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Certificate of Service

I certify that a copy of this Notice Certified Conflict was sent by ordinary U.S. mail on
May 12, 2010 to the counsel listed below:

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Exhibit A

IN THE COURT OF APPEALS
WARREN COUNTY
FILES OF WARREN COUNTY, OHIO

WELSH DEVELOPMENT CO., INC.,
et al.,
Appellants,

MAY - 7 2010
James L. Spaeth, Clerk
LEBANON OHIO

CASE NO. CA2009-07-101

ENTRY GRANTING MOTION TO
CERTIFY

vs.

WARREN COUNTY REGIONAL
PLANNING COMM.,
Appellee.

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellants, Welsh Development Co., on March 4, 2010, and a responsive memorandum filed by counsel for appellee, Warren County Regional Planning Commission, on March 22, 2010.

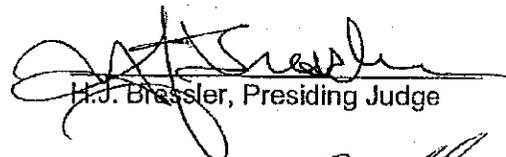
Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinions of the two courts of appeal are inconsistent; the judgments of the two courts of appeal must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73. Welsh argues that this court's decision is in conflict with a decision by the Second District Court of Appeals, *Evans v. Greenview Loc. Sch. Dist.* (Jan. 4, 1989), Green App. No. 88 CA 40, and a decision by the Sixth District Court of Appeals, *Price v. Margaretta Twp. Bd. of Zoning App.*, Erie App. No. E-02-029, 2003-Ohio-221.

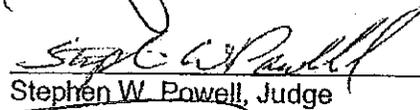
In the present case, this court held that directing a clerk of courts to serve a copy of a notice of appeal upon an administrative agency is not the equivalent of filing a notice of appeal with the agency from which an appeal is being taken as expressly required by R.C. 2505.04. In both cases which Welsh claims are in conflict, the appellants filed a timely notice of appeal with the court of common pleas and instructed the clerk to send a copy of the notice of appeal to the relevant agency. In each case, the agency received the copy of the notice of appeal within the time prescribed by statute and the appellate courts held that the appeals were perfected. Therefore, this court's judgment in this case is in direct conflict with the Second and Sixth Districts courts of appeal.

Based upon the foregoing, the motion to certify conflict is GRANTED. The issue certified is as follows:

Is a service of summons by a clerk of courts upon an administrative agency, together with a copy of a notice of appeal filed in the common pleas court, sufficient to perfect an administrative appeal pursuant to R.C. 2505.04 as long as the agency receives the notice within the time prescribed by R.C. 2505.07?

IT IS SO ORDERED.


H.J. Bressler, Presiding Judge


Stephen W. Powell, Judge


Robert P. Ringland, Judge

Exhibit B

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

FEB 22 2010

James L. Spaeth, Clerk
LEBANON OHIO

WELSH DEVELOPMENT COMPANY,
et al.,

Plaintiffs-Appellants,

- vs -

WARREN COUNTY REGIONAL
PLANNING COMMISSION,

Defendant-Appellee.

CASE NO. CA2009-07-101

OPINION
2/22/2010

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 05CV64044

Frost Brown Todd LLC, Scott D. Phillips, Suite 300, 9277 Centre Pointe Drive, West Chester, Ohio 45069, for plaintiffs-appellants, Welsh Development Co.; Daniel, Angela, Robert and Marcy Proeschel; and Jeraldine & Karl Hoffer

Surdyk Dowd & Turner, Robert J. Surdyk, Kevin A. Lantz, One Prestige Place, Suite 700, Miamisburg, Ohio 45342, for defendant-appellee

BRESSLER, P.J.

{¶1} Plaintiffs-Appellants, Welsh Development Company, Inc., Daniel and Angel Proeschel, Robert and Mary Proeschel, Jeraldine Hoffer, and Karl Hoffer (Welsh) appeal the decision of the Warren County Court of Common Pleas dismissing all but three claims against defendant-appellee, Warren County Regional Planning Commission (the WCRPC),



finding Welsh failed to perfect its administrative appeal and, as a consequence, failed to exhaust its administrative remedies.

{12} Welsh filed two preliminary plat applications with the WCRPC in early 2005 regarding a proposed single-family home subdivision in Turtlecreek Township, Warren County, Ohio. The WCRPC denied the first application and approved the second application subject to certain conditions.

{13} On March 25, 2005, Welsh filed with the Warren County Common Pleas Court a notice of appeal of the first decision, along with a praecipe, notice of filing of supersedeas bond, and instructions to serve a copy of the complaint and notice to the WCRPC. The record indicates the WCRPC was served on March 28, 2005.

{14} Prior to filing, Welsh sent to the Chief Assistant Warren County Prosecutor unfiled courtesy copies of the cover letter mailed to the Warren County Clerk of Courts, the complaint, notice of supersedeas bond, and praecipe.

{15} On April 25, 2005, Welsh filed with the Warren County Common Pleas Court a notice of appeal of the second WCRPC decision and instructions to serve a copy of the complaint and notice of appeal to the WCRPC. The record indicates that service was obtained on April 27, 2005. As with the first appeal, Welsh sent to the assistant prosecutor only a copy of a cover letter mailed to the Warren County Clerk of Courts and enclosed documents similar to those mailed in the previous appeal.

{16} These actions, each of which contained a combination of an administrative appeal and civil action, were consolidated in the common pleas court.

{17} The WCRPC moved to dismiss the consolidated administrative appeals, arguing the common pleas court lacked subject matter jurisdiction based on Welsh's failure to perfect the appeals pursuant to R.C. 2505.04. The WCRPC also raised in its answer to the civil actions the affirmative defense that Welsh failed to exhaust its administrative

remedies.

{¶18} Consequently, the magistrate dismissed Welsh's administrative appeals for want of jurisdiction and dismissed all but three of Welsh's causes of action for failing to exhaust its administrative remedies. Both the WCRPC and Welsh filed objections to the magistrate's decision. The common pleas court overruled the parties' objections and adopted the magistrate's decision.

{¶19} On January 31, 2008, Welsh attempted to voluntarily dismiss the remaining causes of action pursuant to Civ.R. 41(A)(1)(a), with the purpose of creating a final appealable order from which it could appeal.

{¶10} Welsh subsequently filed its first appeal to this court. The WCRPC filed a motion to dismiss the appeal for lack of subject matter jurisdiction, and this court dismissed the appeal for want of jurisdiction, holding that Welsh could not create a final appealable order from the trial court's decision simply by filing a voluntary dismissal as to the remaining claims. See *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, Warren App. No. CA2008-02-026, 2008-Ohio-1158.

{¶11} Following remand, Welsh moved the common pleas court for leave to file amended consolidated complaints, which the court granted. Welsh filed its amended complaints to eliminate the unadjudicated claims and create a final appealable order, from which Welsh filed its notice of appeal to this court. On its second appeal now before this court, Welsh asserts two assignments of error.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT'S AND MAGISTRATE'S DISTINCTION BETWEEN 'SERVICE' AND 'FILING,' FOR PURPOSES OF PERFECTING AN APPEAL UNDER R.C. 2505.04, CONTRADICTS WELL-ESTABLISHED OHIO SUPREME COURT PRECEDENT."

{¶14} Welsh argues the court erred in finding that it lacked subject matter jurisdiction

over the consolidated appeals and asserts that this court should overrule its prior decisions, as we have ignored the binding precedent established by the Ohio Supreme Court in *Dudukovich v. Loraine Metropolitan Housing Auth.* (1979), 58 Ohio St.2d 202.

{¶15} It is well-settled that the filing of a notice of appeal pursuant to R.C. 2505.04 is essential to vest a common pleas court with jurisdiction to hear an administrative appeal. See *Guysinger v. Chillicothe Bd. of Zoning Appeals* (1990), 66 Ohio App.3d 353; *Weatherholt v. Hamilton*, Butler App. No. CA2007-04-098, 2008-Ohio-1355, ¶6. Jurisdiction does not vest in the common pleas court unless and until an appeal is perfected. *Id.* R.C. 2505.04 provides in pertinent part that "an appeal is perfected when a notice of appeal is filed, *** in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved." Further, R.C. 2505.07 requires that such an appeal be perfected within 30 days of the entry of a final order by the involved commission.

{¶16} In 1979, the Ohio Supreme Court considered what would satisfy the filing requirements of R.C. 2505.04 in the context of an administrative appeal. *Dudukovich*. In *Dudukovich*, the appellee¹ sent a copy of the notice of appeal to the housing authority by certified mail and filed a copy with the Lorain County Common Pleas Court two days later. On appeal to the Ohio Supreme Court, the housing authority argued that the common pleas court lacked jurisdiction to hear the appeal because the appellee did not comply with the requirements of R.C. 2505.04. Thus, the issue before the Ohio Supreme Court was whether the appellee sufficiently complied with R.C. 2505.04 by mailing a copy of the notice of appeal to the housing authority. *Dudukovich* at 204.

{¶17} The *Dudukovich* Court held that "the act of depositing the notice in the mail, in

1. Marie Dudukovich was terminated from her employment with the housing authority. She appealed her determination to the common pleas court, and the court found in her favor. The housing authority appealed the decision, and thus, Dudukovich was labeled "appellee" for the remainder of the appeals process.

itself, does not constitute a 'filing,' at least where the notice is not received until after the expiration of the prescribed time limit. *Fulton, Supt. of Banks v. State ex rel. General Motors Corp.* (1936), 130 Ohio St. 494. Rather, '[t]he term 'filed' *** requires actual delivery ***.' *Id.*, at paragraph one of the syllabus." *Id.*

{¶18} The court further held that no particular method of delivery is prescribed by the statute, and "any method productive of certainty of accomplishment is countenanced." *Id.*, quoting *Columbus v. Upper Arlington* (C.P.1964), 94 Ohio Law Abs. 392, 397. The court then determined the housing authority did receive the mailed copy of the notice of appeal and presumed timely delivery of the notice.

{¶19} In the case sub judice, Welsh argues that pursuant to *Dudukovich*, "filing" for purposes of R.C. 2505.04 requires "actual delivery," and if no particular method of delivery is prescribed by statute, then effectuating service of a copy of the filed combination notice of appeal and civil complaint through the clerk of courts, within the required 30-day period, constitutes a perfected appeal. We disagree.

{¶20} The right to appeal is conferred by statute and can be perfected only in the manner prescribed by that statute. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 2001-Ohio-24; *Zier v. Bureau of Unemp. Comp.* (1949), 151 Ohio St. 123, paragraph one of the syllabus; *McCruter v. Board of Review, Bur. Of Emp. Serv.* (1980), 64 Ohio St.2d 277, 279; *Guysinger*, at 357; *Thrower v. City of Akron*, Summit App. No. 21061, 2002-Ohio-5943, ¶17. As stated by the Ohio Supreme Court, "[n]o one would contend that a notice of appeal need not be filed within the time fixed by statute. Compliance with a requirement that a notice of appeal shall be filed within the time specified, in order to invoke jurisdiction, is no more essential than that the notice be filed at the place designated and that it be such in content as the statute requires." *Zier* at 125 (citations omitted).

{¶21} The language of R.C. 2505.04 expressly requires that the notice of appeal be filed with the board from which Welsh appeals. R.C. 2505.04; *Dudukovich* at 204 (appeal must be filed with the board or agency from which the appeal is being taken and with the common pleas court); *Nibert v. Ohio Dept. of Rehab. & Corr.*, 84 Ohio St.3d 100, 101, 1998-Ohio-506 (R.C. 2505.04 "states that an appeal is perfected by the timely filing of the notice of appeal with the particular agency"); *Guysinger* at 357; *Chapman v. Hous. Appeals Bd.* (Aug. 13, 1997), Summit App. No. 18166.

{¶22} As the *Dudukovich* Court found, R.C. 2505.04 does not prescribe a method of delivery when filing the notice of appeal. The statute is explicit, however, in requiring that the notice be *filed* with the agency or board. As we have consistently held, a clerk's *service* of a notice of appeal upon the WCRPC is insufficient to confer jurisdiction on the common pleas court pursuant to R.C. 2505.04. *Ware v. Civ. Serv. Comm. of Hamilton* (Aug. 29, 1994), Butler App. No. CA94-01-020, at 3; *Weatherholt* at ¶7. See, also, *Kilburn v. Village of South Lebanon* (Oct. 2, 1995), Warren App. No. CA94-12-105. Directing a clerk of courts to serve a copy of a notice of appeal upon an agency is not the equivalent of filing a notice of appeal with the agency from which a party is appealing, as expressly set forth in R.C. 2505.04.

{¶23} Despite the contentions of both the dissent and Welsh that this court has ignored Ohio Supreme Court precedent set forth in *Dudukovich*, we find *Dudukovich* factually distinguishable from our prior cases and the case sub judice. In *Dudukovich*, the appellee herself mailed a copy of the notice of appeal directly to the administrative agency. In the present case, however, as in our prior cases *Weatherholt* and *Ware*, the clerk of courts caused the notice of appeal to be personally served on the administrative agency. Because the appellee in *Dudukovich* actually delivered her notice of appeal to the administrative agency, rather than having the clerk cause it to be served, these cases are distinguishable. See, also, *Genesis Outdoor Advertising, Inc. v. Deerfield Twp. Bd. of Zoning Appeal*, Portage

App. No. 2001-P-0137, 2002-Ohio-7272, at ¶19.

{¶24} Although we recognize a split among appellate districts in determining whether service of a notice of appeal on an administrative agency is sufficient to perfect an appeal pursuant to R.C. 2505.04, our holding is consistent with the majority of districts that have addressed the issue.

{¶25} The Eleventh District has consistently held that "[s]ervice is not the equivalent of filing the notice with the [administrative agency]. Filing with the proper agency is essential in order to vest the court of common pleas with jurisdiction to hear the case." *Marks v. Streetsboro Planning Comm.* (Dec. 3, 1999), Portage App. No. 98-P-0076, citing *Trickett v. Randolph Twp. Bd. of Zoning Appeals* (Aug. 18, 1995), Portage App. No. 94-P-0007. See, also, *All Erection and Crane Rental Corp. v. Newbury Twp.*, Geauga App. No. 2008-G-2862, 2009-Ohio-6705, ¶18.

{¶26} The Eleventh District analyzed its holding under *Dudukovich* in *Genesis Outdoor Advertising, Inc. v. Deerfield Twp. Bd. of Zoning Appeal*, Portage App. No. 2001-P-0137, 2002-Ohio-7272. In that case, the appellant mailed a notice of appeal to the county clerk of courts and also mailed a copy of the notice to the secretary of the board of zoning appeals at her home address, which had been used as a return address on official board correspondence. *Id.* at ¶3. On appeal, the court found that the appellant made actual delivery of the notice of appeal with the agency by a method reasonably certain to accomplish the delivery and had filed its notice of appeal in compliance with R.C. 2505.04. *Id.* at ¶15.

{¶27} The court in *Genesis* then stated that although it might appear "at first blush" that its decisions in *Trickett* and other similar cases conflict with *Dudukovich* and *Genesis*, the cases are factually distinguishable. *Id.* at ¶16. The court reasoned that in *Trickett* and the like, the clerk of courts caused the notice to be personally served on the board, and

because service is not the equivalent of filing the notice, the appellants in those cases failed to satisfy the requirements of R.C. 2505.04. In *Dudukovich* and *Genesis*, however, the parties actually delivered their notices of appeal to the administrative agency by mail. Therefore, the cases are not in conflict, as they are factually distinguishable.

{¶28} The Tenth District has also consistently held "that a clerk of court's service of a notice of appeal upon an appellee is not the filing of an appeal with an administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved." *Black-Dotson v. Village of Obetz*, Franklin App. No. 06AP-112, 2006-Ohio-5301, at ¶6, quoting R.C. 2505.04. See, also, *Voss v. Franklin Cty. Bd. of Zoning Appeals*, Franklin App. No. 08AP-531, 2008-Ohio-6913, at ¶5-6. In *Black-Dotson*, the Tenth District considered *Dudukovich*, but distinguished it from the facts before it. *Id.* at ¶5-6. The Tenth District found that unlike in *Dudukovich*, where there was evidence in the record that the agency did receive the mailed copy of the notice of appeal and the appellant did perfect the appeal, there was no evidence in the case before the court that the appellant perfected her appeal where the appellant filed her notice of appeal with the common pleas court and requested the clerk of courts mail the notice to the agency. *Id.* The Tenth District therefore held the "appellant's request that the clerk of court send the notice of appeal to appellee by certified mail is of no consequence, and does not satisfy the filing requirements of R.C. 2505.04." *Id.* at ¶6.

{¶29} In 1990, the Fourth District addressed the issue in *Guysinger*. In that case, the appellants filed their notice of appeal and complaint with the common pleas court, and the clerk of courts made service of process on the zoning board by certified mail. *Id.* at 356. As in the case sub judice, it was undisputed that the board received the served copies within the time limit prescribed in R.C. 2505.07.

{¶30} The appellants in *Guysinger* argued on appeal that service of the summons and notice of appeal is the functional equivalent of filing a notice of appeal with the zoning board.

Id. The Fourth District held that the pleading, filed by the appellants, was not filed in the place designated by R.C. 2505.04 and therefore could not be considered as a notice of appeal sufficient to satisfy the jurisdictional prerequisite of the statute. Id. at 357.

{¶31} The Third and Ninth Districts have also held that an appeal is not perfected pursuant to R.C. 2505.04 through a clerk of courts' service on the administrative agency. See *Jacobs v. Marion Civ. Serv. Comm.* (1985) 27 Ohio App.3d 194; *Thrower* at ¶18 ("Mere notification to the Board that a notice of appeal has been filed in the court [is insufficient to vest jurisdiction over an administrative appeal]. The statute explicitly requires filing with the agency itself"); *Jura v. Hudson*, Summit App. No. Civ.A. 22135, 2004-Ohio-6743, ¶6-7.

{¶32} Although the Fifth District has not specifically addressed whether an administrative appeal is perfected through a clerk of courts' service of a notice of appeal on an agency, it has cited *Guysinger* for the proposition that a party must file a notice of appeal with the agency itself in order to vest the common pleas court with jurisdiction. *Hagan v. Marlboro Twp. Bd. of Zoning Appeals* (Jan. 29, 1996), Stark App. No. 95 CA 0086, 1996 WL 74009, at *1. The court added that "failure to properly file a notice of appeal with the agency has been held to divest the trial court of jurisdiction and prevent an appellant's claim from proceeding." Id., citing *Guysinger* at 357.

{¶33} The dissent claims this court and the appellate districts with whom we agree rely upon an "erroneous reading" of R.C. 2505.04 "due to [our] failure to follow the mandates of *Dudukovich*." We, however, agree with the holding in the Ohio Supreme Court decision: R.C. 2505.04 requires that written notice be filed with the agency or board from which the appeal is being taken, in order for the appeal to be perfected. *Dudukovich* at 204. As thoroughly discussed, our decision and the decisions upon which we rely are not in conflict with the mandates set forth in *Dudukovich*, as the cases are factually distinguishable.

{¶34} Moreover, we decline to extend *Dudukovich* to permit parties appealing

administrative decisions to disregard the explicit requirements prescribed in R.C. 2505.04. Not only would such an extension ignore the Ohio Supreme Court mandate that an appeal can be perfected only in the manner prescribed by that statute, but the extension would ignore 16 years of established court precedent that has created stability and predictability when filing an administrative appeal in the Twelfth District. See *Midwest Fireworks*, 2001-Ohio-24; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶1.

{¶35} The precedent established in this court over the last 16 years to perfect an administrative appeal pursuant to R.C. 2505.04 was not followed. The dissent asserts this court should abandon its prior decisions because of a disagreement with our interpretation of R.C. 2505.04 after *Dudukovich*. Neither Welsh nor the dissent, however, has analyzed such a departure from the doctrine of stare decisis under the standard outlined by the Ohio Supreme Court in *Galatis*.

{¶36} As the Ohio Supreme Court explained, "[t]he doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." *Galatis* at ¶43 (citations omitted). The doctrine is "of fundamental importance to the rule of law." *Id.* at ¶43-44. Indeed, the United States Supreme Court has long revered the doctrine. See *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 160 S.Ct. 444; *Vasquez v. Hillery* (1986), 474 U.S. 254, 265, 266, 106 S.Ct. 617 ("[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact"); *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U.S. 429, 652, 15 S.Ct. 673 (White, J., dissenting) ("The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members.

Break down this belief in judicial continuity [***] to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, [will leave our Constitution bereft of value and it will] become a most dangerous instrument to the rights and liberties of the people"). Thus, the doctrine of stare decisis will not be abandoned without special justification. *Id.* at 44.

{¶37} The dissent cites to a recent Ohio Supreme Court decision involving the admission of evidence in a criminal case to support its theory that the doctrine of stare decisis does not apply to this case. *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576. The court in *Silverman* found that "stare decisis plays a reduced role" in matters involving "an evidentiary rule." *Id.* at ¶33. This case, however, involves a statute prescribing the method a party must follow in perfecting its appeal.

{¶38} "Considerations in favor of stare decisis are at their acme where reliance interests are involved (internal quotations omitted)." *Id.* at ¶31. "Individuals conducting their affairs must be able to rely on the law's stability." *Id.* A party should be able to rely upon consistent precedent for guidance in organizing and filing an appeal with a court. It goes without saying that stability and consistency are of fundamental importance in interpreting rules prescribing methods of access to courts of law. Therefore, we find *Silverman* inapplicable to this case.

{¶39} This court will adhere to prior precedent unless "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create undue hardship for those who have relied upon it." *Id.* at ¶48; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, fn. 7.

{¶40} The first element we consider is whether *Ware* and *Weatherholt* were wrongly decided at the time this court decided both cases: *Ware* in 1994 and *Weatherholt* in 2008.

Our discussion above demonstrates why the cases were not wrongly decided, and we find no change in circumstances that would not justify continued adherence to those decisions. The language of R.C. 2505.04 is clear: a party must file a notice of appeal with the agency from which it is appealing. We will not modify the language of the statute to insert a phrase permitting a party to perfect an administrative appeal by filing a notice with the common pleas court and causing a copy to be served upon the agency through a clerk of courts. See *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97.

{¶41} Secondly, we consider whether our decisions defy practical workability. *Galatis*, at ¶48. Neither Welsh nor the dissent has pointed to anything that would suggest our prior decisions defy practical workability. There is no indication that our former cases have caused chaos in the lower courts or was created "massive and widespread confusion." *Id.* at ¶50. There is also no indication that districts with which our cases are consistent have experienced such confusion.

{¶42} Finally, we consider whether abandoning the precedent would create an undue hardship for those who have relied upon it. *Id.* at ¶48. Litigants and lower courts within our district have a right to rely upon consistent case law and should not be subjected to arbitrary administration of justice. See *id.* at ¶43. Moreover, they are bound by our decisions until the Ohio Supreme Court overrules them. "At its core, stare decisis allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them." *James B. Beam Distilling Co. v. Georgia* (1991), 501 U.S. 529, 551-552; 111 S.Ct. 2439 (O'Connor, J. dissenting).

{¶43} Notably, the appellant in *Weatherholt* attempted to perfect her appeal through service of process in 2006, one year after Welsh. The dissent fails to recognize the undue hardship and unfairness resulting from a departure from our prior decisions. It would create confusion among those litigants and courts who have relied upon our long-standing decision

in *Ware*, which was reaffirmed less than two years ago in *Weatherholt*.

{¶144} It is clear that this court should not abandon the principles of stare decisis in this case. The decisions upon which we rely were not wrongly decided, and any departure from established precedent would create undue hardship.

{¶145} Accordingly, we find unpersuasive Welsh's argument extending *Dudukovich* to permit a request to serve the administrative agency with a copy of a notice of appeal as satisfaction of the explicit requirements set forth in R.C. 2505.04.

{¶146} Within its first assignment of error, Welsh also argues that it perfected its appeals by mailing copies of the cover letter, an unfiled complaint, an unfiled notice of supersedeas bond, and an unfiled praecipe to the WCRPC's chief legal counsel within the required time period. Welsh asserts that the relationship between counsel and the WCRPC was sufficient to expect that delivery to counsel would put the WCRPC on notice of the appeal.

{¶147} Sending courtesy copies of documents to the Warren County Assistant Prosecutor does not constitute filing for purposes of R.C. 2505.04. *Patrick Media Group, Inc. v. Cleveland Bd. of Zoning Appeals* (1988), 55 Ohio App.3d 124. See, also, *Kilburn v. South Lebanon* (Oct. 2, 1995), Warren App. No. CA94-12-105. As stated, R.C. 2505.04 requires Welsh to file a notice of appeal with the WCRPC. To the extent any ambiguity exists in R.C. 2505.04, R.C. 2505.03 directs us to apply the appellate rules and to treat the board as a trial court. In that situation, clearly, an appellant could not appeal from a trial court to this court by mailing the notice to the prosecutor who serves as that court's counsel. *Patrick Media Group* at 125.

{¶148} Therefore, service on the adverse counsel, despite a close relationship between counsel and the agency, is insufficient to satisfy R.C. 2505.04. *Id.* See, also, *Bd. of Trustees Union Twp. v. Bd. of Zoning App. Union Twp.* (Sept. 23, 1983), Licking App. No.

CA-2965 (court was without subject matter jurisdiction where appellant board of trustees served a copy of a notice of appeal on the Licking County prosecutor but failed to file a notice with its own board of zoning appeals); *Guy v. City of Steubenville* (Jan. 15, 1998), Jefferson App. No. 97-JE-22, certiorari denied, 81 Ohio St.3d 1522 (holding that where the notice of appeal was mistakenly filed with the city's law director instead of the Steubenville Civil Service Commission appellant failed to timely perfect his appeal, despite the fact that the city law director and the civil service commission shared a secretary and the same address); *Warren-Oxford Ltd. Partnership v. Warren Cty. Bd. of Commrs.* (Feb. 27, 1989), Warren App. No. CA88-08-059, certiorari denied, 44 Ohio St.3d 706 (holding that "'filing' a paper or document means actually delivering it to the official charged with responsibility for receiving or taking control of it"); *Blasko v. Ohio State Bd. of Pharmacy*, 143 Ohio App.3d 191, 2001-Ohio-3270.

{149} Accordingly, Welsh has failed to employ the proper procedural channels to perfect its appeal, as prescribed in R.C. 2505.04. Welsh's first assignment of error is overruled.

{150} Assignment of Error No. 2:

{151} "THE TRIAL COURT AND MAGISTRATE ERRED TO THE PREJUDICE OF APPELLANTS BY DISMISSING APPELLANTS' COROLLARY CONSTITUTIONAL CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES."

{152} Welsh argues the trial court erred in dismissing its constitutional claims against the WCRPC for failing to exhaust its administrative remedies. Welsh asserts that because it is challenging the constitutionality of various provisions of the Warren County Subdivision Regulations, it is not required to first exhaust its administrative remedies.

{153} Specifically, counts 8 through 10 of Welsh's first complaint and counts 7 through 9 of its second complaint seek a declaratory determination that certain provisions of

the regulations are unconstitutional as applied to Welsh. Its remaining claims, claims for regulatory taking, equal protection, and a violation of Section 1982, Title 42, U.S.Code, all stem from the alleged unconstitutionality of the subdivision regulations.

{¶154} Three elements are necessary to obtain a declarative judgment as an alternative to other remedies: (1) a real controversy exists between adverse parties; (2) which is justiciable in character; (3) and speedy relief is necessary to the preservation of rights that may be otherwise impaired or lost. *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 149.

{¶155} The WCRPC raised in its answer, however, the affirmative defense that Welsh failed to exhaust its administrative remedies and is therefore barred from seeking declaratory relief. Prior to instituting a declaratory judgment action to determine the validity of the subdivision regulations, a party must ordinarily exhaust its administrative remedies. *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12, 17; *BP Communications Alaska, Inc. v. Gen. Collection Agency* (2000), 136 Ohio App.3d 807, 813, discretionary appeal not allowed, 89 Ohio St.3d 1464.

{¶156} Two exceptions to this rule exist, however. *Id.* First, exhaustion is not required if there is no available remedy that can provide the relief sought or if resorting to administrative remedies would be wholly futile. Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive. *Karches* at 17; *BP Communications* at 813.

{¶157} The first exception applies when it would be impracticable to pursue an administrative remedy because the administrative entity lacks the authority to render relief. *Id.* For instance, an administrative agency is without jurisdiction to determine the constitutional validity of a statute. *Jones v. Village of Chagrin Falls*, 77 Ohio St.3d 456, 460-461, 1997-Ohio-253. Therefore, it would be futile to force a party to exhaust its

administrative appeals to an agency that can afford no meaningful relief. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 115.

{¶158} It is an entirely different matter, however, to assert that a party's actions were unconstitutional. *BP Communications* at 814. That allegation does not question the validity of the statute or law, but rather, it questions whether the party's actions were in accordance with the law. *Id.*

{¶159} In *Karches*, the Ohio Supreme Court held that although the exhaustion of administrative remedies is usually required to determine the validity of a zoning ordinance as applied to a specific parcel of property, the property owners demonstrated through evidence of repeated applications and denials and evidence of a petition to change the city's zoning ordinance that its attempts were futile. *Id.* at 16-17. The Ohio Supreme Court determined that the property owners were therefore allowed to pursue their action for declaratory judgment, despite that they had not exhausted their administrative remedies, because they met the first exception to the rule. *Id.*

{¶160} In the case sub judice, Welsh is challenging the constitutionality of the subdivision regulations as applied to its specific proposed development plans. Welsh, however, has failed to demonstrate why this court should apply either exception to the general rule that it must first exhaust its administrative remedies. Had Welsh properly perfected its appeal to the common pleas court, it would have had an adequate administrative remedy available that could have provided it with the appropriate relief sought. See *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, 273. We find the trial court did not err in dismissing Welsh's claims for failure to exhaust its administrative remedies. Welsh's second assignment of error is overruled.

{¶161} Judgment affirmed.

POWELL, J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶62} While I recognize that this district has followed this precedent since 1994, I believe this court's decisions are an improper interpretation of R.C. 2505.04 and disregard clear Ohio Supreme Court precedent. Filing a notice of appeal with the court and service by the clerk of courts of a copy of the filed notice within the 30-day time limit constitutes a perfected appeal under R.C. 2505.04.

{¶63} This appellate district originally adopted the precedent followed by the majority in the instant appeal in *Ware v. Civil Service Comm. of Hamilton* (Aug. 29, 1994), Butler App. No. CA94-01-020, 1994 WL 462192. Citing *Guysinger v. Board of Zoning Appeals of City of Chillicothe* (1990), 66 Ohio App.3d 353, this court found that service of the notice of appeal upon the agency by the court clerk does not satisfy R.C. 2505.04.

{¶64} *Guysinger* was not adopted without criticism. Writing separately, Judge Koehler questioned the *Ware* majority. "I am not as certain as the majority that the notice of appeal in this cause was not 'filed' with the commission. The commission received notice of appeal within the time constraints established by statute. Appellant could have served the notice of appeal on the commission personally, by counsel, by his wife, or by any other agent he might have designated. The clerk of courts could be considered appellant's agent. A filing stamp indicating the notice was also filed in the common pleas court would not prevent the notice of appeal from being sufficiently *filed* with the commission. No matter who presented the notice of appeal to the commission, the place designated by statute, and no matter how many other places it may have been filed before notice was given to the commission, it served its statutory purpose." 1994 WL 462192 at *1-2. (Emphasis sic.)

{¶65} As the majority in the instant appeal indicates, the Ohio Supreme Court has issued one decision relating to the process of perfecting an administrative appeal under R.C.

2505.04, *Dudukovich v. Lorain Metropolitan Housing Auth.* (1979), 58 Ohio St.2d 202. Certainly, in considering the perfection of an administrative appeal pursuant to R.C. 2505.04, any discussion should begin with *Dudukovich*. Yet, in *Guysinger*, the Fourth District Court of Appeals never considered or even mentioned the precedent. Rather, the court makes its own interpretation of the statute, concluding that filing a notice of appeal with the court and serving a copy to the agency does not satisfy R.C. 2505.04. *Guysinger* at 357. Whether the Fourth District's omission was deliberate or unintentional is ambiguous since *Guysinger* contains no reference or citation to *Dudukovich*.

{¶166} The majority mentions four additional appellate districts similarly hold that an appeal is not perfected pursuant to R.C. 2505.04 through service by the clerk of court on the administrative agency. Like this court, each of these districts adopted *Guysinger* as the primary authority for this position with no mention of *Dudukovich*. See *Andolsek v. City of Willoughby Hills Bd. of Zoning Appeals* (Dec. 10, 1993), Lake App. No. 93-L-050, 1993 WL 548046; *Recourse Recovery Systems of Bluffton v. Village Zoning and Bd. of Appeals* (Apr. 24, 1996), Allen App. No. 1-95-77, 1996 WL 197446; *Chapman v. Housing Appeals Bd.* (Aug. 13, 1997), Summit App. No. 18166, 1997 WL 537651; *Voss v. Franklin Cty. Bd. of Zoning Appeals*, Franklin App. No. 08AP-531, 2008-Ohio-6913.

{¶167} Indeed, the subsequent decisions issued by this court similarly contained no reference to the standard espoused in *Dudukovich*. See *Kilburn v. Village of South Lebanon* (Oct. 2, 1995), Warren App. No. CA94-12-105, 1995 WL 577687; *Loveland Park Baptist Church v. Deerfield Twp.* (Dec. 26, 2006), Warren App. No. CA2000-03-032, 2000 WL 1875823; *Weatherholt v. Hamilton*, Butler App. No. CA2007-04-098, 2008-Ohio-1355.

{¶168} In *Dudukovich*, a notice of appeal was sent via certified mail and received by the agency within the statutorily-mandated time period. 58 Ohio St.2d at 204. On appeal to the Supreme Court, the agency claimed that the appellee had not sufficiently complied with

R.C. 2505.04 by mailing a copy of the notice. The court stated, "[t]he term 'filed' *** requires actual delivery ***." *Id.*, citing *Fulton, Supt. of Banks v. General Motors Corp.* (1936), 130 Ohio St. 494, paragraph one of the syllabus. In *Dudukovich*, the Ohio Supreme Court clearly explained the filing requirement of R.C. 2505.04; instructing, "no particular method of delivery is prescribed by the statute. *** '[A]ny method productive of certainty of accomplishment is countenanced.' Having considered appellee's method of service, we find that simply 'because the manner of delivery is unusual does not make it illegal.'" *Id.* at 204. (Internal citations omitted.)

{¶69} Ultimately, the court concluded that the appellee's use of certified mail was sufficient under R.C. 2505.04. *Id.* at 205. "Here a copy of the notice of appeal was sent by certified mail, to a destination within the same city, five days prior to the expiration of the statutory time limit. * * * [A] presumption of timely delivery controls; thus the Court of Common Pleas correctly assumed jurisdiction in this cause." *Id.*

{¶70} The *Guysinger* decision, which provides the basis for this district's precedent, relies upon an erroneous, unsupported reading of the statute due to its failure to follow the definition and analysis provided in *Dudukovich*. Neither the majority in this case, nor the districts that follow *Guysinger*, offer any reasoning to explain why service by the clerk upon the agency is not a "method productive of certainty." See *Hanson v. City of Shaker Heights*, 152 Ohio App.3d 1, 2003-Ohio-749, ¶12.

{¶71} The majority wishes to factually distinguish the instant appeal from *Dudukovich* based upon the differing method employed by Welsh to file its notice of appeal. In support, the majority submits a laundry list of subsequent decisions from those districts that follow the *Guysinger* logic which similarly strain to distinguish *Dudukovich* factually. Yet, *Dudukovich* states that "any method" is sufficient as long as it is "productive of certainty of accomplishment." *Id.* at 204.

{¶72} If certified mail is a sufficient form of delivery, as it was in *Dudukovich*, certainly service by the court clerk is an adequate method to satisfy the requirements of R.C. 2505.04. The method is not so unusual that delivery would be speculative. Like certified mail, service by the clerk is a dependable method which the legal system relies upon daily to effectuate delivery. Service by the clerk satisfies the Supreme Court's definition for "filing."

{¶73} R.C. 119.12 contains the procedure for perfecting an appeal from a state government agency. The provision provides, in pertinent part, "[a]ny party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of the notice of appeal shall also be filed by the appellant with the court."

{¶74} Distinct differences exist between the administrative procedures to perfect an appeal prescribed in R.C. 119.12 from R.C. 2505.04.

{¶75} R.C. 2505.04 states, "[a]n appeal is perfected when a written notice of appeal is filed * * * in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved."

{¶76} R.C. 119.12 places distinct requirements when filing a notice of appeal to a state agency. The provision requires the notice of appeal to be filed with the agency and, thereafter, a copy of the notice filed with court. See *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, ¶¶26-33. The *Guysinger* decision and its progeny additionally wish to inject a R.C. 119.21 construction into R.C. 2505.04. However, R.C. 2505.04 has omitted any obligation specifying the R.C. 119.21 strict chronological filing requirements.

{¶77} By neglecting to include such requirements, the legislature does not believe these concerns are important or necessary. Rather, the legislature is only interested in requiring an appellant to provide the agency with notice of the appeal within the statutory time period. Once the agency receives a timely notice of appeal properly filed under the

Dudukovich standard, the appeal is perfected. If the legislature wished to establish strict filing requirements in R.C. 2505.04, it would have included language similar to R.C. 119.12. See *Patton v. Deimer* (1988), 35 Ohio St.3d 68, 70; *Ohio Savings & Trust Co. v. Schneider* (1927), 25 Ohio App. 259, 262.

{¶78} Allowing perfection of an appeal when notice is served by the clerk, as authorized by the Second, Sixth, Fifth, and Eighth Appellate Districts, is the more well-reasoned approach and comports with the Supreme Court's holding in *Dudukovich*.

{¶79} When the right to appeal is conferred by statute, such as an administrative appeal, it can be perfected only in the mode prescribed by statute. *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123, paragraph one of the syllabus. Despite the majority's contention, the language of the R.C. 2505.04 only requires that a notice of appeal be timely filed with the agency to be properly perfected. Form of delivery or order of receipt by the agency are irrelevant as long as the notice is sent using a "method productive of certainty of accomplishment" and that the "actual delivery" is accomplished within the statutory time limit. *Dudukovich, supra*. Moreover, if one cannot perfect an appeal without strictly adhering to statutory requirements, courts should not add conditions that are not strictly required by the statute.

{¶80} "[T]he primary objective of a notice of appeal is to make it known that an appeal is being taken." *Richards v. Industrial Comm.* (1955), 163 Ohio St. 439, 446. Similarly, "the purpose of the notice of appeal is 'to apprise the opposite party of the taking of an appeal.'" *Id.* at 447, citing *Capital Loan & Sav. Co. v. Biery* (1938), 134 Ohio St. 333, 339.

{¶81} "The Supreme Court has consistently held that the issue of service is one of due process." *McCormick v. Wellston Bd. Of Zoning Adjustment* (Oct. 15, 1982), Jackson App. No. 463, 1982 WL 3561, *2. "Due process requires that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the

action and afford them an opportunity to present their objections." *In re Foreclosure of Liens for Delinquent Taxes* (1980), 62 Ohio St.2d 333, paragraph one of the syllabus. "The issue of service is a shield to protect due process rights; it is not a sword to cut down legitimate appellants who seek redress." *McCormick* at *2. "[Notice] procedures should be liberally construed so that cases are determined on their merits and notice is sufficient if it substantially informs all parties of the appeal." *Hagan v. Marlboro Twp. Bd. Of Zoning Appeals* (Jan. 29, 1996), Stark App. No. 95 CA 0086, 1996 WL 74009, *2, citing *Potters Medical Center, Inc. v. Ohio Dept. of Ins.* (1989), 62 Ohio App.3d 476, 481.

{¶82} Timely service of the notice of appeal by the clerk of courts undoubtedly satisfies due process. The *Guysinger* line of cases are merely an example of courts favoring form over substance and denies litigants based upon superfluous technicalities. Receipt of a timely notice of appeal, whether hand-delivered, sent via certified mail, or served by the clerk of courts, apprises the agency of the pendency of an appeal.

{¶83} In *Hanson v. City of Shaker Heights*, the Eighth District Court of Appeals succinctly criticized the *Guysinger* reasoning. "Although procedural requirements are a vital component of a properly functioning judicial system, it is ridiculous to base a dismissal upon the petty gripes raised here. Moreover, interpreting R.C. 2505.04 so aggressively against the right of appeal would be patently unfair * * *. For example, although R.C. 2505.04 makes no statement concerning the filing of a notice with the common pleas court, *Dudukovich* ruled that the appellant must file a notice with the court of common pleas in order to perfect the appeal. Because the appellant continues to have a duty to file the appeal with both the administrative body and the common pleas court, the appellee should not be allowed to quibble over which must be filed first." 2003-Ohio-749 at ¶11.

{¶84} Similarly, in *Evans by Evans v. Greenview Local School Dist.* (Jan. 4, 1989), Greene App. No. 88 CA 40, 1989 WL 569, four suspended high school students filed an

appeal from a school board decision by filing their notice of appeal in the common pleas court. *Id.* at *1. The clerk of courts served a notice of appeal on the school board via certified mail. *Id.* The Second District found that this procedure satisfied R.C. 2505.04 under the mandates of *Dudukovich*. *Id.* at *2. "Having reviewed the procedure followed by the students, we conclude in light of *Dudukovich* that notice was timely and properly given to the School District. Since a copy of the notice of appeal was actually delivered to the School District, the notice of appeal was 'filed' with the School District." *Id.*

{¶85} *Evans* clearly demonstrates that whether the appellant or the clerk is the source for sending the certified mail is of no consequence as long as the notice is actually delivered within the statutory time period.

{¶86} The majority claims to agree with the *Dudukovich* decision, but ignores the analysis provided by the Supreme Court in that case. Instead, the majority's analysis injects a rigid definition of "filed," concluding that "service" is not a satisfactory method to satisfy the filing requirement of R.C. 2505.04.

{¶87} Yet, the Supreme Court has provided a definition for determining what methods of delivery satisfy the R.C. 2505.04 filing requirement: "[N]o particular method of delivery is prescribed by the statute. * * * '[A]ny method productive of certainty of accomplishment is countenanced.' * * * [S]imply 'because the manner of delivery is unusual does not make it illegal.'" 58 Ohio St.2d at 204. The majority in this case provides no explanation for why hand-delivery or certified mail sent by the appellant, as in *Dudukovich*, are reasonably certain methods of delivery, while service by the clerk is not.

{¶88} In this case, Welsh filed its respective notices of appeal with the Warren County Court of Common Pleas with instructions to serve a copy of the notice and complaint to the WCRPC. The WCRPC acknowledges that it received the notices within the statutory time limit. The receipt of the notices by the agency properly perfected Welsh's appeal under R.C.

2505.04. As a result, I would sustain Welsh's first assignment of error.

{¶189} Moreover, the majority criticizes my decision to deviate from stare decisis of this court, citing an inapplicable standard. The majority engages in a lengthy analysis of the factors espoused in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5489.

{¶190} I recognize the importance of stare decisis in our legal system. See *Welch v. Texas Dept. of Highways and Public Transp.* (1987), 483 U.S. 468, 494-495, 107 S.Ct. 2941. However, recently in *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, the Ohio Supreme Court stated, "[a]lthough the principle of 'stare decisis is the bedrock of the American judicial system,' *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, N.E.2d 124, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, it is one 'of policy and not a mechanical formula of adherence to the latest decision.' *Payne v. Tennessee* (1991), 501 U.S. 808, 828, 111 S.Ct. 2597, quoting *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444." *Id.* at ¶31.

{¶191} The doctrine of stare decisis is not to be followed blindly. *City of Cleveland v. Ryan* (1958), 106 Ohio App. 110, 112. Nor should the rule be used as the sole reason for perpetuation of a rule of law which has proved unsound and unjust. *Carter-Jones Lumber Co. v. Eblen* (1958), 167 Ohio St. 189, 197.

{¶192} "Considerations in favor of stare decisis are at their acme * * * where reliance interests are involved." *Id.* at ¶32, citing *Payne*, 501 U.S. at 828. "Individuals conducting their affairs must be able to rely on the law's stability." *Id.*, citing *United States ex rel. Fong Foo v. Shaughnessy* (C.A.2, 1955), 234 F.2d 715, 719. As a result, the court concluded that *Galatis* only applies to matters of substantive law. *Id.*

{¶193} The court further explained, "the opposite is true in cases * * * involving procedural and evidentiary rules, * * * because a procedural or evidentiary rule 'does not serve as a guide to lawful behavior.'" *Id.*, citing *Payne*, 501 U.S. at 828; and *United States v.*

Gaudin (1995), 515 U.S. 506, 521, 115 S.Ct. 2310. "In fact, 'as to such rules, stare decisis has relatively little vigor.'" *Shaughnessy*, 234 F.2d at 719.

{¶94} As support for the *Silverman* decision, the Ohio Supreme Court relied upon two decisions of the United States Supreme Court where earlier precedent relating to a rule of procedure was overturned. In *Hohn v. United States* (1998), 524 U.S. 236, 118 S.Ct. 1969, the United States Supreme Court revisited an earlier decision concerning the court's statutory certiorari jurisdiction to review denials of certificates of probable cause. *Id.* at 251. The court overruled *House v. Mayo* (1945), 324 U.S. 42, 65 S.Ct. 517, concluding that the earlier decision was erroneous and should no longer be followed. *Hohn* at 251. Similarly, in *Pearson v. Callahan* (2009), ___ U.S. ___, 129 S.Ct. 808, 818, the court unanimously abandoned the procedural rule it declared in *Saucier v. Katz* (2001), 533 U.S. 194, 121 S.Ct. 2151.

{¶95} Like *Hohn* and *Pearson*, the rule at issue in this case is purely procedural. The *Galafis* rule, which applies only to matters of substantive law, clearly has no application to the case at bar. *Silverman* at ¶31. As a result, stare decisis, as used by the majority, does not require this court to continue with this precedent. As the Supreme Court reasoned in *Silverman* regarding their deviation from stare decisis of an evidentiary rule, no individual has a vested right in the way this court interprets R.C. 2505.04. *Id.*

{¶96} Having said all of the above, I submit that the foregoing dissent follows the directive and stare decisis set by the Ohio Supreme Court, while the majority would continue to perpetuate a rule which has failed to incorporate the Supreme Court's mandates in *Dudukovich*.

{¶97} Finally, the majority opines that the position taken by the dissent fails to recognize the undue hardship and unfairness that would result from a departure of the majority's prior decision. However, what hardships would occur when a party is allowed a

forum to present its appeal instead of being summarily denied a chance to obtain recourse based upon an erroneous law? Welsh should not be punished for following the directive of the Supreme Court.

{198} Based upon the foregoing analysis, I respectfully dissent to the majority's conclusion that Welsh failed perfect his administrative appeal by serving a notice of appeal to the WCRPC through service by the clerk. I concur with the majority's analysis and conclusion that delivery of a courtesy copy to the Warren County Assistant Prosecutor does not satisfy the filing requirements of R.C. 2505.04. I would overrule appellant's second assignment of error as moot.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

Exhibit C

[Cite as *Price v. Margareta Twp. Bd. of Zoning Appeals*, 2003-Ohio-221.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

David Price

Court of Appeals No. E-02-029

Appellant

Trial Court No. 2000-CV-432

Margaretta Township
Board of Zoning Appeals

DECISION AND JUDGMENT ENTRY

Appellee

Decided: January 17, 2003

* * * * *

Duffield E. Milkie, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney,
and Terry R. Griffith, for appellee.

* * * * *

GLASSER, J.

{¶1} This is an accelerated appeal from an order of the Erie County Court of Common Pleas, dismissing a zoning appeal for want of jurisdiction.

{¶2} Appellant, David Price, is successor in interest to property in Margaretta Township in Erie County. On June 24, 2000, appellee Margaretta Township Board of Zoning Appeals denied a conditional use permit for this property. On July 19, 2000, appellant appealed this denial to the Erie County Common Pleas Court and requested the clerk of courts to advise appellee of this appeal. It is uncontested that appellee received a copy of the

notice of appeal from the clerk via certified mail on July 22, 2000. On March 14, 2002, appellee moved to dismiss the appeal on the ground that appellant failed to file his notice of appeal with appellee and, therefore, the common pleas court was never vested with jurisdiction pursuant to R.C. 2505.04.

{¶3} When the common pleas court dismissed appellant's appeal for want of jurisdiction, he filed this appeal.

{¶4} In a single assignment of error, appellant contends that the clerk of courts' service on appellee was sufficient to satisfy R.C. 2505.04 or, alternatively, the jurisdictional question was waived by appellee filing transcripts and other evidence with the trial court.

{¶5} The filing of a notice of appeal is jurisdictional. *Roseman v. Village of Reminderville* (1984), 14 Ohio App.3d 124, 126. A court that lacks subject-matter jurisdiction lacks the power to hear the case; therefore, the issue of whether subject-matter jurisdiction has been established may be raised at any time.

{¶6} *State ex rel. Tubbs-Jones v. Suster* (1998), 84 Ohio St.3d 70, 78. Consequently, there can be no waiver of subject-matter jurisdiction.

{¶7} Whether subject-matter jurisdiction exists is a question of law and is reviewed de novo. *Burns v. Daily* (1996), 114 Ohio App.3d 693, 701.

{¶8} In material part, R.C. 2505.04 provides:

{¶9} "An appeal is perfected when a written notice of appeal is filed, *** in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. *** After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional."

{¶10} In *Dudukovich v. Lorain Metro. Hous. Author.* (1979), 58 Ohio St.2d 202, 204, the Supreme Court of Ohio explained what is necessary to perfect an appeal from an administrative decision:

{¶11} "Although R.C. 2505.04 is, admittedly, not explicit on this point, it appears to require that written notice be filed, within the time limit prescribed *** with the agency or board from which the appeal is being taken, in order for the appeal to be perfected. As a practical matter, such notice must also be filed, within the same time limit, with the Court of Common Pleas, in order for it to assume jurisdiction. ***"

{¶12} The parties agree that in this matter the applicable prescribed time for an appeal to be perfected is 30 days from the date of the order appealed from. Similarly, it is undisputed that appellee received by certified mail from the clerk of courts a copy of appellant's notice of appeal within 30 days of appellee's denial of the use permit. At issue is whether, as the common pleas court concluded in this matter, R.C. 2505.04 requires an administrative appellant to separately and personally send a notice of appeal to

the administrative agency or whether timely notice delivered through a court clerk is sufficient in order to perfect an appeal.

{¶13} The common pleas court in this case relied principally on *Guysinger v. Chillicothe Bd. of Zoning Appeals* (1990), 66 Ohio App.3d 353. In *Guysinger*, a contiguous property owner attempted to appeal an award of a zoning variance by initiating an administrative appeal with the Ross County Court of Common Pleas. Appellant did not directly serve the zoning board with a notice of appeal, but relied upon the court clerk to send the board a copy of his appeal notice with his complaint. The common pleas court found this was insufficient notice to establish jurisdiction pursuant to R.C. 2505.04. The appeals court affirmed, holding that a notice sent as part of a summons and complaint was not filed "in the place designated" by the statute. *Id.* at 357.

{¶14} In contradistinction to *Guysinger*, appellant directs our attention to *B.P. Exploration & Oil v. Oakwood Planning Comm.*, Cuyahoga App. No. 80510, 2002-Ohio-4163. *B.P. Exploration* holds that the purpose of the filing requirement is to give notice of the appeal and that any method of service that provides notice of the appeal is sufficient to satisfy the statutory requirement. *Id.* at paragraph 13.

{¶15} *B.P. Exploration* is not directly on point. The issue there was whether hand delivery of a notice of appeal was sufficient to satisfy the statute. Moreover, appellee argues that

the *B.P. Exploration* case should be less persuasive because it is unpublished.

{¶16} Any perceived distinction in the persuasiveness of published and unpublished cases has been eliminated. Rep.R. 4(a) (amended 5-1-02). Moreover, since neither of the cases at issue are from this district, their influence on this court and the common pleas court is, at most, persuasive. Additionally, while *B.P. Exploration* is distinguishable, the case cites two appellate cases which appear to be on all fours with the issue at hand.

{¶17} In both *Evans v. Greeneview Local Sch. Dist.* (Jan. 4, 1989), Greene App. No. 88CA40, and *McCormick v. Wellston Bd. of Zoning Adjustment* (Oct. 15, 1982), Jackson App. No. 463, administrative appellants filed appeal notices with courts whose clerks then timely sent copies of the notices to the respective administrative agencies via certified mail. In *Evans*, the appeals court affirmed a common pleas court finding that this was sufficient to satisfy R.C. 2505.04. In *McCormick*, the appeals court reversed a common pleas court determination that such notice was insufficient.

{¶18} We note that both *B.P. Exploration* and *Evans* reference language from *Dudukovich*, which we find enlightening as well. *Dudukovich* filed his notice of appeal with the common pleas court clerk and himself mailed a copy via certified mail to the administrative agency. In that matter, the Supreme Court stated, at 204:

E.

{¶19} "*** It is established that the act of depositing the notice in the mail, in itself, does not constitute a 'filing,' at least where the notice is not received until after the expiration of the prescribed time limit. *Fulton, Supt. of Banks, v. State, ex rel. General Motors Corp.* (1936), 130 Ohio St. 494. Rather, '[t]he term "filed" *** requires actual delivery ***.' *Id.*, at paragraph one of the syllabus. However, no particular method of delivery is prescribed by the statute. Instead, as was aptly stated in *Columbus v. Upper Arlington* (1964), 94 Ohio Law Abs. 392, 397, 201 N.E.2d 305, 'any method productive of certainty of accomplishment is countenanced.' Having considered appellee's method of service, we find that simply '[b]ecause the manner of delivery is unusual does not make it illegal.' *Id.*"

{¶20} We concur with the view stated in *Evans and McCormick* that R.C. 2505.04, as interpreted by *Dudukovich*, imposes no prohibition of a timely copy of a notice of appeal from a clerk of courts to perfect an administrative appeal. Accordingly, appellant's sole assignment of error is found well-taken.

{¶21} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. Costs to appellee.

JUDGMENT REVERSED.

Peter M. Handwork, P.J.

JUDGE

Richard W. Knepper, J.

George M. Glasser, J.
CONCUR.

JUDGE

JUDGE

Judge George M. Glasser, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

Exhibit D

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
(Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

Only the Westlaw citation is currently available.

Thomas M. Rose, Assistant Prosecuting Attorney, Xenia, for defendant-appellant.

CHECK OHIO SUPREME COURT
RULES FOR REPORTING OF OPINIONS
AND WEIGHT OF LEGAL AUTHORITY.

OPINION

WOLFF, Judge.

Court of Appeals of Ohio, Second District,
Greene County.

Daniel EVANS, a minor by John Evans, his
father and next friend, et al., Plaintiffs-

Appellees,

v.

GREENEVIEW LOCAL SCHOOL DISTRICT, Defendant-Appellant.

No. 88 CA 40.

Jan. 4, 1989.

David A. Orlins, Rudd, Silverberg, Zaharieff
& Orlins Co., L.P.A., Xenia, for plaintiffs-
appellees.

*1 The Greeneview Local School District appeals the judgment of the Greene County Court of Common Pleas which reversed a decision of the Greeneview School Board. Following a hearing, the Board modified a suspension of four Greeneview High School students from ten to five days. The students were disciplined for allegedly violating a school board policy prohibiting students from being under the influence of alcoholic beverages.

The School District raises two assignments of error in this appeal. The first assignment of error raises a procedural issue. The sec-

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
(Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

ond assignment of error involves interpretation of a particular school board policy.

In its first assignment of error, the School District argues that the trial court erred in finding that there was a proper notice of appeal, as required by R.C. 2505.04. The School District contends that “there was no Notice of Appeal’ filed with the Greeneview Local School District and/or the Greeneview Board of Education and/or the Treasurer of the Greeneview Local School District within thirty (30) days from the Board’s March 23, 1988 decision.” (Appellant’s Brief at 9.) The School District argues that this failure to give “Notice of Appeal” violated R.C. 2505.04 and that the trial court was without jurisdiction.

Eight days after the Greeneview Board of Education determination that the students’ suspension be reduced from ten to five days, the students filed a “Notice of Appeal” with

the Greene County Clerk of Courts. The Clerk of Courts sent a copy of the notice of appeal by certified mail to the School District which it received five days after the notice of appeal was filed with the trial court.

The School District argues that this notice did not comply with R.C. 2505.04 which states in pertinent part:

An appeal is perfected when written notice of appeal is filed with the lower court, tribunal, officer, or commissioner.

The School District urges us to follow *Kettering Board of Education v. Gollnitz* (March 6, 1980), Montgomery App. 6376, unreported, where this court concluded that the trial court was without jurisdiction based on failure to comply with R.C. 2505.04. *Gollnitz* is distinguishable from this case because in *Gollnitz* the appellant filed a “Complaint of Appeal from Administrative

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
 (Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

Decision of Board of Education” with the Clerk of Courts. The appellant in *Gollnitz* never filed a “notice of appeal” with the Clerk of Courts or the Board of Education.

In this case, the students filed a “Notice of Appeal” with the trial court. The School District received a copy of the “Notice of Appeal” within the R.C. 2505.07 thirty-day time period. The School District rendered its decision March 23, 1988. The “Notice of Appeal” was filed with the Clerk of Courts on March 31, 1988. The record indicates that the School District received notice of the appeal on April 5, 1988, by certified mail from the Greene County Clerk of Courts. (Receipt from certified mail; Affidavit of Kevin Liming, Treasurer of Greeneview Local Schools.)

*2 The facts of this case are similar to *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 58 Ohio St.2d 202. In

Dudukovich, Ms. Dudukovich appealed a decision of the board of directors of the Lorain Metropolitan Housing Authority. Dudukovich filed a notice of appeal with the common pleas court and mailed a copy of the notice to the LMHA by certified mail which was received by the LMHA. *Id.* at 203-05. The Supreme Court of Ohio stated:

The issue thus becomes whether Dudukovich sufficiently complied with R.C. § 2505.04 by mailing a copy of the notice of appeal to LMHA. It is established that the act of depositing the notice in the mail, in itself, does not constitute a “filing,” at least where the notice is not received until after the expiration of the prescribed time limit. *Fulton, Supt. of Banks v. State ex rel. General Motors Corp.*, 130 Ohio St. 494, 5 O.O. 142 (1936). Rather, “[t]he term ‘filed’ * * * requires actual delivery * * *.” *Id.*, at paragraph one of the syllabus. However, no par-

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
 (Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

particular method of delivery is prescribed by the statute. Instead, as was aptly stated in Columbus v. Upper Arlington, 94 Ohio Law Abs. 392, 397, 201 N.E.2d 305, 31 O.O.2d 351, 353-354 (1964), “any method productive of certainty of accomplishment is countenanced.” Having considered appellee’s method of service, we find that simply “[b]ecause the manner of delivery is unusual does not make it illegal.” *Id.*

Dudukovich, 58 Ohio St.2d at 204.

Having reviewed the procedure followed by the students, we conclude in light of Dudukovich that notice was timely and properly given to the School District. Since a copy of the notice of appeal was actually delivered to the School District, the notice of appeal was “filed” with the School District.

Dudukovich, 58 Ohio St.2d at 204.

The first assignment is overruled.

In the second assignment of error, the School District states that the trial court erred in finding that the record does not substantiate the determination of the Greenvew Board of Education to suspend the students for five days.

The evidence shows that the students, Daniel Evans, Delvin Rockhold, Joshua Leslie, and Jeff Hounshell, were suspended for violating Board Policy 8.02.5(7). The students’ notice of suspension stated that the suspension was based on the students being “under the influence of alcoholic beverages.” (Exhibits A-D, Board of Education Hearing.) The evidence was, for the most part, free of conflict. Testimony at the hearing before the Board of Education established that each student drank one can of beer and all helped drink a fifth can of beer. The students drank the beer at the Rockhold residence before school on March 17, 1988.

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
 (Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

(Transcript of Hearing at 52-53, 73-74, 78, 82.) The students testified that they did not drink beer on the school grounds. (Tr. at 61, 78-79, 87, 94.) They also testified that after drinking the beer they did not feel any different than normal. (Tr. at 53, 82, 83, 92.)

*3 Faculty members from Greeneview High School testified that on the morning of March 17, 1988, they did not notice that the students acted differently than they usually acted. (Tr. at 51, 67, 72-73.) The assistant principal testified that he did not notice that the students had slurred speech or coordination problems on the morning of March 17, 1988. (Tr. at 17.)

The School District tacitly admits that the evidence shows that the students did not “fit the commonly used definition of ‘under the influence’ (utilized) by the Courts in traffic and criminal cases.” (Appellant’s Brief at 17.) Yet, the School District submits that the

students were “under the influence” because “in dealing with school discipline [‘under the influence’] should take on a totally different definition.” (Appellant’s Brief at 18.) The School District suggests that “under the influence” in this case should mean use prior to attending school and smelling of alcoholic beverages. *Id.* The District maintains that admissions of use and smelling of alcohol amount to “under the influence” because the students were influenced by alcohol. (Appellant’s Brief at 21.)

In the absence of any definition of “under the influence” in the School District’s policy, the phrase should retain its commonly understood meaning and should not be extended to the situation here. If the School District wants to redefine “under the influence,” it is free to do so. It was, however, improper for it to do so, after the fact, in this case.

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
(Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

The School District argues that the students' admission to "use" should not go unpunished. The School District readily admits that the students were not charged or suspended for "use" of alcoholic beverages, although School Board Policy 8.02.5(7) lists, as bases for disciplinary action, the following: possession, sale, use, or under influence of narcotics, alcoholic beverages, or other dangerous drugs.

The students' notice of suspension clearly indicated the reason for discipline as being "under the influence" which is violative of School Board Policy 8.02.5(7). "Use" was not a reason given for suspension although use of alcoholic beverages does violate Policy 8.02.5(7) as well. Had the principal intended to base the suspension on "use", he should have listed "use" on the notice of suspension rather than "under the influence." The School District cannot argue af-

ter the fact that use should be punished in this case.

It is clear, of course, why "use" was not the stated basis of the suspension.

If "use" were the basis for suspension, the School and the School Board were without jurisdiction to punish the students use in this case because this particular use was beyond the scope of the Student Discipline Code and the School Board Policy.

The Student Discipline Code states in pertinent part as follows:

Jurisdiction shall come within the school's responsibility when students are on any school property ... (Board Exhibit 3.)

*4 The School Board Policy states that disciplinary action including suspension and expulsion covers the following acts:

The jurisdiction of school authority includes

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
(Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

not only during regular school hours but shall also include all extra or co-curricular activities such as, but not limited to, athletic contests, music contests and programs, plays, dances, student organization meetings, marching band, drill team, cheerleading, queen contests, class trips, parties, field trips, etc.

Jurisdiction shall come within the school's responsibility when other means of transportation agreed to, provided by, leased or rented by the school or any organization in any way connected with the school.

The scope of the schools' jurisdiction can also include conduct at private functions and occurrences off of the school premises, if such violations are covered by school adopted policies such as the Greeneview High School Athletic Policy.

Testimony presented at the Board of Educa-

tion hearing was clear that the students drank before school at a student's home. This was not use punishable under the School Discipline Code or School Board Policy.

While it is arguable that the students' use should be punishable under the circumstances, it is up to the School District to legislatively extend the reach of its policy in anticipation of future, similar incidents. It could not do so after the fact in this case, nor can it ask the courts to do so.

The second assignment is overruled.

The judgment will be affirmed.

BROGAN and WILSON, JJ., concur.

Ohio App., 1989.

Evans by Evans v. Greeneview Local School Dist.

Not Reported in N.E.2d, 1989 WL 569
(Ohio App. 2 Dist.)

Not Reported in N.E.2d, 1989 WL 569 (Ohio App. 2 Dist.)
(Cite as: 1989 WL 569 (Ohio App. 2 Dist.))

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

FEB 22 2010

James L. Spaeth, Clerk
LEBANON OHIO

WELSH DEVELOPMENT COMPANY, :
et al., :

Plaintiffs-Appellants, :

- vs - :

WARREN COUNTY REGIONAL :
PLANNING COMMISSION, :

Defendant-Appellee. :

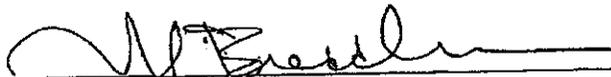
CASE NO. CA2009-07-101

JUDGMENT ENTRY

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


H.J. Bressler, Presiding Judge


Stephen W. Powell, Judge

(concurring in part & dissenting in part)
Robert P. Ringland, Judge



* W C O 2 0 - 2 0 0 9 - 0 7 - 1 0 1 *
02/22/10 JUDGMENT ENTRY FILED (AFFIRMED)

Appx. 27

Appx. 55

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXV. Courts--Appellate

▣ Chapter 2505. Procedure on Appeal (Refs & Annos)

▣ Perfection of Appeal

→ **2505.04 Perfection of appeal; notice of appeal**

An appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure or the Rules of Practice of the Supreme Court, or, in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. If a leave to appeal from a court first must be obtained, a notice of appeal also shall be filed in the appellate court. After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

CREDIT(S)

(1986 H 412, eff. 3-17-87; 1953 H 1; GC 12223-4)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 8/25/10 and filed with the Secretary of State by 8/25/10.

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