

ORIGINAL

IN THE SUPREME COURT OF OHIO

Welsh Development Company, et alia, :

Appellants, :

v. :

Warren County Regional Planning Commission, :

Appellee. :

Case Nos. 2010-0611 and 2010-0858

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

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

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1

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 1

- I. The 1986 amendments to Chapter 25 of the Revised Code did not alter the *Dudukovich* “actual delivery” rule. 2

Authorities Cited:

Dudukovich v. Lorain Metropolitan Housing Auth. (1979),
58 Ohio St.2d 202, 389 N.E.2d 1113..... 2

Ohio Revised Code 2505.03 2

Ohio Revised Code 2505.04 2

Maritime Mfrs. Inc. v. Hi-Skipper Marina (1982), 70 Ohio St.2d 257,
436 N.E.2d 1034 3

Rules of Appellate Procedure 3 3

Rules of Appellate Procedure 4 3

- II. This Court’s recent precedents on filing requirements support continued application of the “actual delivery” rule..... 3

Authorities Cited:

City of Zanesville v. Rouse, 126 Ohio St.3d 1, 2010-Ohio-2218,
929 N.E.2d 1044 3, 4

Louden v. A.O. Smith Corp. (2009), 121 Ohio St.3d 95, 2009-Ohio-319,
902 N.E.2d 458 3, 4

<i>Dudukovich v. Lorain Metropolitan Housing Auth. (1979),</i> 58 Ohio St.2d 202, 389 N.E.2d 1113.....	3, 4
<i>King v. Penn (1885),</i> 43 Ohio St. 57, 1 N.E. 84	4
III. Application of the “actual delivery” rule does not alter jurisdictional requirements.	4
<u>Authorities Cited:</u>	
<i>Dudukovich v. Lorain Metropolitan Housing Auth. (1979),</i> 58 Ohio St.2d 202, 389 N.E.2d 1113.....	5
IV. The Commission’s position would produce absurd results.	5
<u>Authorities Cited:</u>	
<i>Dudukovich v. Lorain Metropolitan Housing Auth. (1979),</i> 58 Ohio St.2d 202, 389 N.E.2d 1113.....	6
R.C. 2303.11	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>City of Zanesville v. Rouse</i> , 126 Ohio St.3d 1, 2010-Ohio-2218, 929 N.E.2d 1044	3, 4
<i>Dudukovich v. Lorain Metropolitan Housing Auth.</i> (1979), 58 Ohio St.2d 202, 389 N.E.2d 1113	passim
<i>King v. Penn</i> (1885), 43 Ohio St. 57, 1 N.E. 84	4
<i>Louden v. A.O. Smith Corp.</i> (2009), 121 Ohio St.3d 95, 2009-Ohio-319, 902 N.E.2d 458	3, 4
<i>Maritime Mfrs. Inc. v. Hi-Skipper Marina</i> (1982), 70 Ohio St.2d 257, 436 N.E.2d 1034	3

STATUTES:

Ohio Revised Code 2303.11	6
Ohio Revised Code 2505.03	2
Ohio Revised Code 2505.04	2

OTHER AUTHORITIES:

Rule of Appellate Procedure 3	3
Rule of Appellate Procedure 4	3

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.

There is no dispute that notices of appeal at issue were in the proper form. There is no dispute that the notices were actually delivered to the court of common pleas within the statutory period for appealing. And there is no dispute that the notices were actually delivered to the administrative agency within the statutory period for appealing. Given these undisputed facts, what conclusion is possible except that the notices of appeal were timely filed and these appeals were properly perfected?

In urging the contrary result, Appellee Warren County Regional Planning Commission pays little heed to the binding precedent from this Court, *Dudukovich v. Lorain Metropolitan Housing Auth.*, 58 Ohio St.2d 202, 389 N.E.2d 1113 (1979). The Commission does not ask this Court to overrule its *Dudukovich* decision or the “actual delivery” rule enunciated in that case. Indeed, the Commission pays no attention to the “actual delivery” rule from that case that determines whether or not a notice of administrative appeal has been “filed.” The omission is telling, given that there is no dispute that the notices of appeal here were *actually* and *timely* delivered to the two tribunals that were to receive them.

Instead, the Commission stakes its entire case on the notion that *who* delivers the notice of appeal makes a jurisdictional difference. While conceding that the “manner” of delivery is flexible, the Commission argues “the identity of the deliverer is not.” Combined Merit Brief of Appellee Warren County Regional Planning Commission on Certified Conflict and Discretionary Appeal, at 14. But the Court will search in vain for any basis for jurisdictional line-drawing

based on the identity of the “deliverer.” As shown below, neither the Revised Code, nor this Court’s precedents, nor sound public policy supports the distinction the Commission tries to inject into R.C. 2505.04.

I. The 1986 amendments to Chapter 25 of the Revised Code did not alter the *Dudukovich* “actual delivery” rule.

The Commission begins its effort to impose new appellate requirements by arguing that the 1986 amendments to the appeal provisions of Chapter 25 of the Revised Code somehow changed the requirements for filing a notice of administrative appeal. According to the Commission, these amendments made the Rules of Appellate Procedure applicable to administrative appeals. And, the Commission apparently contends, those Rules impose some limitations on the identity of the “deliverer” of a notice of appeal. This argument fails on multiple grounds.

First, the 1986 amendments did not alter the *Dudukovich* “actual delivery” rule. Indeed, the Commission does not argue otherwise. Thus, the 1986 amendments notwithstanding, it is been the law since *Dudukovich* that the actual, timely delivery of a notice of administrative appeal counts as the “filing” of that notice.

Second, the 1986 amendments to R.C. 2505.03 provide that the Rules of Appellate Procedure apply to administrative appeals only “to the extent this chapter does not contain a relevant provision” R.C. 2505.03(B). But Chapter 25 *does* contain a relevant provision for the filing of an administrative appeal: R.C. 2505.04. Because Chapter 25 does contain such a provision, the Rules of Appellate Procedure do not govern the filing of a notice of administrative appeal. Instead, R.C. 2505.04 governs. And the proper interpretation of that statute is found in the *Dudukovich* “actual delivery” rule.

Third, even if the Rules of Appellate Procedure did establish the requirements for filing a notice of administrative appeal, those Rules are to be liberally construed:

This court has long recognized that, in construing the Rules of Appellate Procedure, the law favors and protects the right of appeal and that a liberal construction of the rules is required in order to promote the objects of the Appellate Procedure Act and to assist the parties in obtaining justice.

Maritime Mfrs. Inc. v. Hi-Skipper Marina (1982), 70 Ohio St.2d 257, 258, 436 N.E.2d 1034.

The Commission's position is the very antithesis of this principle of liberal construction to protect the right of appeal. The Rules of Appellate Procedure contain clear requirements about the content of a notice of appeal and about the period in which a notice must be filed. App. R. 3(D); App. R. 4(A). The Commission, in effect, asks this Court to add a new requirement dictating *who* must physically hand-deliver the notice of appeal or *who* must personally deposit the notice of appeal with the postal service. But the Rules of Appellate Procedure contain no such requirements. This Court cannot "favor[] and protect[] the right of appeal" by imposing requirements that appear nowhere in the applicable rules.

II. This Court's recent precedents on filing requirements support continued application of the "actual delivery" rule.

The Commission next relies on two recent precedents of this Court to argue that a clerk of courts is not responsible for "filing" and that a party is responsible for that act. See *City of Zanesville v. Rouse*, 126 Ohio St.3d 1, 2010-Ohio-2218, 929 N.E.2d 1044, *reconsideration granted in part on other grounds*, 126 Ohio St.3d 1227, 2010-Ohio-3754, 933 N.E.2d 260; *Louden v. A.O. Smith Corp.* (2009), 121 Ohio St.3d 95, 2009-Ohio-319, 902 N.E.2d 458. These cases provide no support to the Commission's position.

The *City of Zanesville* case demonstrates, like *Dudukovich*, that actual delivery is the *sine qua non* of "filing." (Indeed, the appellants cited that case in their opening brief for that very

proposition.) The issue in *City of Zanesville* was whether a complaint was “filed” even though it lacked a clerk’s stamp. This Court held that, while the clerk’s stamp would be proof of filing, whether a document had been filed did not depend on the clerk having stamped it. *City of Zanesville*, 2010-Ohio-2218, at ¶ 7. To determine whether a document was filed, this Court focused on whether it had been actually delivered to the proper place. A “document is ‘filed’ when it is deposited properly for filing with the clerk” *Id.* “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.’” *Id.* at ¶ 8 (quoting *King v. Penn* (1885), 43 Ohio St. 57, 61, 1 N.E. 84). Because “the docketing of the case shows that the clerk actually received the complaint,” this Court concluded that “the trial court correctly determined that the complaint had been filed” *Id.* at ¶ 11. Thus, the *City of Zanesville* decision supports the *Dudukovich* “actual delivery” rule and the appellants’ position. It demonstrates that “filing” is complete with the actual delivery of the document to the proper office.

This Court’s decision in *Louden v. A.O. Smith Corp.* (2009), 121 Ohio St.3d 95, 2009-Ohio-319, 902 N.E.2d 458, is simply irrelevant to the issues at hand. The issue in that case was whether a would-be appellant could electronically file a notice of appeal when neither the Rules of Appellate Procedure nor the local appellate rules authorized electronic filing. The *Louden* Court did not address the sole issue in the case at bar – whether the identity of the “deliverer” makes any difference. The *Louden* decision simply does not speak to the issues at hand.

III. Application of the “actual delivery” rule does not alter jurisdictional requirements.

The Commission argues that adopting the appellants’ position would alter jurisdictional statutes by permitting the filing of a notice of appeal with the reviewing court rather than the tribunal from which the appeal is taken. See Combined Merit Brief of Appellee Warren County

Regional Planning Commission on Certified Conflict and Discretionary Appeal, at 11-12. This argument is inaccurate and mischaracterizes the appellant's position, which is that timely, actual delivery to the correct tribunal(s) is all that is required for "filing" a notice of administrative appeal.

In the case of an administrative appeal, the notice of appeal must be filed with two tribunals: the agency from which the appeal is taken and the court of common pleas to which the appeal is taken. *Dudukovich*, 58 Ohio St.2d at 204. The appellants do not contend that their appeals were perfected because they timely filed a notice of appeal in the court of common pleas. Instead, they contend that their appeals were perfected because they timely filed a notice of appeal with *both* the court of common pleas *and* the Commission. *Dudukovich* requires nothing more.

No one contends that a would-be appellant should be forgiven for filing a notice of appeal in the wrong tribunal. The issue here is whether the appeals are defective despite timely, actual delivery of notices of appeal to the correct tribunals. The Commission's argument that the appellants improperly seek to alter jurisdictional requirements is nothing but a red herring.

IV. The Commission's position would produce absurd results.

The Commission's position – in which appellate jurisdiction turns on the identity of the "deliverer" of a notice of appeal – has no principled basis for avoiding absurd implications. Must the appellant herself hand-deliver the notice of appeal? The Commission does not say. May the appellant's attorney hand-deliver it? The attorney's administrative assistant or paralegal? What about a third-party courier service? The Commission does not say. If mailing the notice of appeal is permitted, must the appellant herself deliver the envelope to the post office? Or can it be mailed from the appellant's attorney's office? May the appellant have a

relative or friend mail it? The Commission does not say. If any of these are acceptable, why would it make any difference if the appellant directs the common pleas clerk to mail the notice?

These are not mere law-school hypotheticals. They are legitimate questions arising out of the Commission's argument, which appears to be that the appellant herself must take the *final* action – or last step – that results in the timely, actual delivery of the notice of appeal to the correct tribunal. Yet not only does the Commission fail to offer any principled basis for answering these questions, it also fails to recognize that the notice of appeal is *always* delivered at the appellant's direction. Notices of appeal do not magically appear out of thin air to be deposited with a tribunal. They are delivered to tribunals because an appellant has elected to appeal and has caused the notice of appeal to be delivered. The lesson of *Dudukovich* was that it makes no difference how the appellant causes the notice of appeal to be delivered, so long as it reaches the proper tribunal on time.

This point also disposes of the Commission's straw-man argument that court clerks are not authorized to file appeals on behalf of litigants. No one contends that a court clerk could unilaterally decide to take an appeal on behalf of a litigant. That is not what the clerk did here. Rather, the clerk sent the notices of appeal to the Commission *at the direction of the appellants* in the form of a praecipe. Court clerks certainly *are* authorized to send papers based on a litigant's praecipe. *See* R.C. 2303.11. Thus, the notices of appeals were actually and timely delivered to the Commission not because a clerk decided to send them, but instead because the appellants took steps to ensure that the notices were delivered to the Commission. How those steps are materially different from handing the notices to a postal employee, a co-worker, a courier, or a friend is something the Commission has not explained.

Furthermore, from the perspective of the agency from which an appeal is taken, it should make no difference how a timely notice of appeal is actually delivered to the agency. What difference could it possibly make whether it is the appellant herself, her attorney, one of her attorney's staff members, or a third-party courier who walks through the agency door with a notice of appeal? What difference could it possibly make whether it is the appellant herself, her attorney, one of her attorney's staff members, or the clerk of the common pleas court who affixes the postage and mails the envelope containing the notice of appeal? The notice itself tells the agency everything it needs to know, regardless of how it arrived or who was involved in its delivery. And the agency reacts in exactly the same way to a timely notice of appeal, regardless of how it arrived or who was involved in its delivery.

The Commission thus urges this Court to adopt a rule that is poorly defined, makes no difference to the agency itself, and invites ancillary litigation over the method of delivery and the identity of the "deliverer" – all in the name of depriving litigants of their appellate rights. It is hard to imagine a more unappealing rule of law than the one the Commission now urges upon this Court.

CONCLUSION

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 Reply 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 October 19, 2010 on the counsel listed below:

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