ORIGINAL

IN THE SUPREME COURT OF OHIO

WELSH DEV. CO., INC., *et al.*,	:	**Case No. 2010-0611** **Case No. 2010-0858**
Appellants,	:	
vs.	:	**Certified Conflict and on Appeal from the Warren County Court of Appeals, Twelfth Appellate District,**
WARREN CTY. REGIONAL PLANNING COMM.,	:	**Judgment filed February 22, 2010**
Appellee.	:	**Court of Appeals Case No: CA2009-07-101**

MOTION FOR RECONSIDERATION OF APPELLEE WARREN COUNTY REGIONAL PLANNING COMMISSION

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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Appellee, Warren County Regional Planning Commission ("WCRPC"), pursuant to S.Ct.Prac.R. 11.2, respectfully moves the Court to reconsider its decision on the merits herein, rendered on or about April 7, 2010. *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, --- Ohio St.3d ---, Slip Opinion No. 2011-Ohio-1604 ("*Welsh*"). The WCRPC requests reconsideration because the Court did not address in its decision the effect of the General Assembly's 1986 amendments to Ohio Revised Code Chapter 2505 in Am. Sub. H.B. 412. The *Welsh* opinion is at odds with the aforementioned amendments and, furthermore, when the decision is read in conjunction with the aforementioned amendments, the result will be to generate confusion and uncertainty regarding the proper procedure for all appeals governed by the Rules of Appellate Procedure. Therefore, the WCRPC requests that the Court reconsider its decision.

II. CASE POSTURE

This case involves two consolidated administrative appeals from WCRPC decisions. For both appeals, the Appellants, Welsh Development Company, *et al.* ("Welsh"), took virtually identical steps to perfect the appeals. They:

> filed a complaint and notice of appeal in the Warren County Court of Common Pleas against WCRPC[.] * * * The notice and complaint contained a praecipe for the clerk of courts to serve WCRPC by certified mail. * * * An unfiled courtesy copy of the initial pleadings was sent to the Warren County assistant prosecutor[.] * * *

Id. at ¶ 4. In both instances, the WCRPC received service of process from the clerk of courts within the thirty-day deadline imposed by R.C. 2505.07. *Id.* at ¶ 31. After raising the affirmative defense of failure to exhaust administrative remedies, the WCRPC moved the trial court to dismiss because Welsh failed to file its appeal with the agency, opting instead to file its notices with the clerk and to instruct the clerk to serve the WCRPC with the notices, among other documents. *Id.* at ¶ 7. The trial court granted dismissal for want of jurisdiction and the Twelfth District Court of Appeals affirmed. *Id.* at ¶ 9, 12.

This Court reversed the court of appeals. The Court held:

> An administrative appeal is considered filed and perfected for purposes of R.C. 2505.04 if the clerk of courts serves upon the administrative agency a copy of the notice of the appeal filed in the court of common pleas and the administrative agency is served within the time period prescribed by R.C. 2505.07.

Id. at syllabus. In support, the Court expanded upon its holding in *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202. The Court noted that, in *Dudukovich*, because there was evidence showing the agency received the notice of appeal sent by certified mail to the agency by the appellant, and because "the housing authority 'presented no evidence of late delivery,' we concluded that 'a presumption of timely delivery controls.' Thus, we held in *Dudukovich* that the trial court 'correctly assumed jurisdiction.'" *Welsh*, 2011-Ohio-1604, at ¶ 19 (internal citation omitted) (quoting *Dudukovich*, 58 Ohio St.2d at 205). After noting the conflict that developed in the appellate districts since 1979, the Court adopted the minority view of the Second and Sixth Districts, *id.* at ¶ 28, and commented:

> When service of a notice of an appeal by the clerk of courts informs and apprises the administrative agency of the taking of an appeal, sets forth the names of the parties, and advises those parties that an appeal

> of a particular claim is forthcoming, the notice of appeal has satisfied its purpose and the *legislative intent* in R.C. 2505.04.

Id. at ¶ 30 (emphasis added).

III. LAW AND ARGUMENT

A. Reconsideration Standard

Rule 11.2 of the Rules of Practice of the Supreme Court of Ohio provide for motions for reconsideration. Although there appears to be no established standard upon which the Court may grant reconsideration, the Court has "invoked the reconsideration procedures set forth in S.Ct.Prac.R. XI to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995) (and cases cited therein). Moreover, the Court has granted reconsideration based on issues previously briefed. See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, at ¶ 79 (O'Connor, J., dissenting). The Court should grant reconsideration of the instant case because the Court did not address the General Assembly's amendments to Chapter 2505, enacted subsequent to the *Dudukovich* decision, and brought before this Court by the WCRPC.

B. The Chapter 2505 Amendments Prescribe Application of the Rules of Appellate Procedure to Appeals from Administrative Agencies of Political Subdivisions.

As the Court stated, "We have held repeatedly that when the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by the applicable statute." *Welsh*, 2011-Ohio-1604, at ¶ 14. In 1986, the General Assembly, in Am. Sub. H.B. 412, amended R.C. 2505.03, which now reads, in part: "Unless, in the case of an administrative-related appeal, Chapter 119 or other sections of the Revised Code apply, such an appeal is governed by this chapter and, *to the extent this chapter*

does not contain a relevant provision, the Rules of Appellate Procedure." R.C. 2505.03(B) (emphasis added). This legislation mandates the appellate rules be applied when Chapter 2505 does not provide other procedural authority. Section 2505.04 does not provide any specific procedural rule for administrative appeals from political subdivision agencies. Therefore, the Rules of Appellate Procedure must apply, as held by several appellate courts. *Cleveland Bd. of Zoning Appeals v. Abrams*, 186 Ohio App.3d 590, 2010-Ohio-1058, at ¶ 40, 929 N.E.2d 509 (Gallagher, J., concurring); *McCann v. Lakewood* (1994), 95 Ohio App.3d 226, 232, 642 N.E.2d 48; see *In re Namey* (1995), 103 Ohio App.3d 322, 326, 659 N.E.2d 372 ("Clearly, R.C. 2505.03 does provide that R.C. Chapter 2505 and the Appellate Rules may be applied, *but only if* R.C. 119.12 fails to address the issue."); cf. *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665, at ¶ 5, 878 N.E.2d 1048 (Chapter 2505 may be superseded by more specific provisions).

With its amendments, the legislature also provided for the consistent application of the appellate rules in administrative appeals. Appellate Rule 3(A) requires "[a]n appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." App.R. 3(A). This requirement is jurisdictional. *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, syllabus. In addition, Rule 3(E) requires the trial court clerk to "mail or otherwise forward a copy of the notice of appeal * * * to the clerk of the court of appeals named in the notice." App.R. 3(E).

In an administrative appeal, of course, the trial court is the agency; the reviewing body is the court of common pleas. "A trial court does not sit as a trier of fact in an

administrative appeal[.] * * *" *Aspinwall v. Mentor Bd. of Tax Review*, 146 Ohio App.3d 466, 2001-Ohio-8896, at ¶ 9; R.C. 2506.01(A). In view of this fact, the General Assembly required that when an administrative appeal is governed by the appellate rules:

> if it is necessary in applying the Rules of Appellate Procedure to such an appeal, *the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.*

R.C. 2505.03(B) (emphasis added). For the instant appeals, therefore, the WCRPC must be viewed as a trial court or the court's clerk.

C. The Court's Decision Permits Appeals to be Filed With a Reviewing Court.

Notwithstanding the statutory language, the Court held in *Welsh* that an administrative appeal is perfected if an appellant files a notice of appeal with the common pleas court clerk and the clerk "serves upon the administrative agency a copy of the notice of the appeal filed in the court of common pleas and the administrative agency is served within the time period prescribed by R.C. 2505.07." *Welsh*, 2011-Ohio-1604, syllabus. The Court's decision, therefore, inverts the process mandated by the appellate rules as adopted by the legislature in Chapter 2505. Instead of following Rule 3(A)'s jurisdictional requirement that an appeal be filed with the clerk of the trial court – the agency in this instance – the *Welsh* decision allows appellants to file their appeals with the appellate court – common pleas in this instance. The *Welsh* procedure, allows an administrative appellate to evade the clear jurisdictional requirement of filing an appeal with the trial court. Furthermore, such process thwarts Rule 3(E) because it is the appeals court's clerk that is forwarding notice to the trial court; contrary to the procedure set forth in the Rule.

The procedure outlined in *Welsh* cannot be limited to administrative appeals. Chapter 2505 applies to all appeals, *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (1976), 46 Ohio St.2d 105, 110 n.3; R.C. 2505.03(B); R.C. 2505.04, unless, unlike here, another statute, such as Chapter 119, governs. Section 2505.04 specifically provides that the Rules of Appellate Procedure apply not only to the type of administrative appeal at issue in *Welsh* but also to "an appeal of a final order, judgment, or decree of a court[.] * * *" R.C. 2505.04. Under *Welsh's* operation, therefore, all appellants are permitted to file appeals in the court of appeals, rather than the trial court, with the trial court receiving notice through the appellate clerk's forwarding of the Notice of Appeal.

The consequence of this outcome is likely to produce confusion and lack of certainty. For example, this Court only recently stated, "[A] party appealing a trial court order must file * * * the notice of appeal with the clerk of the trial court pursuant to App.R. 3." *Louden v. A.O. Smith Corp.*, 121 Ohio St.3d 95, 2009-Ohio-319, syllabus. Even with the *Welsh* Court's clarification, "In the general sense, filing is actual delivery. It means taking a document to a clerk of courts for file-stamping as a court record," 2011-Ohio-1604, at ¶ 36 (citing *Zanesville v. Rouse,* 126 Ohio St.3d 1, 2010-Ohio-2218, at ¶ 7, vacated in part on reconsideration on other grounds, 126 Ohio St.3d 1227, 2010-Ohio-3754), the instant decision generates uncertainty. An appellant would be permitted to file an appeal by making actual delivery to an appellate court rather than a trial court as specified in App.R. 3(A). On the other hand, *Welsh* might be read to prescribe one application of the Rules of Appellate Procedure for administrative appeals and another

application for all other appeals, notwithstanding the consistent application of the Rules to both types of appeals under R.C. 2505.03 and R.C. 2505.04.

IV. CONCLUSION

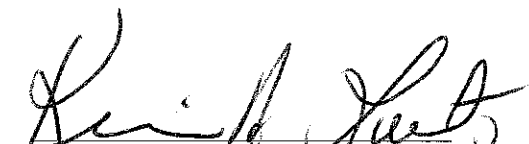
The *Welsh* decision inverts the procedure for perfecting appeals from that established by the General Assembly by its incorporation of the Rules of Appellate procedure in its Chapter 2505 amendments. Am. Sub. H.B. 412. Rather than requiring administrative appellants to file or "actually deliver" their appeals to the agency, which sits as the trial court, they may now file their appeals with the reviewing court. This process does not take into account Appellate Rule 3(A), which mandates filing with the trial court. Although the Rules are applicable to all appeals from court judgments and decisions of agencies of political subdivisions, the legislature took into account the distinctions between the two types of entities when it specified that administrative agencies would be treated as trial courts or as a trial court clerk. As both Appellate Rule 3(A) and R.C. 2505.04 are jurisdictional, Welsh's failure to comply with their provisions left the Warren County Common Pleas Court devoid of jurisdiction.

This Court should reconsider its decision because it did not address the General Assembly's 1986, post-*Dudukovich*, amendments. The lack of discussion on this issue will produce uncertainty concerning not only appeals from administrative agencies of political subdivisions but with regard to all appeals to which the Rules of Appellate Procedure apply. Either appellants may now file their appeals in a reviewing court, with that court serving notice upon the trial court, contrary to App.R. 3(A, E), or the Court has carved an exception for the Rules' application to administrative appeals that is not supported by Rule or statute.

Because of these issues, the Warren County Regional Planning Commission respectfully requests that the Court reconsider its decision in *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, --- Ohio St.3d ---, Slip Opinion No. 2011-Ohio-1604.

Respectfully submitted,

SURDYK, DOWD & TURNER
CO., L.P.A.



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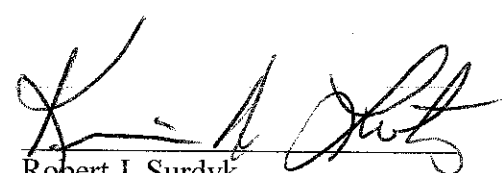
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. Mail to Mr. Matthew C. Blickensderfer, Frost Brown Todd LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202 and to Messrs. Scott D. Phillips and Benjamin J. Yoder, Frost Brown Todd LLC, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, on this 15th day of April, 2011.



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