[Cite as *Genesis Outdoor Advertising, Inc. Deerfield Twp. Bd. of Zoning Appeals,* 2002-Ohio-7272.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

GENESIS OUTDOOR ADVERTISING, INC.,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2001-P-0137**
- vs -	:	
DEERFIELD TOWNSHIP BOARD OF ZONING APPEAL,	:	
Appellee.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 01 CV 0595.

Judgment: Reversed and remanded.

Gary L. Van Brocklin, 44 Federal Plaza Central, #204, Youngstown, OH 44503 (For Appellant).

Victor V. Vigluicci, Portage County Prosecutor and *Chad E. Murdock,* Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Appellee).

ROBERT A. NADER, J.

{¶1} This is an accelerated calendar appeal of a judgment of the Portage County Court of Common Pleas dismissing the administrative appeal of appellant, Genesis Outdoor Advertising, Inc.,

{¶2} On March 3, 2001, a citizen filed an appeal with appellee, Deerfield Township Board of Zoning Appeals[1] ("BZA"), requesting a review of appellee's approval of a zoning certificate for appellant to construct two large metal signs on his property. Appellee held a public hearing on the matter on April 24, 2001. On May 12, 2001, appellee announced its decision reversing the issuance of the zoning certificate. On June 9, 2001, the minutes of the hearing were approved and journalized.

{¶3} On June 19, 2001, appellant mailed its notice of appeal to the Clerk of Courts of the Portage County Court of Common Pleas. The Clerk filed the notice of appeal on June 20, 2001. On June 19, 2001, appellant also mailed its notice of appeal to the secretary of the BZA, at her home address. Attached to the notice of appeal was a cover letter, which read:

{¶4} "Enclosed please find a copy of the Notice of Appeal and Praecipe for Transcript regarding the above captioned case.

{¶5} "If there are any questions regarding this matter, please do not hesitate to contact my office."

{¶6} On August 7, 2001, appellee filed a motion to dismiss appellant's appeal, arguing that the Court of Common Pleas lacked jurisdiction to hear the appeal because appellant failed to file a notice of appeal with the BZA within the thirty day limit of R.C. 2505.04. After a hearing, the trial court granted appellee's motion to dismiss.

{¶7} Appellant filed a timely appeal, raising the following assignment of error:

1. The trial court record in this matter indicates that the original notice of appeal to the trial court incorrectly identifies appellee as the "Deerfield Township Board of Zoning Appeal." However, for the sake of accuracy, we will refer to appellee as the "Deerfield Township Board of Zoning Appeals."

{¶8} "[i]t was error to dismiss Appellant's administrative appeal for failure to file a notice of appeal in the BZA when appellant made simultaneous filings in the BZA and the Court of Common Pleas."

{¶9} R.C. 2505.04 provides that "[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." In this case, appellant was required to file his notice of appeal with appellee within thirty days of appellee's approval and journalization of the minutes of the May 12, 2001 meeting, wherein appellee announced its decision. See R.C. 2505.07; *Green v. South Cent. Ambulance Dist.* (1997), 118 Ohio App.3d 24, 28. Thus, appellant was required to file his notice of appeal by July 8, 2001.

{¶10} The parties stipulated that the secretary of the BZA received the letter containing appellant's notice of appeal on or about June 21, 2001. Therefore, if appellant's mailing of the notice of appeal to the secretary of the BZA at her home address constitutes a filing, appellant's filing was timely. If it were not a filing, appellant failed to file a timely notice of appeal, and the trial court was without jurisdiction to consider appellant's appeal.

{¶11} In *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, the Supreme Court of Ohio considered what would satisfy the filing requirements of R.C. 2505.04. The court found that:

{¶12} "'[t]he term 'filed' * * * requires actual delivery * * *.' [*Fulton, Supt. of Banks v. State, ex rel. General Motors Corp.* (1936), 130 Ohio St. 494, 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.'" *Dudukovich,* supra at 204.

{¶13} The Eighth District Court of Appeals recently decided a case with facts quite similar to the case at bar. In *BP Exploration and Oil, Inc. v. The Planning Comm. of the Village of Oakwood*, 8th Dist. No. 80510, 2002-Ohio-4163, BP had applied for the construction of a gasoline station and was denied by the Planning Commission. BP filed a notice of appeal from the Commission's decision by filing a notice of appeal in the Court of Common Pleas and hand delivering a notice of appeal to the secretary of the planning commission. The trial court dismissed the appeal for lack of jurisdiction, because BP had not filed its appeal with the Commission as required by R.C. 2505.04.

{¶14} The Eighth District Court of Appeals reversed the decision of the trial court. The court reasoned that, "[b]ased on *Dudukovich* and its progeny, we conclude that *R.C. 2505.04* is designed as a notice provision, requiring actual delivery by any method demonstrating a certainty of accomplishment of that delivery." (Emphasis sic.) Id. at 13. Thus, the court held that: "it is clear that BP 'filed,' as defined by *Dudukovich*, its notice of appeal with Oakwood, and it is undisputed that Oakwood received actual delivery of the same. As such, BP has complied with the notice requirements of *R.C. 2505.04*." (Emphasis sic.) Id. at 18.

{¶15} We agree with the reasoning set forth in *BP Exploration and Oil*, and its interpretation of *Dudukovich*. When determining whether appellant filed his notice of appeal with appellee, we must determine whether appellant made an actual delivery of the notice of appeal to appellee, by a method reasonably certain to accomplish the

delivery. The parties stipulated that the secretary of the BZA received actual delivery of the notice of appeal, on or about June 21, 2000, prior to the deadline. The notice was mailed via overnight courier to the secretary's home address, which had been used as the return address on outgoing official BZA correspondence. This constitutes actual delivery by a method reasonably certain to accomplish that delivery. Thus, it is clear that appellant filed its notice of appeal in full compliance with the requirements of R.C. 2505.04.

{¶16} At first blush, it would appear that *Dudukovich*, *BP Exploration and Oil*, and this opinion conflict with our decisions in *Trickett v. Randolph Twp. Bd. of Zoning Appeals* (Aug. 18, 1995), 11th Dist. No. 94-P-0007, 1995 Ohio App. LEXIS 3394, and *Leifheit v. Bd. of Zoning Appeals of Palmyra Twp.* (June 22, 2001), 11th Dist. No. 99-P-0112, 2001 Ohio App. LEXIS 2804. These former cases are, however, factually distinguishable.

{¶17} In *Leifheit*, the appellant filed a notice of appeal with the court of common pleas and requested the Clerk of Courts to issue a summons and a copy of the notice of appeal for service on the BZA. The clerk did as appellant requested. In *Trickett*, though the record is unclear as to precisely what procedural measures were taken by the appellant, it appears that the notice of appeal was also filed in the court of common pleas and was served on the BZA. In both cases, the notice of appeal was accompanied by an affidavit of service, which attested that a copy of the notice of appeal had been served on the BZA.

{¶18} Thus, in both cases, the Clerk of Courts caused the notice of appeal to be personally served on the BZA, rather than filed with it by the appellant. Because

"[s]ervice is not the equivalent of filing the notice with the [BZA]," we determined that both *Trickett* and *Leifheit* failed to satisfy the filing requirements of R.C. 2505.04. See *Trickett*, supra at *10; *Leifheit*, supra at *7-8.

{¶19} In the present case, however, appellant mailed the notice of appeal directly to the secretary of the BZA by overnight courier. Because appellant actually delivered its notice of appeal to the BZA, rather than having the clerk cause it to be served, these cases are distinguishable. We follow *Dudukovich* and conclude that appellant did file his notice of appeal with the BZA.

{¶20} Appellant's assignment of error has merit.

{¶21} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this opinion.

DONALD R. FORD, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.