

[Cite as *Cleveland Bd. of Zoning Appeals v. Karafiat*, 2004-Ohio-1681.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT  
COUNTY OF CUYAHOGA

NO. 82862

CITY OF CLEVELAND, BOARD  
OF ZONING APPEALS, ET AL.,

Plaintiffs-Appellees :

VS.

ADOLPH KARAFIAT, ET AL., :

Defendants-Appellants :

JOURNAL ENTRY  
and  
OPINION

DATE OF ANNOUNCEMENT  
OF DECISION

: APRIL 1, 2004

## CHARACTER OF PROCEEDING

: Civil appeal from  
: Common Pleas Court  
: Case No. 480221

## JUDGMENT

: VACATED.

DATE OF JOURNALIZATION

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APPEARANCES:

For plaintiffs-appellees: Subodh Chandra, Esq.  
Director of Law

BY: Robert P. Lynch, Jr., Esq.  
Assistant Director of Law  
City Hall, Room 106  
601 Lakeside Avenue  
Cleveland, Ohio 44114-1077

For defendants-appellants: Adolph Karafiat, Pro Se  
3852 Ridge Road  
Cleveland, Ohio 44114

MICHAEL J. CORRIGAN, A.J.

{¶1} This is an appeal from the trial court's determination that the City of Cleveland Board of Zoning Appeals' ("Board") decision to sustain the violations issued to Adolph and Betty Karafiat ("Karafiat") was not unconstitutional, illegal, arbitrary, capricious, or unreasonable. We do not address the merits of this appeal because we find that the Board was never properly served with Karafiat's notice of the administrative appeal and the trial court lacked jurisdiction to hear the administrative appeal.

{¶2} Failure to file a copy of the notice of administrative appeal to the Board results in a failure to perfect the appeal according to R.C. 2505.04 and is grounds for dismissal. See *Patrick Media Group, Inc. v. Cleveland Bd. of Zoning Appeals* (1988), 55 Ohio App.2d 124, 562 N.E.2d 921 (affirming the trial court's dismissal for lack of jurisdiction because the plaintiff, although serving the city's law director with his notice of administrative appeal, never served the Board with the notice). Because there is no evidence in the record that the Board was served with a copy of the notice, the trial court

lacked subject matter jurisdiction to hear the appeal in the first instance. Accordingly, we vacate the trial court's judgment and reinstate the Board's decision.<sup>1</sup>

{¶3} The judgment is vacated.

Judgment vacated.

ANN DYKE, J., CONCURS.

KENNETH A. ROCCO, J., DISSENTS WITH SEPARATE OPINION.

KENNETH A. ROCCO, J. DISSENTING.

{¶4} I must respectfully disagree with the majority's assertion that there is no evidence in the record that the Board was served with the notice of appeal. On September 3, 2002, appellants filed in the common pleas court a notice of appeal from a decision of the board of zoning appeals. This notice was captioned "In the City of Cleveland, Board of Building Standards, Board of Zoning Appeals." The certificate of service certifies that the notice was "filed in the ZONING APPEALS BOARD." There is no evidence in the record to contradict this certification. In my opinion, on this record, we must presume that the notice of appeal

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<sup>1</sup> Although in its appellate brief the Board also moved to dismiss the instant appeal, we deny the Board's motion to dismiss.

was timely filed with the board as certified by appellants, and that the common pleas court therefore had jurisdiction to decide the appeal. *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 55 Ohio St.2d 202, 204-05 (timely delivery of a notice of appeal to the board, presumptively accomplished by mailing five days before the expiration of the 30 day time limit, constitutes "filing"); *Berea Music v. Berea*, Cuyahoga App. No. 2002-Ohio-6639, ¶¶9 & 10; cf. *Patrick Media Group, Inc. v. Cleveland Bd. of Zoning Appeals* (1988), 55 Ohio App.3d 124.

{¶5} Having concluded that the common pleas court had jurisdiction to review the board's decision, I would hold that the common pleas court did not err by finding the board's decision was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Appellants failed to ensure that the board provided the court with the record of proceedings which would have supplied the factual basis for such a determination, or to request a de novo hearing before the court. See *Woerner v. Mentor Exempted Village School Dist. Bd. Of Edn.* (1993), 84 Ohio App.3d 844, 846-847. Thus, the court had no

factual basis on which to make such a determination. Accordingly, I would affirm the common pleas court's decision.

This cause is vacated.

It is, therefore, ordered that said appellants recover of said appellees their costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN  
ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).