

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

**McDONALD'S CORPORATION,** )  
 )  
 Petitioner/Appellant, )  
 )  
 v. ) C.A. No. 01A-05-011 CG  
 )  
 **ZONING BOARD OF ADJUSTMENT** )  
 **FOR THE CITY OF WILMINGTON,** )  
 )  
 Respondent/Appellee. )

Date Submitted: December 3, 2001  
Date Decided: January 10, 2002

**ORDER**

Upon Appeal from the Zoning Board of Adjustment for the City  
of Wilmington. **DISMISSED.**

Thomas C. Marconi, Losco & Marconi, P.A., Wilmington, Delaware, Attorney for  
Petitioner/Appellant.

Amy E. Evans, Assistant City Solicitor, Wilmington, Delaware, Attorney for  
Respondent/Appellee.

GOLDSTEIN, J.

This 10<sup>th</sup> day of January, 2002, upon consideration of the papers filed by the parties and the record in this case, it appears that:

(1) McDonald's owns real property located at 1611 Pennsylvania Avenue in Wilmington, Delaware. On February 13, 2001, McDonald's filed an application with the Board seeking a determination as to whether McDonald's could continue to use the existing special exception for the property granted in 1974 which specifically allows the use of the R-4 zoned parcels of the property as accessory parking areas to serve the C-2 zoned parcel of the property. Alternatively, McDonald's asked that the Board grant a new identical special exception.

(2) On April 25, 2001, the Board held a hearing to consider McDonald's application. At the conclusion of the hearing, the Board voted unanimously to deny McDonald's application. On July 25, 2001, the Board issued a document entitled "City of Wilmington Building Zone Ordinance Decision," in which the Board set forth its reasons for its decision and the result of the vote at the hearing.

(3) On May 25, 2001, McDonald's filed a Petition for a Writ of Certiorari with this Court pursuant to 22 *Del. C.* § 328 on May 25, 2001 seeking review of the Board's decision. The Court ordered that the writ be issued and the appeal was submitted to the Court.

(4) In its answering brief, the Board argues that, although McDonald's filed its petition within 30 days after the April 25, 2001 hearing, it did not appeal the final decision of the Board. The Board argues that its written Building Zone Ordinance Decision, dated

July 25, 2001, constitutes the final decision of the Board. Because McDonald's did not appeal the July 25, 2001 decision within 30 days after its issuance, the decision stands as final.

(5) McDonald's responds that it filed its petition in a timely manner. McDonald's argues that the Board made its final decision during the April 25, 2001 hearing when it voted to deny McDonald's application. McDonald's contends that the Board's July 25, 2001 Building Zone Ordinance Decision merely memorialized the April 25 decision.

(6) Upon review of the applicable Rules of Procedure of the Board of Adjustment and the applicable statutes, the Court finds that the Board's written Building Zone Ordinance Decision dated July 25, 2001, not the oral vote taken April 25, 2001, was the final decision of the Board from which appeal must have been taken. Article 5 of the Rules of Procedure, entitled "Final Disposition of Appeal," provides, in pertinent part:

The final disposition of any appeal or application to the Board of Adjustment shall be in the form of a Resolution, which may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may embody such order, requirement, decision or determination as ought to be made. The concurring vote of two members shall be necessary to a decision.

McDonald's is correct in pointing out that nothing in the above-quoted language specifies that the required Resolution be in writing. However, 22 Del. C. § 328, which sets forth the procedure for appeal to this Court from a decision of the Board, provides that "[s]uch petition shall be presented to the Court within 30 days *after the filing of the decision in the office of the board.*" (Emphasis added.) Such language clearly is meant to apply to a written decision

by the Board, rather than an oral vote. Therefore, the Court finds that the “decision” referenced in Section 328 was the Board’s July 25, 2001 Building Zone Ordinance Decision. Thus, McDonald’s did not file its petition for writ of certiorari within 30 days after the Board’s final decision as required by the statute.

(7) It is well-settled that failure to perfect an appeal within the statutorily prescribed period prevents an appellate court from exercising jurisdiction.<sup>1</sup> Unless the late filing of the appeal, or in this case, petition for writ of certiorari, can be attributed to the fault of court-related personnel, “not even excusable neglect on the part of a litigant will permit the appellate court to exercise jurisdiction.”<sup>2</sup>

---

<sup>1</sup> *Draper King Cole v. Malave*, Del. Supr., 743 A.2d 672, 673 (1999)(citing *Giordano v. Marta*, Del. Supr., 723 A.2d 833, 837 (1988); *Riggs v. Riggs*, Del. Supr., 539 A.2d 163 (1988)).

<sup>2</sup> *PNC Bank, Delaware v. Hudson*, Del. Supr., 687 A.2d 915, 916 (1997) (citing *Eller v. State*, Del. Supr., 531 A.2d 951 (1987)).

(8) In addition, the Court finds that the jurisdictional defect created by McDonald's premature filing of its petition for a writ of certiorari cannot be cured by subsequent entry of the Board's final order on July 25, 2001.<sup>3</sup> Rather, the appropriate remedy would have been for McDonald's to file a notice of appeal from the Board's final order.<sup>4</sup>

As a result, the Court finds that it is without jurisdiction to consider the merits of McDonald's appeal. Therefore, the Court hereby **DISMISSES** the above-captioned appeal.

**IT IS SO ORDERED.**

---

Carl Goldstein, Judge

oc: Prothonotary

---

<sup>3</sup> See *Gunzl v. Spayd*, Del. Supr., No. 13, 1999, Berger, J. (Apr. 8, 1999), Order at 1 (holding that the jurisdictional defect created by appellant's premature filing of a notice of appeal to the Supreme Court could not be cured by the subsequent entry of a final order by the Superior Court).

<sup>4</sup> See *Id.*