

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

CASE NO.: 5D09-3789
LOWER TRIBUNAL CASE NO.: 09-CA-19AP

CARILLON COMMUNITY
RESIDENTIAL ASSOCIATION,
INC., and KEN HOFER,

Petitioners,

vs.

SEMINOLE COUNTY, FLORIDA,
AHG GROUP, LLC and
UNIVERSITY OF CENTRAL
FLORIDA FOUNDATION, INC.,

Respondents.

MOTION FOR EXTENSION OF TIME

Respondents, AHG GROUP, LLC and UNIVERSITY OF CENTRAL FLORIDA FOUNDATION, INC., by and through their undersigned attorneys, hereby request an extension of time within which to serve their Response to and including December 31, 2009, and allege as follows:

1. By Order dated November 23, 2009, the Court entered an Order to Show Cause providing Respondents twenty days within which to file a Response to the Petition for Writ of Certiorari.

2. The Order was received while undersigned counsel was out of the office over Thanksgiving and the week of November 30th for the Thanksgiving holiday, and the deadline was calendared administratively for Monday, December 21, 2009 by a paralegal assigned the task of litigation control within the law firm.

3. Upon return from vacation, undersigned counsel became ill with a severe case of the flu, which turned into strep throat and bronchitis, and undersigned counsel has been out of the office due to illness from Tuesday, December 8 through Tuesday, December 15, 2009. Although undersigned counsel returned to the office this week on Wednesday, December 16, 2009, undersigned counsel still has a very severe case of laryngitis which is impacting undersigned counsel's ability to meet her case load. Undersigned counsel cannot speak above a whisper, and then only for a few minutes at a time due to the strong hoarseness that remains from the strep throat and bronchitis.

4. Respondents, accordingly, are in need of an extension of time within which to prepare and serve the Response Brief. Due to undersigned counsel's illness and the fact that her law firm will be closed with no secretarial help available on December 24 and December 25, 2009, Respondents are in need of an extension of time to and including December 31, 2009 within which to prepare and serve their Response.

5. Undersigned counsel has consulted with counsel for Respondent, Seminole County, and is authorized to advise the Court that Respondent, Seminole County has no objection to this request for extension of time.

6. Undersigned counsel has consulted with counsel for Petitioner and has been advised that Petitioner objects to this request for extension of time. Petitioner's counsel has also advised undersigned counsel that he believes that the deadline for the Response was Monday, December 14, 2009.

7. The calendaring of the deadline for filing the Response in this case was handled administratively by a paralegal while undersigned counsel was out of the office on vacation and subsequent illness. Florida Rule of Appellate Procedure 9.420(e) was relied upon in the calculation and administrative calendaring of the deadline while undersigned counsel was out of the office. Rule 9.420(c) provides that "if a party ... is required or permitted to do an act within some prescribed time after service of a document, and the document is served by mail, five days shall be added to the prescribed period."

8. Opposing counsel has brought to undersigned counsel's attention the case of Gillespie v. City of Destin, 946 So.2d 1195 (Fla. 1st DCA 2006), in which the First District Court of Appeal stated that an additional five days should not be calculated when an order requires the document to be filed within so many days of the date of the order. In Gillespie, however, the First District Court of Appeal

overturned a circuit court order dismissing an appeal for failure to timely file an initial brief after the petitioner interpreted Rule 9.420(e) as affording him an additional five days beyond the ten-day period set forth in the circuit court's order establishing a briefing schedule. The circuit court order, beyond setting a briefing schedule, provided that if the initial brief was not timely filed within that ten-day period, the action would be dismissed.

9. On appeal, the First District found that, irrespective of the directive in the circuit court order that the appeal would be dismissed for the untimely filing of the brief, the circuit court erred in dismissing the appeal because, among other things, dismissal was too harsh a sanction. *Id.* at 1199. The appellate court found that dismissal was not warranted absent a finding of willful failure to comply with the court's order, that dismissal of an appeal for the untimely filing of a brief served only to penalize the client for the shortcomings of the counsel, and that such shortcomings could be better addressed by the use of other sanctions, such as fines, costs, reprimand and contempt. *Id.* The late-filed brief, accordingly, was ordered to be filed and the appeal to proceed.

10. As was explained by the First District in *Gillespie*, "public policy in Florida favors deciding controversies on their merits, even when an initial brief is untimely filed." *Id.*, citing *Lindsey v. King*, 894 So.2d 1058, 1059-60 (Fla. 1st

DCA 2005) (recognizing the ““principle of law that dismissals for the tardy filing of a brief are highly disfavored.””)

11. Upon conducting additional research, Respondents also bring to the Court’s attention the case of Kaloyios v. Regal Homes of Central Florida, Inc., 967 So.2d 1035, 1037 (Fla. 5th DCA 2007), in which this Court similarly overturned a circuit court’s dismissal of an appeal finding that it was too harsh a sanction for counsel’s inadvertent failure to file the brief in a timely fashion, ruling that the harsh sanction of dismissing an appeal is imposed only when there is extreme, willful misconduct, or an intentional disregard of court orders or the appellate rules, which rises to the level of inexcusable neglect, citing Baron v. First Union National Bank, 792 So.2d 708 (Fla. 5th DCA 2001) (denying certiorari where circuit court dismissed appeal almost six months after appeal was initiated and there was no reasonable justification for delay in filing initial brief).

12. The instant appeal involves a challenge by Petitioners of development approvals granted by Seminole County to Respondents. It is Respondents who own the property, the land use approvals and the development rights that are the subject of this certiorari appeal. It is only Respondents who would experience any prejudice occasioned by a delay in the Court’s granting of an extension of time and the corresponding impact upon Respondents’ development of their property.

Petitioners are third-party residents who live in the vicinity of Respondents' property.

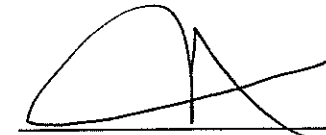
13. To the extent the Court agrees with Petitioners' position that the Response was due December 14, 2009, while undersigned counsel was out of the office due to illness, any delay in the filing of this motion was inadvertent and excusable. More importantly, as previously explained, no prejudice will be suffered by Petitioners in the granting of this extension of time, and the granting of this extension of time to Respondents to serve the Response Brief will assist the Court in appropriately deciding the controversy raised by the issues on appeal on their merits pursuant to public policy. Gillespie, 946 So.2d at 1199; Lindsey, 894 So.2d at 1059-60.

14. In the first-tier circuit-court level of certiorari review that preceded this appeal, moreover, Respondents granted to Petitioners the courtesy of extensions of time. Petitioners initially filed an *unopposed* motion for extension of time in order to file one consolidated reply. Petitioners also sought an *additional* two-week extension of time to serve the reply brief based upon the workload of Petitioners' counsel.

15. This is Respondents' first request for an extension of time, and it is not interposed for the purpose of delay. The amount of time requested is

reasonable and is limited to that necessary to prepare and serve the Response Brief in order that the Court may arrive at a determination of the issues on the merits.

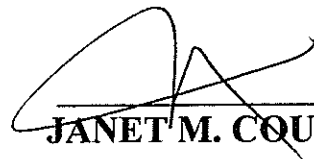
WHEREFORE, Respondents request an extension of time to serve the Response to and including December 31, 2009.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **DAVID A. THERIAQUE, ESQUIRE, S. BRENT SPAIN, ESQUIRE,** and **LESLIE E. BRYSON, ESQUIRE** of Theriaque, Vorbeck & Spain, 433 North Magnolia Drive, Tallahassee, Florida 32308 and **ROBERT A. MCMILLAN** and **KATHY FUREY-TRAN**, Seminole County Attorneys Office, 1101 East 1st Street, Sanford, Florida 32771, this 18th day of December, 2009.



JANET M. COURTNEY