

CASE NO. A05-2124

**State of Minnesota
In Court of Appeals**

JEFF BARTHELD AND DANA BARTHELD,

Relators,

vs.

COUNTY OF KOOCHICHING, et al.,

Respondents.

RELATORS' BRIEF AND APPENDIX

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STATEMENT OF THE LEGAL ISSUES

I. Was the denial of an application for a conditional use permit (“CUP”) to allow a bed and breakfast in the applicants’ residence on the grounds that the county wanted to examine guidelines for bed and breakfast businesses arbitrary, capricious, and without reasonable justification when the applicants otherwise met every condition under the ordinance?

Authorities:

Zylka v. City of Crystal, 283 Minn. 192, 195-96, 167 N.W.2d 45, 49 (1969)
Medical Services, Inc. v. City of Savage, 487 N.W.2d 263, 267-68 (Minn.App. 1992)

II. Was the denial of an application for a CUP to allow a bed and breakfast in the applicants’ residence arbitrary, capricious, and without reasonable justification where the county failed to make findings of fact, lacked a legally sufficient reason, and lacked a factual basis in the record?

Authorities:

Honn v. City of Coon Rapids, 313 N.W.2d 409, 416 (Minn. 1981)
Yang v. County of Carver, 660 N.W.2d 828, 834 (Minn.App. 2003)
Barton Contracting Co, Inc. v. City of Afton, 268 N.W.2d 712, 718 (Minn. 1978)

STATEMENT OF THE CASE

In April, 2005, Jeff and Dana Bartheld applied to Koochiching County for a conditional use permit for a recreational service-oriented business pursuant to Section 2.79(b)(4) of the Koochiching County Zoning Ordinance. SR.31. The specific business which the Barthelds proposed to operate was a bed and breakfast. Id. After filing their application, the Barthelds proposed numerous revisions to their application to address neighbors' concerns. SR.35. The revisions to the application included reducing the bed and breakfast to two units, with no cooking and no liquor on the premises, a quiet time from 10:30 p.m. to 6:00 a.m., parking on their property only, boat and trailer launching and docking arranged through Rainy Lake Marina only, and a sunset for the use permit after five years. Id. The Koochiching County Planning and Zoning Commission unanimously approved the project, 7-0-0, as amended. SR.37; SR.43.

On August 23, 2005, the Koochiching County Board of Commissioners met and denied the Barthelds' application for a conditional use permit. SR.43-44. Further, without any prior notice or hearing, the County Board voted to place a moratorium on further bed and breakfast businesses. Id.

The reasons stated at the August 23, 2005 hearing were that "the request [was] hard to support when the vast majority of property owners in the neighborhood are opposing it" and that the County Board wanted to establish "guidelines for establishing" bed and breakfast businesses. SR.43-44. The reasons stated in the written September 14, 2004 notice of denial were "the vast majority of neighbors opposed to the business establishment" and "concerns and questions on Bed and Breakfast type businesses." A.1.

On October 27, 2005, the Barthelds filed a petition for a writ of certiorari to the Minnesota Court of Appeals, requesting review of Koochiching County's denial of their conditional use permit application under Minnesota Statute §606.01 et seq., on the grounds that the decision was arbitrary, capricious, unreasonable, lacking adequate findings, and without evidentiary support. A.5.

STATEMENT OF THE FACTS

In early 2005, Jeff and Dana Bartheld became interested in operating a bed and breakfast in their residence, located in Koochiching County (the "County"). They wrote to the Koochiching County Planning and Zoning Commission and asked for information on establishing a bed and breakfast in their home. SR.29. The Director of Environmental Services for Koochiching County responded, explaining that the Barthelds needed only to meet "home operation criteria." SR.30. Relying on the information from the Director, in May, 2005, the Barthelds filed an application for a conditional use permit with the County. SR.31.

The Barthelds' application was first considered by the Koochiching County Planning and Zoning Commission. In their application, the Barthelds sought a conditional use permit to operate a five unit bed and breakfast in their residence. SR.31. The Planning and Zoning Commission held a hearing on the Barthelds' application. SR.35. At the hearing, several neighbors expressed concerns regarding the Barthelds' proposed business, and the Planning and Zoning Commission continued the hearing to another date. Id.

To address their neighbors' concerns, the Barthelds revised their application. SR.35. The Planning and Zoning Commission then held a second hearing on the Barthelds' application where the Barthelds' revisions were discussed. SR.36. In revising their application, the Barthelds proposed reducing the bed and breakfast to two units, with no cooking and no liquor on the premises, a quiet time from 10:30 p.m. to 6:00 a.m., parking on their property only, boat and trailer launching and docking arranged through

Rainy Lake Marina only, and a sunset for the use permit after five years. SR.35. At the conclusion of the second hearing, the Koochiching County Planning and Zoning Commission unanimously approved the Barthelds' application as amended. SR.37.

With the unanimous approval of the Planning and Zoning Commission, the Barthelds' application next went before the Koochiching County Board of Commissioners for hearing. SR.38-44. At the August 23, 2005 hearing before the County Board, some residents spoke in support of the Barthelds' application, including the owners of two existing bed and breakfast businesses in Koochiching County. SR.43-44. Other residents spoke of their belief that the Barthelds' proposed home business was not "a good fit." Id. One resident expressed his belief that the Koochiching County Ordinance was "ambiguous." Id.

At the conclusion of the hearing, the County Board denied the Barthelds' application for a conditional use permit. SR.43-44. The minutes from the August 23 hearing note the Board felt "the request [was] hard to support when the vast majority of property owners in the neighborhood are opposing it" and that the County Board wanted to establish "guidelines for establishing" bed and breakfasts. SR.43-44. Then, without any prior notice or discussion, the Commissioners voted to place a moratorium on further bed and breakfast businesses. SR.43-44.

On September 14, 2005, the Koochiching County Board of Commissioners' Chair sent the Barthelds a notice of denial. A.1. In his notice of denial, the Board Chair writes that the Barthelds' application was denied because "the vast majority of neighbors

opposed to the business establishment” and “concerns and questions on Bed and Breakfast type businesses.” A.1.

ARGUMENT

I. STANDARD OF REVIEW

An Arbitrary and Capricious Denial of a Conditional Use Permit Must Be Overturned.

By law, the Barthelds should have been issued a conditional use permit. While bodies administering zoning ordinances have broad discretionary power to deny applications for conditional use permits, they may not do so arbitrarily. Zylka v. City of Crystal, 283 Minn. 192, 195-96, 167 N.W.2d 45, 49 (1969). A decision by a county to deny a conditional use permit will be found to be arbitrary and capricious if the applicant establishes that he has met all the standards specified by the zoning ordinance. Id. Moreover, generalized community opposition which is not based upon concrete information is not a sufficient reason for a county to deny an application for a conditional use permit. Yang v. County of Carver, 660 N.W.2d 828, 834 (Minn.App. 2003) (public comment stating that proposed slaughterhouse would generate noise and traffic and that it might have detrimental effect on environment and property values found speculative and not supporting findings); see also Barton Contracting Co, Inc. v. City of Afton, 268 N.W.2d 712, 718 (Minn. 1978) (mere community opposition is legally insufficient reason for denial); Scott County Lumber Co. v. City of Shakopee, 417 N.W.2d 721, 728 (Minn.App. 1988), review denied (Minn. Mar. 23, 1988); Earthburners, Inc. v. County of Carleton, 513 N.W.2d 460, 461-63 (Minn. 1994).

Finally, a permit applicant has the burden of establishing that the reasons for the denial are either legally insufficient or had no factual basis in the record. Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757, 763 (Minn. 1982); however, a permit applicant challenging a denial faces a lower burden than if she were challenging a conditional use permit approval. Schwardt v. County of Watonwan, 656 N.W.2d 383, 389 n. 4 (Minn. 2003) (stating conditional use permit denials are held to less deferential standard of review than conditional use permit approvals).

The Barthelds met the requirements of the County's ordinance and received unanimous approval in favor of their application from the County's planning and zoning committee. SR.37. Yet the Koochiching County Board denied the Barthelds' application, noting neighbors' opposition and a desire to establish bed and breakfast guidelines. SR.43-44; A.1.

II. THE BARTHELDS WERE ENTITLED TO A CONDITIONAL USE PERMIT BECAUSE THEY MET EVERY CONDITION UNDER THE ORDINANCE.

Where a particular use is permitted under a given zoning ordinance, those desiring to operate a business that falls under the definition of that use are entitled to a conditional use permit if they comply with the specific requirements, regulations, and performance standards prescribed by the ordinance. Medical Services, Inc. v. City of Savage, 487 N.W.2d 263, 267-68 (Minn.App. 1992). A decision by a county to deny a conditional use permit will be found to be arbitrary and capricious if the applicant establishes that he has met all the standards specified by the zoning ordinance. Zylka v. City of Crystal, 283 Minn. 192, 195-96, 167 N.W.2d 45, 49 (1969).

The Barthelds complied with sections 2.79(b)(4) and 5.12 of the Koochiching County Zoning Ordinance and are entitled to a CUP. In Koochiching County, a homeowner may operate a recreational service-oriented business in their home “such as resorts and motels” and “other recreational services which in the opinion of the County Planning Commission are of the same general character....” SR.7. In order to operate such a recreational service-oriented business, the homeowner must receive a CUP. Id. The CUP must be issued to the homeowner if the applicant demonstrates that the CUP (1) will not prevent the enjoyment of the environment, the use of neighboring properties, nor diminish their value; (2) will not impede development; (3) is consistent with the area’s development; and (4) is in keeping with the spirit of the ordinance. SR.22. The CUP may be limited as necessary. Id.

The Barthelds intended to operate a bed and breakfast from their home. Accordingly, they applied for a CUP pursuant to sections 2.79(b)(4) and 5.12. SR.31. After filing their application, the Barthelds proposed numerous revisions to their application to address neighbors’ concerns. SR. 35. The revisions to the application included reducing the bed and breakfast to two units, with no cooking and no liquor on the premises, a quiet time from 10:30 p.m. to 6:00 a.m., parking on their property only, boat and trailer launching and docking arranged through Rainy Lake Marina only, and a sunset for the use permit after five years. Id. After public hearings, the Koochiching County Planning Commission (also known as the Koochiching County Planning and Zoning Commission) determined that the bed and breakfast was a type of recreational service governed by section 2.79(b)(4), and that the Barthelds presented evidence which

satisfied each of the requirements under section 5.12. SR.36-37. The Koochiching County Planning Commission unanimously approved the Barthelds' amended application. Id.

Despite the unanimous approval of the Planning and Zoning Commission ("Commission"), the Koochiching County Board of Commissioners ("Board") met and denied the Barthelds' application. SR.43-44; A.1. The Board made no findings that the Commission's approval was unfounded, or that the Barthelds failed to meet the requirements of section 2.79 or section 5.12. Instead, the Board stated at the August 23, 2005 hearing that "the request [was] hard to support when the vast majority of property owners in the neighborhood are opposing it" and that the Board wanted to establish "guidelines for establishing" bed and breakfasts. SR.43-44. The reasons stated in the written September 14, 2004 notice of denial were "the vast majority of neighbors opposed to the business establishment" and "concerns and questions on Bed and Breakfast type businesses." A.1. Yet these conclusory statements by the Board are unfounded.

The County had no basis for denying the Barthelds' application to "establish guidelines for establishing" bed and breakfast businesses or to address "concerns and questions on Bed and Breakfast type business." (The County's denial based upon the neighborhood opposition was legally insufficient and lacking a factual basis in the record, as argued below.) At the August 23, 2004 hearing, a single resident, Jim Nelson, commented that *he* thought that the ordinance was ambiguous and that the County should establish guidelines. SR.43. This was the *only* comment during the hearing on the

ordinance being ambiguous. Further, Mr. Nelson neither explained why he thought the ordinance was ambiguous, nor said if he was referring to section 2.79 or section 5.12. Despite the fact that the Commission approved the Barthelds' application under the ordinance with *no* discussion or suggestion that the ordinance was ambiguous, the Board denied the application because of "concerns and questions on Bed and Breakfast type businesses." A.1. Like Mr. Nelson, the Board neither explained why it thought the ordinance was ambiguous, nor said if it was referring to section 2.79 or section 5.12.

Further, the attempted action by the Board to place a moratorium on bed and breakfast businesses was arbitrary and unenforceable. The general rule allows for the retroactive application of zoning ordinances; however, a major exception to the rule exists in "cases of bad faith or arbitrary action on the part of a governmental subdivision." Interstate Power Company, Inc. v. Nobles County Board of Commissioners, 617 N.W.2d 566, 575 (Minn. 2000). In such cases, the amendment is not applied retroactively. Id. In this case, the Board's attempted action to place a moratorium on all bed and breakfasts was arbitrary and cannot be used to deny the Barthelds' application. The Board gave no notice of its intent to consider a moratorium. The motion was made immediately after the Board denied the Barthelds' application without notice and without any discussion or public hearing. SR.43-44. Accordingly, the moratorium cannot be applied retroactively to deny the Barthelds' application.

In short, the ordinance is not ambiguous. The Barthelds' application met all of the requirements of the ordinance. The Koochiching County Planning Commission determined the Barthelds' proposed business fell under section 2.79, found that the

application met the requirements of section 5.12, and unanimously approved the Barthelds' application. Yet the Board latched on to one isolated comment from a neighbor that he thought the ordinance was ambiguous and denied the Barthelds' application. The Board never identified which section of the ordinance was ambiguous, nor explained the alleged ambiguity. For this reason, the Board's denial of the Barthelds' application for a CUP was arbitrary and capricious and must be reversed.

III. DENIAL OF THE BARTHELD APPLICATION FOR A CONDITIONAL USE PERMIT WAS LEGALLY INSUFFICIENT BECAUSE THE COUNTY FAILED TO MAKE FACTUAL FINDINGS.

A party makes a prima facie showing of arbitrariness by demonstrating that the agency failed to "record any legally sufficient basis for its determination at the time it acted." Honn v. City of Coon Rapids, 313 N.W.2d 409, 416 (Minn. 1981) (quoting Zylka v. City of Crystal, 283 Minn. 192, 198, 167 N.W.2d 45, 50 (1969)); Crystal Beach Bay Association v. County of Koochiching, 309 Minn. 52, 243 N.W.2d 40 (1976) (prima facie case of arbitrariness exists if the county board's decision is not accompanied by findings.) Further, "[w]hile it is not necessary to prepare formal findings of fact, a county board 'must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion.'" Picha v. County of McLeod, 634 N.W.2d 739, 742 (Minn.App. 2001) (quoting Honn, 313 N.W.2d at 416).

In Picha v. County of McLeod, 634 N.W.2d at 739, a landowner sought certiorari review of a decision by the McLeod County Board denying an application for a conditional use permit to operate a cemetery. The McLeod County Board did not make any formal findings of fact. Further, the minutes from hearing on Picha's application

noted only that: “the reasons for denying the CUP were: ‘incompatibility with current use of the land and to avoid setting a precedent of allowing private cemeteries.’” Picha, 634 N.W.2d at 742. In reversing the McLeod County Board, the Court of Appeals concluded that the minutes from the hearing did not “adequately explain the reasons for its decision.” Id.

Just as the McLeod County Board failed to make findings in Picha, the Koochiching County Board failed to make findings in denying the Barthelds’ application for a CUP. The minutes of the August 23, 2005 hearing show that at the conclusion of the hearing, “[b]oard members stated that the request [for the CUP] was hard to support when the vast majority of the property owners in the neighborhood are opposing it” and that the “Board weighed the suggestion of coming up with guidelines for establishing B&Bs [sic] in the County to ensure they are acting in a uniform manner.” SR.43-44. Thereafter, the minutes show that a motion was made to deny the Barthelds’ application for a CUP and place a moratorium on similar businesses, and that the motion carried. Id. Thereafter, in his September 14, 2005 letter to the Barthelds, the Board Chair writes that the “topics considered by the Board were the vast majority of neighbors opposed to the business establishment and the ambiguity in the County Zoning Ordinance to respond to concerns and questions on Bed and Breakfast type business.” A.1.

Yet neither of the reasons given in the minutes nor in the September 14 letter amount to the types of findings required under Zylka and its progeny. Neither the minutes nor the September 14 letter “adequately explain the reasons for the decision.” Picha, 634 N.W.2d at 742. First, both the minutes and the September 14 letter note

neighborhood opposition. Yet generalized neighborhood opposition is not a sufficient basis for denying an application for a conditional use permit. Yang, 660 N.W.2d at 834 (Minn.App. 2003) (public comment stating that proposed slaughterhouse would generate noise and traffic and that it might have detrimental effect on environment and property values found speculative and not supporting findings); Barton, 268 N.W.2d at 718 (Minn. 1978) (mere community opposition is legally insufficient reason for denial); see also argument at IV, below. Second, the issue of the Koochiching County Zoning Ordinance's ambiguity was barely addressed at the August 23, 2005 hearing. As reflected in the hearing's minutes, one neighbor stated his opinion that "[h]e felt there was ambiguity in the county zoning leaving questions unanswered...." SR.43. Yet he failed to explain how the ordinance is ambiguous; moreover, the Board failed to explain its reasons for concluding the ordinance is ambiguous and failed to identify what portion of the ordinance is ambiguous. SR.43-44; A.1.

The Board made only conclusory statements in support of its denial of the Barthelds' application for a CUP. In doing so, the Board failed to make findings of fact or otherwise explain its reasons for denying the application. Because the Board failed to make findings of fact, its denial of the Barthelds' application was arbitrary and must be reversed.

IV. ALTERNATIVELY, THE COUNTY LACKED A FACTUAL BASIS IN THE RECORD TO DENY THE BARTHELDS' APPLICATION FOR A CONDITIONAL USE PERMIT.

A permit applicant has the burden of establishing that the reasons for the denial are either legally insufficient or had no factual basis in the record. Hubbard Broadcasting,

Inc. 323 N.W.2d at 763; however, a permit applicant challenging a denial faces a lower burden than if she were challenging a conditional use permit approval. Schwardt, 656 N.W.2d at 389 n. 4. A board acts arbitrarily when its findings are not substantiated by evidence in the record. Yang v. County of Carver, 660 N.W.2d 828, 832-34 (Minn.App. 2003).

A. The Generalized Community Opposition To The Barthelds' Application Was Not a Legally Sufficient Reason For Denying Their Application.

The Board acted arbitrarily in denying the Barthelds' application for a CUP because the Board had no evidence in the record to support the denial. As argued above at III, the Board failed to make adequate findings or otherwise explain its reasons for denying the application. SR.43-44; A.1. However, for the sake of argument, even if the Board's two conclusory statements rise to the level of findings, they are not substantiated by evidence in the record. The minutes of the August 23, 2005 hearing show that at the conclusion of the hearing, "[b]oard members stated that the request [for the CUP] was hard to support when the vast majority of the property owners in the neighborhood are opposing it." SR.43. Thereafter, in his September 14, 2005 letter to the Barthelds, the Board Chair writes that the "topics considered by the Board were the vast majority of neighbors opposed to the business establishment...." A.1.

Yet "the simple fact that community members oppose a landowner using his land for a particular purpose is not a legally sufficient reason for denying a special-use permit." Barton, 268 N.W.2d at 718; Yang, 660 N.W.2d at 834 (public comment stating that proposed slaughterhouse would generate noise and traffic and that it might have

detrimental effect on environment and property values found speculative and not supporting findings); Scott County Lumber Company, 417 N.W.2d at 721 (community opposition to a landowner's desire to use his property for a particular purpose not legally sufficient reason). Community opposition to an application which is not based on concrete evidence cannot support a denial of an application. Id. For example, in Yang v. County of Carver, 660 N.W.2d at 834, town residents opposed an application for a CUP for a slaughterhouse. The residents told the board that traffic would increase if the application was approved. Residents also told the board that the applicant "appeared to be holding 'a great big party [with] many, many cars' every weekend and that [the applicant] appeared to be having 'big parties [with] ten to 14 cars going in;' one neighbor reported his mother saw 'ten cars coming down the road at 10:00 at night.'" Yang, 660 N.W.2d at 833. In holding that the residents' opposition was insufficient to support a finding that the slaughterhouse would increase traffic, the Court of Appeals explained that "the neighbors' anecdotal comments contain no detail as to how the cars they witnessed might affect circulation or the general welfare, and are insufficiently concrete to substantiate a finding that the proposed use would create excess traffic." Id.

The minutes of the August 23, 2005 hearing on the Barthelds' application show that the community opposition in this case had even less factual support than the opposition which was found to be insufficient in Yang. At the hearing on the Barthelds' application, Bobbi Ready stated that she "fears the bed and breakfast business will create more noise" and "add more traffic...." SR.43. Gordon Routier spoke about his being "denied to operate a chiropractic business" but that "a bed and breakfast business was

approved....” Id. Steve Gunberg spoke, too, and said that the Barthelds’ proposed business would not be a “good fit.” Id. Karen Hedke spoke about her concern of losing business to the Barthelds if their application were to be approved. Id. Jim Nelson gave his opinion that the Barthelds’ proposed business did not “fit” the neighborhood, that the ordinance was ambiguous, and that a road would need to be improved. Id. Walt Whitbeck opined that he did not feel “a two-unit with continental breakfast qualified as a B&B.” Id.

Yet Ready, Gunberg and Nelson’s comments are based upon pure speculation. None of them provided any concrete evidence or support for their fears of more noise or that the Barthelds’ business would not “fit” the neighborhood. Routier’s comments do not even indicate he opposed the Barthelds’ application, but instead address the Board’s apparent failure to permit him to operate his business. Nelson, too, failed to identify in what way the ordinance was ambiguous or to identify which portions of the ordinance are ambiguous. Hedke gave no concrete basis for her concern that she would lose business to the Barthelds; further, Gretchen Davis and Tara Nelson, owners of two other bed and breakfast businesses in Koochiching County, actually supported the Barthelds’ application and had no apparent concern over losing business to the Barthelds. Whitbeck simply made his opinion known; it is not even clear if he opposed or supported the Barthelds’ application.

In short, the generalized community opposition to the Barthelds’ application was not a legally sufficient reason for the County Board to deny their application.

B. The Board Had No Factual Basis For Finding The Ordinance Was Ambiguous.

The minutes of the August 23, 2005 hearing also note that the “Board weighed the suggestion of coming up with guidelines for establishing B&Bs [sic] in the County to ensure they are acting in a uniform manner.” SR.44. Thereafter, the minutes show that a motion was made to deny the Barthelds’ application for a CUP and place a moratorium on similar businesses, and that the motion carried. Id. Thereafter, in his September 14, 2005 letter to the Barthelds, the Board Chair writes that the Board considered the ambiguity in the County Zoning Ordinance to respond to concerns and questions on Bed and Breakfast type business.” A.1. Yet, again, there is no record evidence to support the Board’s decision. At the August 23, 2004 hearing, a single resident, Jim Nelson, commented that *he* thought that the ordinance was ambiguous and that the County should establish guidelines. SR.43. This was the *only* comment during the hearing on the ordinance being ambiguous. Further, Mr. Nelson neither explained why he thought the ordinance was ambiguous, nor said if he was referring to Section 2.79 or Section 5.12. Despite the fact that the Koochiching Planning Commission approved the Barthelds’ application under the ordinance with *no* discussion or suggestion that the ordinance was ambiguous, the Board denied the application because of “concerns and questions on Bed and Breakfast type businesses.” A.1. Like Mr. Nelson, the Board neither explained why it thought the ordinance was ambiguous, nor said if it was referring to Section 2.79 or Section 5.12.

The Board made conclusory statements about community opposition and ambiguity in the ordinance in support of its denial of the Barthelds' permit. Yet community opposition is not a legally sufficient reason for denial, and the Board had no factual basis for concluding that the ordinance was ambiguous. For these reasons, the Board's denial of the Barthelds' application was arbitrary and must be reversed.

CONCLUSION

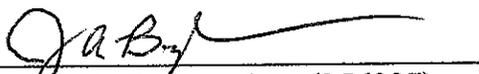
The Barthelds' application met all of the requirements of the ordinance. Yet the Board denied the application without making findings of fact or otherwise explaining its reasons for denying the application. The Board also made conclusory statements which were not legally sufficient and which had no factual basis in the record. Accordingly, the Koochiching County Board's denial of the Barthelds' application for a conditional use permit was arbitrary and must be reversed. This Court should reverse the Board's denial and direct the Board to approve the Barthelds' application. Further, this Court should award realtors their costs.

Respectfully submitted,

Dated: 11/21/05

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).