

CASE NO. A05-2124

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State of Minnesota  
In Court of Appeals

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JEFF BARTHELD AND DANA BARTHELD,

*Relators,*

vs.

COUNTY OF KOOCHICHING, et al.,

*Respondents.*

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RELATORS' REPLY BRIEF

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## ARGUMENT

### I. THE COUNTY'S MORATORIUM IS UNLAWFUL.

At the conclusion of the August 23, 2005 hearing before the Koochiching County Board ("County Board"), the County Board voted to place a moratorium on bed and breakfast businesses. SR.43-44. However, because the County Board acted arbitrarily in doing so, failed to give any notice of the proposed moratorium, and failed to limit the duration of the moratorium to one year, the moratorium is unlawful.

#### A. The Koochiching County Board Acted Arbitrarily And In Bad Faith When It Attempted To Enact The Moratorium.

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 in bad faith. In his September 14, 2005 letter to the Barthelds, the Board Chair writes that the "County Zoning Ordinance" had an "ambiguity." A.1. Again, in their Brief, page 8, the Respondents argue that the County zoning ordinance is ambiguous.

These assertions by the Board Chair and Respondents ignore the clear language of the ordinance. The Koochiching County Zoning Ordinance, section 2.79(b)(4), provides that 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 (emphasis added). 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). SR.30, 36-37. In passing the moratorium on the basis that the ordinance was ambiguous as to bed and breakfast businesses, the County Board exceeded its authority under the ordinance and acted arbitrarily.

In short, the County zoning ordinance provides that the County Planning Commission has the authority to determine if a proposed recreational service-oriented business meets the requirements of the ordinance. In fact, the County Planning Commission found that the Barthelds’ bed and breakfast business met the ordinance’s requirements. In arguing that the ordinance is ambiguous as to bed and breakfast businesses, the County Board acted arbitrarily and usurped the authority granted to the County Planning Commission.

**B. The Koochiching County Board Failed To Give Any Notice Of The Proposed Moratorium.**

Chapter 375 governs County Boards. Minnesota Statute § 375.51 governs enactment of ordinances. Subdivision 1 provides that “[a] public hearing shall be held before the enactment of any ordinance adopting or amending a comprehensive plan or official control....” Subdivision 2 requires the county to publish notice of intent to enact a given ordinance.

In the instant case, the County Board failed to give the notice required under Minn.Stat. § 375.51. For this reason, the attempted moratorium passed at the August 23, 2005 hearing is unlawful.

**C. Alternatively, The Koochiching County Board Failed To Limit The Duration Of Its Attempted Moratorium.**

In their brief, the Respondents allege that the County Board acted pursuant to Minn. Stat. § 394.34. Yet there are neither findings nor record evidence to make clear if the County Board was acting pursuant to Minn. Stat. § 394.34. Further, even if the County Board was acting pursuant to Minn. Stat. § 394.34, it still failed to follow the statute and the attempted moratorium is unlawful.

Chapter 394 governs planning, development and zoning for Counties. Minnesota Statute § 394.34 provides, in relevant part, that:

If a county is conducting, or in good faith intends to conduct studies within a reasonable time, or has held or is holding a hearing for the purpose of considering a comprehensive plan or official controls or an amendment, extension, or addition to either . . . the board in order to protect the public health, safety, and general welfare may adopt as an emergency measure a temporary interim zoning map or temporary interim zoning ordinance, the purpose of which shall be to classify and regulate uses and related matters as constitutes the emergency. Such interim resolution shall be limited to one year from the date it becomes effective and to one year to renewal thereafter.

First, the Record is devoid of evidence that the County Board was conducting, intended to conduct, held or was holding a hearing to consider an amendment to the ordinance at issue. Further, the Record has no evidence that the Barthelds' application presented an "emergency." Second, the attempted moratorium passed by the County Board is of

unlimited duration. A.3. Because the attempted moratorium is not limited by time, it fails to comply with Minn. Stat. § 394.34.

Respondents' argument that cases analyzing Minn. Stat. § 462.355, Subd. 4 support their attempted moratorium is misplaced. Minnesota Statute § 462.355, Subd. 4 governs municipal authority to enact an interim ordinance in limited circumstances. Said authority is limited to instances where a municipality "is conducting studies or has authorized a study to be conducted or has held or has scheduled a hearing" to adopt or amend a comprehensive plan or official control. Minn. Stat. § 462.355, Subd. 4. Further, any such interim measure must be limited to "one year from the date it is effective." Id. As set forth above, there is no Record evidence that the County Board is conducting a study, authorized a study, has held or has scheduled a hearing on bed and breakfast businesses. Further, the County Board's attempted moratorium has no time limitation at all.

To the extent that the cases cited by Respondents in their Brief, pages 7-9, regarding municipal interim zoning powers apply to Minn. Stat. § 394.34, said cases actually support the proposition that the attempted moratorium is unlawful. As set forth above, Minn. Stat. § 462.355, Subd. 4 provides that any interim ordinance may be enacted "for a period not to exceed one year from the date it is effective." In each case cited by Respondents, the challenged interim action taken was upheld because the given city complied with the time limit requirements of Minn. Stat. § 462.355, Subd. 4. Semler Constr., Inc. v. City of Hanover, 667 N.W.2d 457 (Minn.App. 2003) (interim ordinance limited to one year upheld); Duncanson v. Board of Supervisors of Danville Township,

551 N.W.2d 248 (Minn.App. 1996) (interim ordinance limited to one year or less upheld); Wedemeyer v. City of Minneapolis, 540 N.W.2d 539 (Minn.App. 1995) (interim hold on application for eleven weeks while city council held hearings and considered moratorium ordinance upheld); Almquist v. City of Marshan, 245 N.W.2d 819 (Minn. 1976) ( interim ordinance limited to six months upheld).

In the instant case, the County Board's attempted moratorium is not limited in time. As such, the County Board's moratorium fails to comply with Minn. Stat. § 394.34 and is unlawful.

In conclusion, even if the County Board acted pursuant to Minn. Stat. § 394.34 in passing the moratorium, the moratorium is nonetheless still unlawful because it is not limited by time.

### **CONCLUSION**

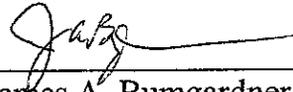
In arguing that the ordinance is ambiguous as to bed and breakfast businesses, the County Board acted arbitrarily and usurped the authority granted to the County Planning Commission. Further, because the County Board failed to give the notice required under Minn.Stat. § 375.51, the attempted moratorium passed at the August 23, 2005 hearing is unlawful. Alternatively, even if the County Board acted pursuant to Minn. Stat. § 394.34 in passing the moratorium, the moratorium is nonetheless still unlawful because it is not limited by time. This Court should reverse the County Board's denial and direct the County Board to approve the Barthelds' application.

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