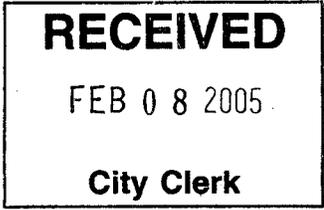


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BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

KIM AND KEITH BUSCH, AND  
MIKE AND MARILYN MILLER,  
  
Appellants,  
  
vs.  
  
CBJ PLANNING COMMISSION,  
  
Appellee,  
  
and  
  
BREEZE IN CORPORATION,  
  
Appellee/Intervenor.



Case No. 2004-04

**ORDER DENYING APPEALS**

***Background.***

Kim and Keith Busch, with Mike and Marilyn Miller, appeal the Planning Commission's grant of a Conditional Use Permit to the Breeze In Corporation to rebuild the Douglas Breeze In convenience store pursuant to the recently-revised convenience store ordinance, 2004-09.

The CBJ Planning Commission's Notice of Decision was issued August 27, 2004, and this appeal was timely filed thereafter. Separately, the Breeze In Corporation appeals a determination by Dale Pernula, director of the CBJ Community Development Department, interpreting the Breeze In Conditional Use Permit to allow construction of a 5,000 square foot store, but disallowing a proposed 5,000 square foot basement.

The Busch's appeal was briefed and argued by Patricia O'Brien and Mr. Miller; Breeze In was represented by Stephen Sorensen and Murray Walsh. The Planning Commission was represented by Deputy City Attorney Margaret H. Boggs.

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1 The appeal of director Pernula's determination was originally brought before the Planning  
2 Commission pursuant to CBJ 49.20.110; the Commission certified the question to the Assembly,  
3 and the two appeals have been addressed as one.

4 The consolidated appeals present two distinct sets of issues: 1) those issues surrounding the  
5 5,000/10,000 square foot issue, which will determine the maximum size of the proposed rebuilt  
6 convenience store, and 2) issues surrounding the conditional use permit, raised by the Busch appeal,  
7 centered on their concern that the present plan calls for "excessive expansion" of the Breeze In  
8 store.

9  
10 ***Discussion.***

11 Standard of Review.

12 When reviewing an appeal, the Assembly must act within the standard of review set out in the  
13 CBJ Appeals Code, at CBJ 01.50.070. That Code section assigns the appellants the burden of  
14 proof, and sets out a standard of review which is deferential to the Planning Commission. The  
15 Code allows the Assembly to reverse the decision of the Planning Commission in only three  
16 circumstances: 1) a lack of substantial evidence supporting the decision, 2) inadequate written  
17 findings, or 3) a failure of procedural due process. A fourth basis for reversing the Commission,  
18 that its action would violate the law, is implicit.

19 In essence, the standard of review is an expression of the basic structure of the City and  
20 Borough, delegating most planning and permitting functions to the Planning Commission, and  
21 including the Assembly only as a check against gross deviation from ordinance standards. Under  
22 this deferential standard of review, even if the Assembly would reach a conclusion different from  
23 that of the Planning Commission if presented the matter in the first instance, it must affirm the  
24 decision of the Planning Commission unless the limited circumstances set forth above are proven by  
25 the appellant. Mere disagreement by appellants with the Commission's decision will not suffice to  
26 see it overturned.

1 The 5,000/10,000 Square Foot Issue.

2 This dispute over the maximum square footage for the rebuilt convenience store first arose after  
3 the Breeze In conditional use permit was issued. The Breeze In indicated that it was proceeding  
4 with a 5,000 square foot basement in addition to the 5,000 square foot store, and CDD director Dale  
5 Pernula issued an interpretive ruling declaring that the department's understanding was that there  
6 would be no additional square footage allowed, that the building was limited to a total of 5,000  
7 square feet. Breeze In appealed the director's ruling to the Planning Commission, and the  
8 Commission certified the question to the Assembly for consolidation with the conditional use  
9 permit appeal.

10 The square footage issue was discussed by the parties at the pre-hearing conference, and the  
11 Pre-Hearing Order stated the issue for briefing and argument as follows:

12 Did the Planning Commission's grant of this conditional use permit include a  
13 5,000 square foot basement in addition to the 5,000 square foot convenience store,  
and, if so, was that proper under CBJ code?

14 The materials filed by Breeze In did provide notice to CDD that it was seeking a 5,000 square  
15 foot basement in addition to the 5,000 square foot convenience store: 1) the conditional use permit  
16 application so stated, at page 1 [R. 48] ("There will be a 5,000 square foot storage basement beneath  
17 the retail floor"), 2) the project narrative mentioned the basement, [R. 105], 3) some, but not all, of  
18 the project drawings showed the basement [R. 52], and, 4) the basement was mentioned in Mr.  
19 Walsh's testimony before the Commission [R. 868]. CDD staff missed the reference, as Mr.  
20 Pernula noted at oral argument.<sup>1</sup>

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23 <sup>1</sup> The Assembly would like to express its disappointment that CDD staff failed to review the  
24 materials adequately to spot this issue. This oversight caused a significant waste of time and money  
25 for all involved. The applicant, the appellants, the Clerk, the Law Department, the Mayor and Assembly  
26 all spent considerable time working on an appeal that could have been simply avoided. This permit was  
a relatively high-profile matter, years in the process, for which an appeal was virtually certain.  
Additional CDD staff resources should have been allocated as necessary for a proper review. CDD  
27 Director Pernula was commendably straightforward at oral argument in his admission that he missed  
the issue.

1 The Notice of Decision, which incorporated the CDD staff report, makes no mention of the  
2 basement. The staff report, however, incorporates the application, which, as noted above, does  
3 mention the basement. The Breeze In argues that the record shows that the Commission, in fact,  
4 approved the basement, and that the ordinance allows the additional square footage for storage. The  
5 neighbor appellants, and the Commission oppose on both points.

6 The Assembly's interpretation of the convenience store ordinance, CBJ 49.65.500-.540,  
7 enacted as Ordinance Serial No. 2004-09, resolves this issue. The question is whether the  
8 ordinance allows a maximum of 5,000 square feet – including additional square footage earned  
9 through application of the “bonus provisions” (CBJ 49.65.540) – *or*, would additional storage be  
10 allowed for a maximum of 10,000 square feet in the building. The Assembly finds that the intent of  
11 the recently-enacted convenience store ordinance is to allow no more than 5,000 square feet of floor  
12 space in the building, including all storage.

13 The convenience store ordinance, CBJ 49.65.540(a), provides in part, regarding square footage:

14 The planning commission may allow development in excess of 3,000 square feet  
15 but no more than 5,000 square feet of total gross floor area upon written findings  
awarding a bonus.

16 Breeze In argues that certain definitions in the CBJ Land Use Code, CBJ 49.80.120, support its  
17 interpretation of the convenience store ordinance, *i.e.*, that the ordinance allows storage in addition  
18 to 5,000 square feet of retail space.

19 The Breeze In focuses on the following two CBJ Land Use Code definitions:

20 *Gross building area* means the total horizontal floor areas of all floors, measured  
21 to the exterior of the walls, of a principal building, together with all accessory  
22 buildings or structures, exclusive of steps and porches. The gross area of a  
building without surrounding exterior walls shall be measured to the outside line  
of the supporting structure.

23  
24 *Gross floor area* means the total horizontal floor area measured to the outside of  
25 surrounding exterior walls or to the centerline of common interior walls. The  
gross floor area of a building without surrounding exterior walls shall be  
measured to the outside line of the supporting structure.

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28 Order Denying Appeals

1 In particular, Breeze In points to the fact that the definition of “gross building area” includes  
2 “all floors,” while the definition of “gross floor area” does not mention “all floors.” Under Breeze  
3 In’s theory, this difference indicates that, in adopting the term “gross floor area” in the convenience  
4 store ordinance, the Assembly must have intended to encompass only the retail floor area within the  
5 square footage limitation.

6 In addition, Breeze In notes, the Assembly modified the convenience store ordinance after it  
7 was heard by the Planning Commission, expressly allowing storage uses to be included in  
8 convenience stores. That addition, CBJ 49.65.530(e), now reads:

9 Height shall be limited to one story except that a second story may be allowed for  
10 residential use and for accessory office and storage uses, provided that any storage  
use must relate directly to the primary permitted use.

11 The Assembly does not adopt Breeze In’s interpretation, for the following reasons. First, the  
12 definition of “gross floor area” includes “the total horizontal floor area” without distinguishing  
13 between the main floor, basement, or other floors. Second, even if Breeze In’s interpretation were  
14 correct regarding the term “gross floor area,” the convenience store ordinance in fact modifies that  
15 term by adding the word “total,” before it, adding a further limitation on square footage: “no more  
16 than 5,000 square feet of *total* gross floor area.” As with each and every word in an ordinance,  
17 meaning must be attributed to the use of the term “total,” modifying the defined term “gross floor  
18 area.” By adding the term “total,” the Assembly clearly intended to further limit the maximum  
19 square footage allowed in convenience stores.

20 Section .530(e), upon which Breeze In relies, is primarily a height limitation. The argument  
21 that this subsection adds storage to the square footage limitation, goes too far: Under that theory,  
22 there would be no limit whatsoever on storage, allowing a “warehouse with a convenience store  
23 front,” a concern raised at the Planning Commission hearing on the draft ordinance. [R. 1033]. The  
24 Breeze In argues that this means storage is allowed so long as the footprint of the building is not  
25 enlarged, *i.e.*, in this case, allowing a 5,000 square foot basement in addition to the 5,000 square  
26 foot main floor. While this might be a fine policy – or not – it is not supported by the language of

1 the present ordinance; no such limitation appears.

2       Apparently, the parking approved by the Commission was scaled to a 5,000 square foot rebuild,  
3 not 10,000; this goes to the question of what, in fact, the Planning Commission did, rather than what  
4 the convenience store ordinance allows. Because the Assembly is basing its decision on what the  
5 ordinance would (or would not) allow, evidence of what the Planning Commission in fact did is not  
6 critical.

7       The legislative history of the convenience store ordinance includes many references to 5,000  
8 square feet – including the bonus provisions – as the maximum allowed, storage included. For  
9 example, Mr. Walsh, before the Planning Commission on October 9, 2001, on behalf of the Breeze  
10 In, proposed an amendment which would have applied the limit only to the retail area; the  
11 amendment was not adopted. Also in the record are references to the effect that the reason the  
12 3,000 square foot maximum can be increased to 5,000 with the bonus provisions is to accommodate  
13 storage.

14       The Assembly finds that the convenience store ordinance limits convenience stores to a  
15 maximum of 5,000 square feet. Accordingly, Breeze In's appeal of Mr. Pernula's determination is  
16 denied.

17  
18 ***Neighborhood Harmony Issues.***

19       CBJ 49.15.330(d)(5) provides that a conditional use permit shall be denied upon a finding that  
20 the proposed land use:

21             Will substantially decrease the value of or be out of harmony with property in the  
22             neighboring area . . .

23       Appellants argue that the Breeze In as permitted would violate this provision, and therefore, the  
24 Planning Commission's grant of a conditional use permit should be reversed.

25       First, the Assembly notes that this issue should be addressed in the context of the existing land  
26 use, *i.e.*, the Breeze In as it presently exists prior to reconstruction. The proposed reconstruction  
27 includes numerous items which arguably improve neighborhood values and harmony, *e.g.*, the left-

1 turn pocket, bus stop, landscaping, fence, noise limitations, lighting directed on-site, the building  
2 further set back from the Douglas Highway, and a more attractive building exterior.

3 The neighborhood appellants argue for additional conditions requiring a right turn, only, exiting  
4 the Breeze In, and requiring the Breeze In to wait until the State of Alaska, Department of  
5 Transportation/Public Facilities completes construction of a “roundabout” at the Douglas end of the  
6 Douglas Bridge. The Planning Commission considered these issues, but declined to add the  
7 requested conditions.

8 The Assembly finds that the traffic conditions imposed by the Commission are supported by  
9 substantial evidence, and that failing to add the conditions requested by appellants does not violate  
10 the Land Use Code. The Commission received considerable testimony and materials on this issue,  
11 including evidence from a traffic engineer hired by the applicant. While it might have been  
12 reasonable for the Commission to have added the requested conditions, doing so at this stage is not  
13 the role of the Assembly under the Appeals Code.

14 In essence, the neighborhood appellants disagree with the Planning Commission’s decision on  
15 these issues. Mere disagreement, even reasonable disagreement, is not sufficient to meet the  
16 standard of review and burden of proof in the CBJ Appeals Code.

17 Appellants argue that the Commission’s written findings are inadequate, the Assembly finds  
18 that the written findings are the barest minimum but, in light of the whole record on appeal, the  
19 Commission’s decisions are supported by substantial evidence.

20 Hours of Operation.

21 Appellants are concerned about the unlimited hours of operation allowed by the Commission,  
22 arguing that the Commission should have recommended that the Assembly include hours  
23 limitations in the convenience store ordinance and that the Commission should have limited the  
24 hours of the Breeze In.

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28 Order Denying Appeals

1 First, the question of the Planning Commission's recommendation to the Assembly regarding  
2 the convenience store ordinance is not subject to appeal under the CBJ Appeals Code; it is simply a  
3 recommendation, and in any event, the time for bringing that issue has long passed.

4 The Planning Commission spent considerable time and effort addressing the issue of hours of  
5 operation, and in the end did not place a condition limiting the hours. Liquor store hours are limited  
6 outside of the convenience store ordinance, but the rest of the store may be open around the clock.  
7 This is the case for the existing store as well; nothing outside the alcohol sales restrictions limits its  
8 hours of operation. Because the Commission examined this issue closely and based its decision on  
9 substantial evidence, e.g. the testimony taken from the neighbors and developer, and the Planning  
10 Commission's deliberations, the Assembly will not reverse the decision to grant a preliminary plat  
11 based on this issue.

12  
13 ***Beach Access Issue.***

14 The proposed expansion of the Breeze In apparently will take away a driveway providing  
15 occasional access to the beach along Douglas Island. In the past, Breeze In has, from time to time,  
16 allowed the neighbors and the CBJ Public Works Department to access to the beach across its  
17 property. The neighborhood appellants protest this loss of access, but provide no legal justification  
18 for denying the Breeze In this use of its property. The CBJ Public Works Department beach access  
19 issue is a matter more appropriately addressed by the CBJ Public Works Department or the Lands  
20 and Resources Division, rather than on appeal of Breeze In's Conditional Use Permit. Statements  
21 by both parties at oral argument indicate that there are no legal issues regarding closing off the  
22 beach access, that it is the Breeze In's legal right to take the access away. The Assembly takes no  
23 action regarding the beach access issue.

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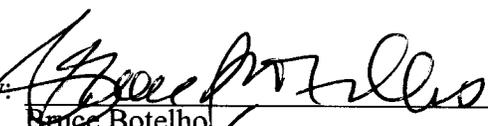
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1 **Conclusion.**

2 For the reasons given above, the Buschs' appeal of the Breeze In Conditional Use Permit is  
3 denied; appellants have not met their burden of proof. In addition, for the reasons outlined above,  
4 the Breeze In's appeal of Director Pernula's determination is denied. Accordingly, Breeze In will  
5 be allowed to proceed with reconstruction of its structure pursuant to the conditional use permit  
6 issued on August 27, 2004; however, it will be required to submit new plan drawings demonstrating  
7 that the building will not encompass more than 5,000 square feet, consistent with Mr. Pernula's  
8 determination. Both appeals are denied.

9 IT IS SO ORDERED, at Juneau, Alaska, this 9<sup>th</sup> day of February, 2005.

11 CITY & BOROUGH OF JUNEAU

12  
13 By:   
14 Bruce Botelho  
15 Presiding Officer on Appeal

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