



KURE BEACH  
PLANNING & ZONING COMMISSION

Meeting Date: April 6, 2016

Agenda Item #V. C. Container Housing

Present to Town Council on:

Date: April 19, 2016

PLANNING AND ZONING COMMISSION  
CONSISTENCY STATEMENT  
N.C. Gen. Stat. 160A-383

(To be read into the record as a motion, seconded, and voted upon)

X This recommendation is consistent with the objectives and policies of the Town of Kure Beach Land Use Plan adopted by Town Council September 27, 2006 (Adopted and Certified by Coastal Resources Commission November 17, 2006)

X This recommendation applies to Section 8 Part I of the Town of Kure Beach Land Use Plan, subsection "Constraints to Development"

X Consideration of recommended text amendment to The Town of Kure Beach Code ,  
(a) Chapter 19 Zoning, Art. I. Definitions - *Building (amending)*  
(b) Chapter 197. Art. I. Definitions -adding *Container*  
(c) Sec. 19-79.5 Uses that are prohibited (amend)

\_\_\_\_\_ This recommendation applies to the John Sawyer Architects BI District Study (HPA 2007)

The Planning and Zoning Commission considers its recommendation to be reasonable and in the public interest based on the following:

1. To clearly and specifically identify *building and container*
2. To propose test amendments prohibiting the use of Containers as buildings in light of the emerging interest of containers
3. **To prohibit** the use of containers as residential or any other type of buildings in any zoning district.
4. Limit Town liability in compliance with NC Supreme Court decision, *Byrd v. Franklin County* by expressly identifying containers as a prohibited use.

Therefore, the Planning and Zoning Commission requests Town Council's consideration of the above recommendation.

Attest:

  
\_\_\_\_\_  
John Ellen, Chairman

Planning and Zoning Commission

**PROPOSED TEXT AMENDMENTS PROHIBITING  
THE USE OF CONTAINERS AS BUILDINGS**

**Chapter 19 Zoning**

**Sec. 19-1. Definitions**

1. Amending the definition for “Building” as follows:

*Building* shall mean a structure enclosed and isolated by exterior walls constructed or used for residence, business, industry, or other public or private purposes, or accessory thereto, and including tents, lunch wagons, dining cars, and trailers; provided that, however, the term building shall not mean nor be construed so as to include a container. The term building shall be construed as if followed by the words or part thereof.

2. Adding a definition for “Container” as follows:

*Container* shall mean any standardized shipping container used for intermodal freight transport. Also known as cargo or freight container, ISO or intermodal container, and shipping, sea, or ocean container.

**Sec. 19-79.5. Uses that are prohibited.**

1. Adding the following to the list of prohibited uses:

The use of containers as buildings

**Commentary:**

1. These amendments should preclude the use of containers as a building for any purpose in any zoning district.
2. An ordinance adopting these particular amendments should include appropriate findings providing a rational basis for Council’s action.

## CURRENT ORDINANCES (showing changes) PERTAINING TO OPTION TO PROHIBIT

### Sec. 19-1. Definitions

*Building* shall mean a structure enclosed and isolated by exterior walls constructed or used for residence, business, industry, or other public or private purposes, or accessory thereto, and including tents, lunch wagons, dining cars and trailers; **provided that, however, the term building shall not mean nor be construed so as to include a container.** ~~All provisions of building area will apply to term building.~~ The term building shall be construed as if followed by the words or part thereof.

### Sec. 19-79.5. - Uses that are prohibited.

[The following uses are prohibited:]

- Adult book and video stores: SIC codes 5731, 5192, 5947, 5932, 5942 and 5961.
- Internet gaming devices: SIC codes 7993 and 7999.
- Adult oriented dancing: SIC code 7911.
- **The use of containers as buildings**

### KEY TO FONTS USED FOR CHANGES

~~Strikethrough~~ – info deleted

**BOLD** – info added

# ELDRIDGE LAW FIRM, P.C.

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## MEMORANDUM

**TO: KURE BEACH PZC; JOHN BATSON**  
**FROM: JAMES E. ELDRIDGE, PZC ATTORNEY**  
**DATE: APRIL 6, 2016**  
**RE: REGULATING UNLISTED USES**

## INTRODUCTION

Sec. 19-78 of the Town's zoning regulations provides in pertinent part that:  
no building or land shall be used and no building shall be erected or altered which is intended or designed to be used in whole or part for any use other than those listed as permitted for that district.

As PZC's members know, that "catchall" prohibition has been invalidated by the North Carolina Supreme Court's decision in *Byrd v. Franklin County*, 2015 WL 6799552 (Nov. 6, 2015) (hereinafter cited as *Byrd*) which "rejected the notion that a zoning ordinance may prohibit uses not explicitly allowed." Given the impossibility of expressly identifying every prohibited use, PZC's attorney was instructed to research alternative methods for effectively regulating unlisted uses. I have completed that review and my findings are discussed below.

## DISCUSSION

The *Byrd* decision is actually the most recent appellate decision on this issue and follows a line of cases dating back to 2010 which addressed a variety of attempts to regulate unlisted uses. Having reviewed those cases and other materials, PZC's attorney recommends the following measures to more effectively regulate prohibited and unlisted uses.

1. The Town's zoning regulations should clearly specify non-permitted uses whenever possible. This measure has already been implemented under Sec. 19-79.5 which prohibits the following uses: adult book and video stores; internet gaming devices; and adult-oriented dancing. This list can be expanded as necessary as new land uses in unanticipated districts arise. For example, this list could be amended to expressly prohibit the use of

containers as buildings [residential or otherwise] in any zoning district should Council adopt such a regulation.

2. The Town should periodically update its zoning regulations to address specific emerging or controversial land uses. Such new uses can be expressly prohibited in Sec. 19-79.5 or regulated as permitted or special uses in particular zoning districts. It appears that the Town does periodically update its zoning provisions in this respect based on the express inclusion of internet gaming as a prohibited use in Sec. 19-79.5 and by the current consideration of how to regulate the emerging use of containers as buildings.

3. Finally, the Town should consider amending the zoning regulations to require that unlisted uses be treated the same as the most nearly similar use in lieu of a blanket provision prohibiting all unlisted uses. Such an amendment is recommended in light of the *Byrd* decision under which the State Supreme Court apparently “does not favor interpretations or ordinance provisions that presume an otherwise lawful use of land is prohibited.” David Owens, *Coates’ Canons Blog: Dealing with Land Uses Not Specifically Addressed in a Zoning Ordinance: The Saga Continues*, School of Government at the University of North Carolina, November 17, 2015 at 2. As Owens points out, such a provision requires close attention to clearly setting forth uses which policy dictates should be prohibited as discussed above. Such a provision also requires that the zoning regulations “give some definition and guidance to staff as to how to evaluate the similarity of uses to avoid...an impermissible degree of discretion in [staff].” *Id.* at 3.

### CONCLUSION

Given the impossibility of listing all possible land uses, the Town’s zoning regulations should clearly specify, whenever possible, prohibited uses and update those provisions when presented with emerging or controversial uses. The Town should also consider, given that “the law favors uninhibited free use of private property over government restrictions,” *Byrd v. Franklin County*, \_\_\_ N.C. App. \_\_\_, 765 S.E.2d 805, (2014) (dissenting opinion), amending the zoning regulations to require that unlisted uses be reviewed as the most nearly similar use and provide staff with the guidelines and standards deemed necessary for making such determinations.



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This recommendation is consistent with the objectives and policies of the Town of Kure Beach Land Use Plan adopted by Town Council September 27, 2006 (Adopted and Certified by Coastal Resources Commission November 17, 2006)

X

This recommendation applies to Section 8 Part I of the Town of Kure Beach Land Use Plan, Subsection "Constraints to Development"

X

Consideration of recommended text amendment to The Town of Kure Beach Code ,  
(a) Chapter 19Zoning, Art. I. Definitions - *Building (amending)*  
(b) Chapter 19Z Art. I. Definitions -adding *Container*  
(c) Sec. 19-79.5 Uses that are prohibited (amend)  
(d) Delete Sec. 19-78

       This recommendation applies to the John Sawyer Architects B1 District Study (HPA 2007)

The Planning and Zoning Commission considers its recommendation to be reasonable and in the public interest based on the following:

1. To clearly and specifically identify *building and container*
2. To propose test amendments prohibiting the use of Containers as buildings in light of the emerging interest of containers
3. To regulate the use of containers for residential purposes in RA-2T district only
4. Limit Town liability in compliance with NC Supreme Court decision, *Byrd v. Franklin County*

Therefore, the Planning and Zoning Commission requests Town Council's consideration of the above recommendation.

Attest:

John Ellen

John Ellen, Chairman  
Planning and Zoning Commission

**PROPOSED TEXT AMENDMENTS REGULATING  
THE USE OF CONTAINERS AS DWELLINGS**

**Chapter 19 Zoning**

**Sec. 19-1. Definitions**

1. Amending the definition for “Building” as follows:

*Building* shall mean a structure enclosed and isolated by exterior walls constructed or used for residence, business, industry, or other public or private purposes, or accessory thereto, and including tents, lunch wagons, dining cars, and container dwellings provided that, however, the term building shall not mean nor be construed so as to include a container used for any other purpose other than as a container dwelling. The term building shall be construed as if followed by the words or part thereof.

2. Adding a definition for “Container” as follows:

*Container* shall mean any standardized shipping container used for intermodal freight transport. Also known as cargo or freight container, ISO or intermodal container, and shipping, sea, or ocean container.

3. Adding a definition for “Dwelling, Container” as follows:

*Dwelling, container* shall mean a container designed for and used for residential purposes.

**Sec. 19-177. Permitted Uses (in the RA-2T district)**

1. Insert a new sub-section (3) as follows:

(3) Container dwellings

2. Renumber existing (3)-(7) as (4)-(8).

**Sec. 19-79.5. Uses that are prohibited.**

1. Adding the following to the list of prohibited uses:

Containers as buildings for any use other than as container dwellings

**Commentary:** The proposed amendments permit the use of containers as dwellings in the RA-2T district but should preclude the use of containers as any other building in any other zoning district.

**CURRENT ORDINANCES (showing changes) PERTAINING TO OPTION TO PERMIT IN RA-2T DISTRICT**

Sec. 19-1. Definitions

*Building* shall mean a structure enclosed and isolated by exterior walls constructed or used for residence, business, industry, or other public or private purposes, or accessory thereto, and including tents, lunch wagons, dining cars and trailers **container dwellings provided that, however, the term building shall not mean nor be construed so as to include a container used for any other purpose other than as a container dwelling.** ~~All provisions of building area will apply to term building.~~ The term building shall be construed as if followed by the words or part thereof.

Sec. 19-177. - Permitted uses.

The following are the permitted uses in the RA-2T district:

- (1) One- and two-family dwellings;
- (2) Manufactured/mobile homes;
- (3) Container dwellings**
- (4) Offices of resident members of recognized professions, dentists, engineers, lawyers, architects, where such professions are carried on in their respective residences (80-11, 21, 31, 41, 42, 43, 49; ~~8711~~, 12, 21; 8111);
- (5) Customary home occupations, such as dressmaking, music teaching, preserving, home cooking and laundering, but not including beauty parlors, provided that such occupation shall be engaged in only by residents on the premises and not more than the equivalent of the area of one (1) floor shall be used for such occupation, that no products nor any advertising of any nature shall from the street and that no accessory building; used for such home occupation;
- (6) Churches and other places of worship, include houses and Sunday schools (8661);
- (7) Colleges, schools, public libraries, public museums, libraries, and other public buildings (8221, 8211, 8231, 8412); (S)
- (8) Accessory buildings to permitted uses, provided that no accessory building shall be rented or occupied. Provided, further, that accessory buildings shall be constructed at time or following construction of the main building.

Sec. 19-79.5. - Uses that are prohibited.

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