

# Byron Shire Council Environmental Zones – Landowner Review Report

Review of proposed environmental zones to requested land parcels in the Byron Shire Local Government Area (associated with planning proposal *E-Zone Implementation Program Stage 3*, PP-2020-3915)

August 2022





# Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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# 1. Introduction

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## 1.1 Purpose of this report

This report provides a review of 31 landowner requests to the proposal by Byron Shire Council's to rezone land parcels to Environmental Conservation (C2<sup>1</sup>) and Environmental Management (C3<sup>1</sup>), associated with its planning proposal titled the *E-Zone Implementation Program Stage 3* (PP-2020-3915).

This review is carried out under the *Frequently Asked Questions* (FAQs) (**Attachment A**), attached to the *Northern Councils Environmental Zone Review – Final Recommendations Report* (**Attachment B**) (Recommendations Report). The FAQs state that if “a landholder does not agree that their land meets the primary use or validation criteria for an E<sup>1</sup> zone, the NSW Chief Planner has been appointed by the Minister for Planning to undertake an independent review. The Chief Planner will make a decision on the dispute, based on an assessment of the evidence provided by both Council and the landholder.”

As the ‘Chief Planner’ role no longer exists within the Department of Planning and Environment (Department), the Department’s Agile Planning and Programs (APP) team have assessed the proposed zone for each property, having regard to evidence provided by Council, the landowner and the Department’s Biodiversity and Conservation Division (BCD). This assessment has then been independently reviewed by MacroPlan (in particular the former NSW Chief Planner, Mr Gary White).

The Department’s APP team and MacroPlan are independent from the Department’s Northern Regional team within the Planning and Land Use Strategy division which is responsible for finalising Council’s planning proposal.

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## 1.2 Council’s planning proposal

On 8 February 2021, a Gateway determination (**Attachment C**) was issued for Council’s planning proposal called the *E-Zone Implementation Program Stage 3* (PP-2020-3915) (**Attachment D**). This planning proposal is stage 3 of a program to integrate land identified as ‘deferred matters’ into the Byron Local Environmental Plan 2014 (BLEP 2014). More specifically, the planning proposal seeks to apply environmental and non-environmental zones to 2,206 properties in the Shire (**Figure 1**), including the application of C2 zones to approximately 5,000 ha of land and a C3 zones to approximately 800 ha of land.

Stages 1 and 2 of the program are complete, and Council is currently preparing for Stage 4.

The planning proposal was exhibited from 29 March to 30 July 2021 and 335 submissions were received. On 4 November 2021, Council resolved to adopt an amended planning proposal (amended

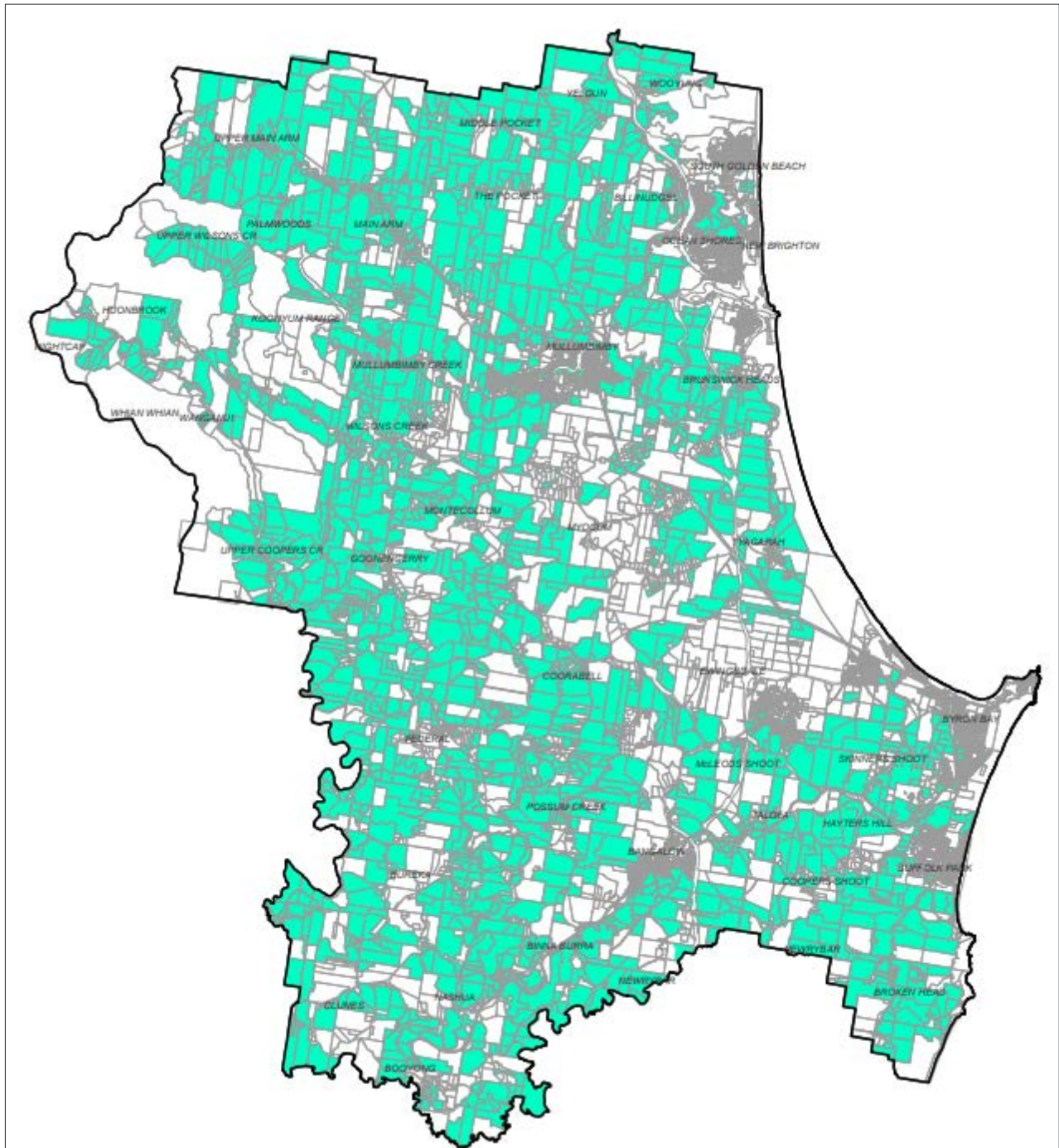
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<sup>1</sup> In December 2021, the Standard Instrument (Local Environmental Plan) Amendment (Land Use Zones) Order 2021 renamed ‘environment zones’ to ‘conversation zones’, which is why this document references C2 and C3 zones rather than E2 and E3 zones. This is a change to the name and zone category only and does not change what land uses are permissible within these zones or the zone objectives.



in response to the exhibition) and forward it to the Department for finalisation. In accordance with the requirements of the Gateway determination, Council also notified owners of land proposed to be rezoned to C2 and C3 that they have 28 days to write to the Department requesting a review of the proposed zoning on their property. In response, the Department's APP team received 31 review requests (**Section 2.1**), which are considered in this report.

On 17 February 2022, Council submitted the planning proposal to the Department for finalisation. In accordance with Ministerial Direction 3.4 (Application of C2 and C3 Zones and Environmental Overlays in Far North Coast LEPs), the planning proposal must comply with the Recommendations Report.



**Figure 1** Land affected by Council's planning proposal, highlighted green (Source: Council's planning proposal)

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## 1.3 Review Terms of Reference

In accordance with the FAQs (**Attachment A**) a recommendation on each of the 31 review requests is to be based on an assessment of the evidence provided by both Council and the landholder. This report therefore considers the evidence provided by Council and the landowner to determine whether the proposed rezoning to C2 and/or C3 is consistent with the requirements of the Recommendations Report.

The Recommendations Report states that C2 and C3 zones can only be applied where:

- the **primary use of the land** is considered to be environmental conservation (for C2) or environmental management (for C3) **AND**
- the land contains one or more of the **attributes listed in the C2 or C3 zone criteria** (tables 1 and 2 in the Recommendations Report), such as for example areas defined as Littoral Rainforests, Coastal Wetlands, Endangered Ecological Communities (EECs) or Key Threatened Species Habitat.

According to the Recommendations Report, the primary use is the main use of the land for the last two years. Where a property has varying characteristics, the primary use may vary resulting in more than one zone being applied to the land ('split zone'). The Recommendations Report notes that the primary use will be identified during the preparation of a planning proposal, therefore by Council.

The primary use of land consideration doesn't apply for land zoned under the Byron LEP 1988 as:

- 7(a) Environmental Protection (Wetlands)
- 7(b) Environmental Protection (Coastal Habitat)
- 7(j) Environmental Protection (Scientific)
- 7(k) Environmental Protection (Habitat).

The Recommendation Report requires that C2 or C3 zone criteria be verified on the land, such as by any one or more of the following:

- biodiversity field inspections and ground surveys, by an appropriately qualified person
- supporting flora and fauna reports (where field work is not older than 5 years), by a suitably qualified person
- review of current (not older than 5 years) high resolution digital aerial photography **and** verified by another one of the verification techniques
- Aboriginal heritage field inspections and ground surveys, supporting cultural heritage reports and consultation with Aboriginal cultural knowledge holders.

## 2. Landowner review requests

### 2.1 Landowner review requests

31 requests were received by the Department to review the Council's proposed rezoning to C2 and/or C3. These review requests are provided in **Attachment E**, and the properties who requested a review are listed in **Table 1** and shown in **Figure 2 (Attachment F)**.

Of the 31 review requests, the Department's APP team considers that two are ineligible for a review under the Recommendations Report or FAQs.

- Site 29 (64 Corkwood Crescent, Suffolk Park) - there are no C zones proposed for this site; and
- Site 30 (160 Koonyum Range Road, Wilsons Creek) - the review request was lodged by a neighbour, rather than the landowner as provided under the FAQs.

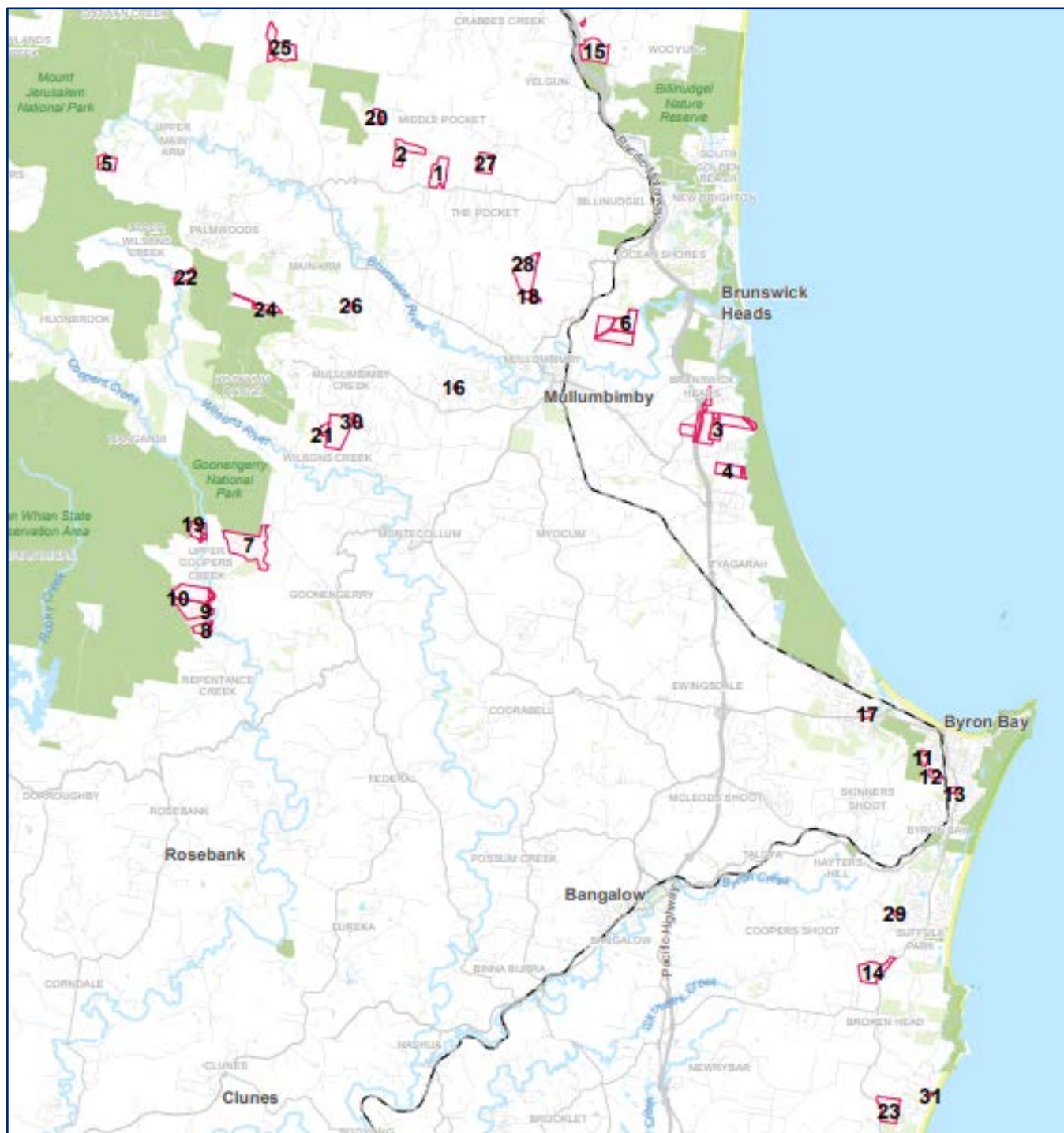
Therefore, this review covers the 29 eligible owner's requests for a review under the FAQs.

**Table 1** Properties requesting review

#	Property Address	Landowners supporting information
1	660 The Pocket Road, The Pocket	Email requesting review
2	201 Skyline Road, The Pocket	Anecdotal evidence (including photos) of existing cottage, dwelling entitlement, use of land and suggested area suitable for C2 zone.
3	296 Gulgan Road & Pacific Highway & 15 Eucalyptus Lane, Brunswick Heads (6 parcels)	Letter outlining history of discussions with BSC, Consultant submission objecting to zoning.
4	146 Tandys Lane, Tyagarah	Owner submission seeking agreement on C2 zone conditioned on a dwelling entitlement being provided for the site.
5	133B Middle Ridge Road, Upper Main Arm	Email requesting review
6	80 Vallances Road, Mullumbimby	Legal Counsel letter seeking review on behalf of owners. Indicated an ecological survey was to be submitted.
7	11 Garrong Road, Goonengerry	Consultant planner submission outlining communication between owner and Council including stamped consent plans and modification consent for multiple occupancy development provided.
8	73 Upper Coopers Creek Road, Upper Coopers Creek	Letter requesting a review and more time for consultation.
9	135 Coopers Creek Road, Upper Coopers Creek	Email requesting review
10	159 Coopers Creek Road, Upper Coopers Creek	Email requesting review
11	185 Butler Street, Byron Bay	Letters and emails requesting review. Includes anecdotal references to flooding on the site resulting from Council drainage.
12	Cemetery Road, Byron Bay	Email requesting review. Reference provided in relation to proposed use of site for eco-tourism accommodation.
13	Bangalow Road, Byron Bay	Email requesting review. Identifies a potential error in the Coastal Wetlands SEPP mapping which crossed over onto the access to the site.
14	368 Broken Head Road, Broken Head	Email request for review from consultant planner.

#	Property Address	Landowners supporting information
15	336 Tweed Valley Way, Wooyung	Email request for review from owner. Identifies land as previous agricultural/orchards contain regrowth vegetation.
16	9 Scotts Wood Grove, Mullumbimby Creek	Email request from owner
17	373-391 Ewingsdale Road, Byron Bay	Consultant and owner submission requesting a review. Justification of established educational establishment.
18	103 Dudgeons Road, Mullumbimby	Email request from owner. Identified possible forestry use being sought on the site.
19	401 Coopers Creek Road, Upper Coopers Creek	Email request from owner. Copy of rates notice to establish 'Residential' rating category.
20	560 Middle Pocket Road	Submission from planning consultant. Provision of a Preliminary Site Assessment (independent ecological report) and chronology of correspondence and consultation with Council.
21	150 Koonyum Range Road, Wilsons Creek	Email request from owner. Anecdotal evidence of the zoning for neighbouring property. Evidence of right of carriageway provided.
22	376 Upper Wilsons Creek Road, Wilsons Creek	Email request from owner identifying the final zone location changed between exhibition and approval by Council.
23	865 Broken Head Road, Broken Head	Email from planning consultant confirming existing development consent on site and incorrect location of Council cadastre boundaries puts the C2 zone within the bush fire asset protection zone.
24	Boogarem Road, Koonyum Range	Submission from planning consultant requesting review.
25	Blindmouth Road	Email requesting review
26	46 Coopers South Lane, Main Arm	Email requesting review
27	259 Upper Middle Pocket Road, Middle Pocket	Email requesting review. Statement land has banana plantation and possible agricultural uses.
28	170 Dudgeons Road, Mullumbimby	Letter requesting review. Advise property contains weed species and used for agriculture/grazing.
29	64 Corkwood Crescent, Suffolk Park	No C zone proposed.
30	160 Koonyum Range Road, Wilsons Creek	Submitted by neighbour.
31	512 Seven Mile Beach Road, Byron Bay	Email requesting review. Photos of vegetation included.





**Figure 2** Location of 31 landowner review requests (source: DPE GIS)

## 3. Assessment of review requests

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### 3.1 APP Team's assessment of review requests

In accordance with the FAQs associated with Recommendations Report, the Department's APP team have carefully considered each of the 29 eligible review requests against the requirements of the Recommendations Report, having regard to the evidence provided by the landowner, Council and BCD. The considerations of the assessment are outlined below.

### 3.2 Council justification for proposed C zones

Council have provided justification to support the proposed C zones for each site, in the form of a document titled *BSC Summary Table and Supporting Information (Attachment H)*. This identifies the primary land use and information on relevant ecological attributes for each site. To validate this information, Council has predominantly relied on a review of aerial photography (comparing 1979 with images taken in 2015 and 2022) and have been able to rely on existing ecology reports for some sites or existing vegetation mapping (as these have been prepared within the last 5 years).

Council indicates where they have been able to carry out site visits and where an ecologist has attended the site, and in some instances where landowners have denied access.

Council also indicates the area of land proposed for C zones. For nearly all the sites, Council have amended the originally proposed C zone boundaries to reduce the extent of C zones in response to submissions on the planning proposal.

### 3.3 Biodiversity and Conservation Division Advice

The Department's Biodiversity and Conservation Division (BCD) have also reviewed the sites against relevant spatial data held by the Department (**Attachment I**).

This is largely a desktop analysis of each site using a High Environmental Value (HEV) map layer (from 2018) to identify indicative vegetation attributes at a regional scale. Information relating to Endangered Ecological Communities (EECs) or Key Threatened Species Habitat is from historical threatened species flora and fauna records in conjunction with current aerial imagery.

The Department's APP team notes that in many instances BCD contends that site visits are required to confirm site attributes at a property scale. The Department's APP team also notes that BCD have offered to support Council should any further site visits or ground truthing be required.

## 3.4 APP Team's recommendations

The Department's APP team considered that 2 of the 31 review requests are ineligible for a review under the Recommendations Report or FAQs, as follows:

- Site 29 (64 Corkwood Crescent, Suffolk Park) - there are no C zones proposed for this site; and
- Site 30 (160 Koonyum Range Road, Wilsons Creek) - the review request was lodged by a neighbour, rather than the landowner as provided under the FAQs.

Having considered each review request, the Department's APP team supports Council's proposed C zones for 7 of the 31 sites as shown in Table 2 and **Attachment G**. For these 7 sites Council has validated the primary use and ecological attributes in accordance with the requirements of the Recommendations Report, being through a review of high resolution digital aerial photography and supported by field inspections and ground surveys and/or ecological surveys (not older than 5 years).

For the remaining 22 eligible sites, the Department's APP team considers that Council's proposed zoning should be deferred, for the reasons specified in **Attachment G**. For the majority of these sites, Council have only relied on a comparative analysis of vegetation using historical aerial photography (some dating back to the 1970's and 2015) with recent aerial imagery (2021 - 2022) sourced from Nearmap. Whereas, in accordance with the Recommendations Report, Council need to support the use of 'high resolution digital aerial photography' with one other verification method in the Recommendations Report (being field inspections and ground surveys and/or ecological surveys (not older than 5 years)).

The Department's APP team also notes that some of these sites require further consideration by Council, as the proposed C zones may be impacted by approved developments or where landowners have provided site specific information (such as ecological reports).

The Department's APP team notes that in some instances Council have sought to undertake site visits, and these have been denied by the landowner. Noting the offer of assistance from BCD, Council is strongly encouraged to approach landowners again.

The Department's APP team understands that Council has an opportunity to reconsider these deferred sites, as it prepares the planning proposal for stage 4 of E Zones Implementation Program.

Table 2: APP Team Recommendations

#	Property Address	Existing zone	Proposed Zone	Recommendation
1	660 The Pocket Road, The Pocket	1A, RU1, RU2, DM	C2, RU2	Defer
2	201 Skyline Road, The Pocket	1A, RU2, DM	C2, RU2	Defer
3	296 Gulgan Road & Pacific Highway & 15 Eucalyptus Lane, Brunswick Heads (6 parcels)	1A, 1D, RU2, 1D 7A, 9A	C2, RU2, C3, 1A, 9A	Support proposed zone
4	146 Tandys Lane, Tyagarah	1A, 1D, 7A, 7B, RU2, DM	C2, RU2	Defer
5	133B Middle Ridge Road, Upper Main Arm	1A, 7D, RU1, RU2, DM	C2, RU2, 7D	Defer
6	80 Vallances Road, Mullumbimby	1A, 7B, RU1, RU2, DM	C2, C3, RU2	Defer
7	11 Garrong Road, Goonengerry	1A, 7K, RU2, DM	C2, C3, RU2	Defer
8	73 Upper Coopers Creek Road, Upper Coopers Creek	1A, RU2, DM	C2, RU2	Defer

#	Property Address	Existing zone	Proposed Zone	Recommendation
9	135 Coopers Creek Road, Upper Coopers Creek	1A, RU2, DM	C2, RU2	Defer
10	159 Coopers Creek Road, Upper Coopers Creek	1A	C2, RU2	Defer
11	Butler Street, Byron Bay	7A, 7B, DM	C2	Defer
12	Cemetery Road, Byron Bay	7A, DM	C2	Defer
13	Bangalow Road, Byron Bay	2A, 7A, R2, DM	C2, C3	Support proposed zone
14	368 Broken Head Road, Broken Head	1A, 1B1, 7D, RU1, RU2, DM	C2, C3, RU2	Support proposed zone
15	336 Tweed Valley Way, Wooyung	1A, RU2	C2, RU2	Defer
16	9 Scotts Wood Grove, Mullumbimby Creek	1C2	C2	Defer
17	373-391 Ewingsdale Road, Byron Bay	5A, 7B, SP2	C2, SP2	Defer
18	103 Dudgeons Road, Mullumbimby	7D	C2	Defer
19	401 Coopers Creek Road, Upper Coopers Creek	1A, RU2	C2, C3, RU2	Support proposed zone
20	560 Middle Pocket Road	1A, RU2	C2, C3, RU2	Defer
21	150 Koonyum Range Road, Wilsons Creek	7C, 7D, 7K	C2, RU2	Defer
22	376 Upper Wilsons Creek Road, Wilsons Creek	7C, 7K	C2, C3, RU2	Support proposed zone
23	865 Broken Head Road, Broken Head	1A, 7D, 7K, RU2	C2, C3	Defer
24	Boogarem Road, Koonyum Range	7D	C2	Support proposed zone
25	Blindmouth Road	1A RU2	C2, RU2	Defer
26	46 Coopers South Lane, Main Arm	1A, RU2	C2, RU2	Defer
27	259 Upper Middle Pocket Road, Middle Pocket	1A, RU2	C2, RU2	Support proposed zone
28	170 Dudgeons Road, Mullumbimby	1A, 7D, RU2	C2, RU2	Defer
29	64 Corkwood Crescent, Suffolk Park	7D, R21A	7D, R21A	n/a
30	160 Koonyum Range Road, Wilsons Creek	1A, 7D, 7K	C2, C3, RU2	n/a
31	512 Seven Mile Beach Road, Byron Bay	1A, 7F1, 7J	C2, RU2	Defer

## 3.4 Independent peer review

As noted previously, MacroPlan (in particular the former NSW Chief Planner, Mr Gary White) have provided an independent peer review of the Department's APP team's assessment and recommendations (**Attachment J**).

In his peer review, Mr White concludes that he *is satisfied with the recommendations which have been made across the 31 items contained in the Department's review and assessment* and that the "review has focused around the process needing to align to the considerations outlined in the Northern Councils E Zone Review Report. I am satisfied that work undertaken by the Department has been consistent with the requirements of the report."

Mr White further notes that the ability to visit sites for verification or evidence gathering purposes requires further consideration in the future, especially in circumstances where a great deal of effort and work is generated where a landowner does not allow fair and reasonable access.

# 4. Conclusion

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## 4.1 Conclusion

The Department received 31 review requests in relation to the proposal by Byron Shire Council to rezone land parcels to Environmental Conservation (C2 ) and Environmental Management (C31), under *E-Zone Implementation Program Stage 3* (PP-2020-3915).

The Departments APP team have undertaken a detailed review of the 31 requests against: the requirements of the both the FAQs and the terms of the Recommendations Report; and evidence provided by Council, the landowner and BCD.

The Department's APP team recommends that:

- 2 of the 31 sites are not eligible for a review under the Recommendations Report FAQ.
- 7 of the 31 sites are supported, as being consistent with the requirements of the Recommendations Report
- 22 of the 31 sites be deferred, providing Council with an opportunity to supplement the aerial photography with a further verification method.

An independent peer review was undertaken of the Department's APP teams assessment and recommendations, which concluded that the reviewer was satisfied with the recommendations for all the sites, and notes that the Department's assessment is consistent with the requirements of the Recommendations Report.



# Attachments

- A: FAQs attached to the Recommendations Report
- B: Northern Councils Environmental Zone Review – Final Recommendations Report
- C: Gateway Determination for PP-2020-3915
- D: E-Zone Implementation Program Stage 3 Planning Proposal (PP-2020-3915)
- E: Landowner review requests
- F: Map showing location of review requests
- G: APP Team’s Site by Site consideration of review requests
- H: Council advice on review requests
- I: Biodiversity and Conservation Division advice on review requests
- J: Independent peer review of Department’s assessment and recommendation