



Our Ref: DOC21/286613

Your Ref: PP26.2020.7.1

General Manager
Byron Shire Council
PO Box 219
Mullumbimby NSW 2482

Attention: Mr Alex Caras

Dear Mr Arnold

RE: Planning Proposal to amend Byron Local Environmental Plan 2014 – Stage 3 E Zones

Thank you for your letter dated 12 April 2021 about the proposed Stage 3 E Zone amendments to the Byron Local Environmental Plan (LEP) 2014, seeking comments from the Biodiversity and Conservation Division (BCD) of the Biodiversity, Conservation and Science Directorate in the Environment, Energy and Science Group of the Department of Planning, Industry and Environment. I appreciate the opportunity to provide input.

The Planning Proposal (PP) represents 'Stage 3' of a program to integrate the majority of deferred matters into the Byron LEP 2014, with the exception of Coastal 7(f1) and 7(f2) zones and land formerly zoned 7(d), which will all be considered under a separate process in consultation with the NSW Government.

We understand that like the Stage 1 and 2 PPs, Stage 3 applies environmental zones and non-environmental zones to certain private land in the Byron Shire. This includes both 'Deferred Matter' and 'Non-Deferred Matter' areas identified in Byron LEP 2014.

The BCD has reviewed the PP and its supporting information. We are of the view that the review and application of the E zones across the Byron Shire has generally been well implemented by the council.

However, several issues are apparent with the application of the primary use test, as set out in the Northern Councils E Zone Review Final Recommendations Report, dated October 2015 (E Zone Review), for 'Deferred Matter' lands not formerly zoned 7(a), 7(b), 7(j) or 7(k) under BLEP 1988 and Non – Deferred Matter land zoned under BLEP 2014,. These issues are discussed in detail in **Attachment 1** to this letter.

In summary, the BCD recommends that prior to finalising the proposed Stage 3 amendments relating to 'Deferred Matter' lands not formerly zoned 7(a), 7(b), 7(j) or 7(k) under BLEP 1988 and Non – Deferred Matter land zoned under BLEP 2014, the council must ensure that:

1. The PP has appropriately determined the primary use of the land.
2. Justification is included in the PP of the council's determination of the primary use of each of the relevant parcels.

3. The PP has distinguished between environmental conservation and environmental management land uses as follows:
 - a. In areas of native vegetation where ancillary uses are absent or have not occurred in the last two years, the land use would align with Environmental Conservation.
 - b. In areas of native vegetation where ancillary uses are present or which have occurred in the last two years, such as grazing, the land use would align with Environmental Management
4. The E2 zone is applied to land that meets the criteria in Table 1 of the E Zone Review where the land use has been identified as Environmental Conservation as per our recommendation 3.a. above.
5. The E3 zone is applied to land that meets the criteria in Table 1 or Table 2 of the E zone Review where the land use has been identified as Environmental Management as per our recommendation 3.b. above.
6. Where the primary use of the land is not considered to be environmental conservation or environmental management and the E2 or E3 zone criteria are verified as present on the land, then the land should be zoned E2 or E3 if the landowner agrees to applying either of those zones.
7. Where the primary use of the land is not considered to be environmental conservation or environmental management and the E2 or E3 zone criteria are verified as present on the land but the landholder does not agree to an E2 or E3 zone, then mapped planning controls should be applied to the land.
8. Where mapped planning controls are required, these should be developed and incorporated into the PP to ensure E2/E3 zone criteria known to be present are appropriately considered as part of the development application process.

If you have any questions about this advice, please do not hesitate to contact Ms Nicky Owner, Senior Conservation Planning Officer, at nicky.owner@environment.nsw.gov.au or 6659 8254.

Yours sincerely

Dimitri Young

14 May 2021

DIMITRI YOUNG
Senior Team Leader Planning, North East Branch
Biodiversity and Conservation

Enclosure: Attachment 1: Detailed BCD Comments – Byron LEP 2014 – Stage 3 E Zones

Attachment 1: Detailed BCD Comments – Byron LEP 2014 – Stage 3 E Zones

Purpose of the Planning Proposal

The Byron Shire Council is consulting with the Biodiversity Conservation Division (BCD) of the Department of Planning, Industry and Environment during the public exhibition period for the Planning Proposal (PP) after receiving a Gateway Determination.

The Planning Proposal (PP) forms Stage 3 of a program examining and integrating land identified as “deferred matters” (DM) in the Byron Local Environmental Plan 2014 (BLEP 2014) resulting from the NSW Government’s E Zone Review, which included the publication of the Northern Councils E Zone Review Final Recommendations Report in October 2015 (henceforth referred to as the E Zones Review).

The Stage 3 PP integrates most deferred matters into the BLEP 2014, with the exception of Coastal 7(f1) and 7(f2) zones and land formerly zoned 7(d), which will all be considered under a separate process in consultation with the NSW Government. We understand that like the Stage 1 and 2 PPs, Stage 3 applies environmental zones and non-environmental zones to certain private land in the Byron Shire. This includes both ‘Deferred Matter’ areas subject to the Byron LEP 1988 (BLEP 1988) and ‘Non-Deferred Matter’ areas identified in the BLEP 2014.

While we have comprehensively reviewed the PP and its supporting information, given the high number of lots subject to the PP (over 2200 lots), we have not examined in close detail the environmental values or the likely primary use of every individual lot.

The BCD is of the view that the council has generally applied the E Zone Review requirements appropriately. Nonetheless, further guidance follows in relation to ensuring environmental protection zones have been applied appropriately, along with suggested revisions to the primary use test to ensure adequate justification has been provided where these decisions lead to zoning changes.

E Zones Approach for ‘Deferred Matter’ lands formerly zoned 7(a), 7(b), 7(j) or 7(k) by Byron LEP 1988

We support the approach adopted to finalise the proposed Stage 3 amendments relating to land formerly zoned 7(a), 7(b), 7(j) or 7(k) by LEP 1988 and we recognise that the council has correctly identified that these lands are not to be subject to the primary use test, as set out in the E Zones Review.

E Zones Approach for remaining ‘Deferred Matter’ lands under BLEP 1988 and ‘Non-deferred Matter’ lands under BLEP 2014

The E Zones Review requires application of the primary use test as the first consideration for determining whether an E zone is warranted on ‘Deferred Matters’ lands not formerly zoned 7(a), 7(b), 7(j) or 7(k) under BLEP 1988 and on other lands zoned under BLEP 2014.

The primary use of the relevant lots is to be identified by the council during the preparation of the PP based on the main use for which the land has been used for the last two years, noting the primary use of the land may vary across a particular property depending on the characteristics of the land.

According to the PP, the council has determined the primary use of individual parcels of land by considering the characteristics of the land, its prior zoning, aerial photography, visual inspection, contact with landowners and other property information.

Unfortunately, however, while Table 5 of the PP lists the primary use determined for each of the lots affected by this PP, the outcomes of the application of the primary use test do not appear to be adequately justified. Similarly, there has been no justification provided within the PP for how zone boundaries have been split.

Examples of the questionable splitting of E and rural zone boundaries in instances where lots appear to have similar and contiguous canopy and which may therefore reflect a similar land use across the two zone types, are shown on Images 1 and 2 below.

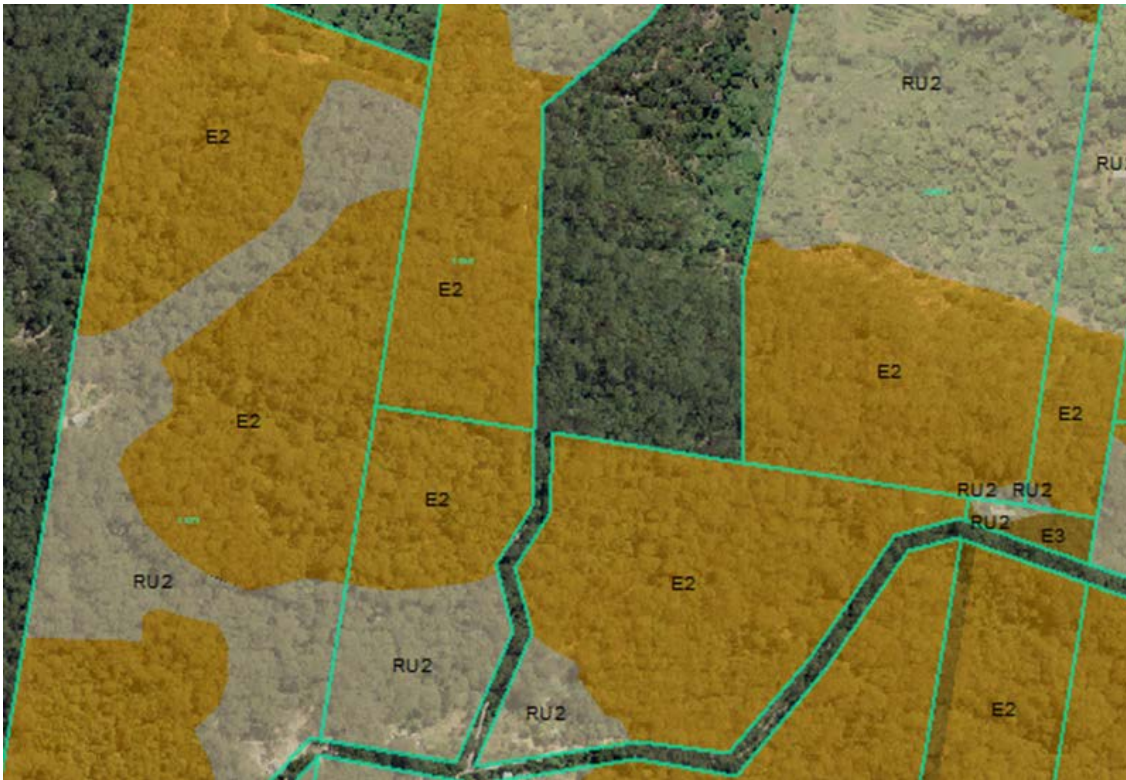


Image 1 - Properties in the Goonengerry Mill Road locale.



Image 2 - Properties in the Coolamon Scenic Drive locale.

In addition, it appears that 'rural living' has been included as a primary use in Table 5 of the PP. It is our view that rural living does not necessarily justify a non-environmental zoning, particularly in situations where there is no commercial agricultural use of the land in question. It is quite likely that many rural properties on which houses are situated are likely to also contain land that more closely aligns with environmental conservation or environmental management land uses.

The main use of the land is to be determined based on evidence about the nature of the activities and operations occurring on the land over the last two years. If the main use is for farming (rural) operations, agricultural practices need to be demonstrated. Determining the primary use will require the use of methodologies such as site visits, property development records, farm management plans, up-to-date aerial photography, Private Native Forestry or Property Vegetation Plan approvals, conservation records and discussions with landowners.

We also understand that an initial assessment of primary land use was undertaken using council records to identify if the primary use of the land is 'environmental'. The PP indicates that land has a primary use of 'environmental' when it meets the criteria for an E2 (conservation) or E3 (management) zone and where commercial agricultural activities are not carried out.

We suggest instead that the council uses the following approach to differentiate between 'environmental management' and 'environmental conservation' in the application of the primary use test for this PP:

- in areas of native vegetation where ancillary uses are absent or have not occurred in the last two years, the land use would align with Environmental Conservation, and the E2 zone would be applied where such land meets the ecological criteria in Table 1 of the E Zone Review.
- in areas of native vegetation where ancillary uses are present or have occurred in the last two years, such as grazing, the land use would align with Environmental Management, and the E3 zone would be applied where such land meets the ecological criteria in Table 1 or Table 2 of the E Zone Review.

This would be consistent with the E Zone Review, which requires extensive agriculture be included in the E3 land use table as being permitted without consent.

Adopting this approach for the primary use test in the PP is likely to allow additional parcels that are proposed to be zoned a combination of E2 (environmental conservation) and RU2 (rural landscape) due to the presence of some grazing, to also incorporate E3 (environmental management) in lieu of the RU2 zone in some areas, without jeopardising the ongoing use of these parcels for agricultural purposes.

The BCD recommends that prior to finalising the proposed Stage 3 amendments relating to 'Deferred Matter' lands not formerly zoned 7(a), 7(b), 7(j) or 7(k) under BLEP 1988 and Non – Deferred Matter land zoned under BLEP 2014, the council must ensure that:

1. The PP has appropriately determined the primary use of the land.
2. Justification is included in the PP of the council's determination of the primary use of each of the relevant parcels.
3. The PP has distinguished between environmental conservation and environmental management land uses as follows:
 - a. In areas of native vegetation where agricultural uses are absent or have not occurred in the last two years, the land use would align with Environmental Conservation.
 - b. In areas of native vegetation where ancillary uses are present or which have occurred in the last two years, such as grazing, the land use would align with Environmental Management

4. The E2 zone is applied to land that meets the criteria in Table 1 of the E zone Review where the land use has been identified as Environmental Conservation as per our recommendation 3.a. above.
5. The E3 zone is applied to land that meets the criteria in Table 1 or Table 2 of the E zone Review where the land use has been identified as Environmental Management as per our recommendation 3.b. above.
6. Where the primary use of the land is not considered to be environmental conservation or environmental management and the E2 or E3 zone criteria are verified as present on the land, then the land should be zoned E2 or E3 if the landowner agrees to applying either of those zones.
7. Where the primary use of the land is not considered to be environmental conservation or environmental management and the E2 or E3 zone criteria are verified as present on the land but the landholder does not agree to an E2 or E3 zone, then mapped planning controls should be applied to the land.
8. Where mapped planning controls are required, these should be developed and incorporated into the PP to ensure E2/E3 zone criteria known to be present are appropriately considered as part of the development application process.

From: [Environmental Zones](#)
To:
Cc: [Caras, Alex](#)
Subject: Tweed Byron Local Aboriginal Land Council EZones
Date: Thursday, 19 August 2021 9:42:46 AM

Hi Paul

Nice to chat this morning.

I can confirm that the following properties have been deferred from Planning Proposal 3:

1, 3 & 9 New Brighton Rd New Brighton (59590, 59600 & 59620)
146 & 162 Tweed St Brunswick Heads (PNs 181550, 183900 & 240704)

Regards

Jane Wickers

Environmental Zones | BYRON SHIRE COUNCIL

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Byron Shire Council acknowledges the Traditional Owners of this land, the Arakwal people, the Minjungbal people and the Widjabul people of the Bundjalung Nation, and pays our respects to Elders past and present.

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