

3<sup>rd</sup> March 2021

The Municipal Manager  
Bitou Local Municipality  
Private Bag X1002  
Plettenberg Bay 6600

Mr Marcel Minne  
Bitou Spatial Planner

**Without Prejudice**

Dear Sir,

**BITOU MUNICIPALITY: DRAFT ZONING BY-LAW 2020**

We refer to the above proposed Draft Zoning By-Law written in terms of Section 22(1) of the Western Cape LUPA (Act 3 of 2014) and Section 24(1) of the SPLUMA (Act 16 of 2013).  
Bitou municipal notice no.2 of 2021 of 21 January 2021 refers.

1. The Nature's Valley Ratepayers' Association (NVRA) has a standing mandate from the ratepayer body to protect the long established single residential character of the township and the environmental integrity of the public open spaces together with the environmentally sensitive area of the Tsitsikamma Section of the GRNP that forms the boundary of Nature's Valley (NV). These important objectives are also entrenched in the constitution of the Association.
2. It is also necessary to take note of the fact that the NVRA is a long-standing, active ratepayer association that has played a leading role in protecting and serving the interests of the Nature's Valley (NV) ratepayer body since its establishment in 1983. The Association can rightfully be regarded as the mouthpiece of the owners in expressing the wishes of the community.
3. After studying the Bitou draft zoning by-law document, the NVRA is submitting the following attachments for your serious consideration:

**Attachment I:** Comments, concerns, objections to aspects of the Bitou Draft Zoning By-law.

**Attachment II:** Natures Valley, Restrictive Conditions of Title:  
Adv. David Borgström SC; Opinion on the "Nature of restrictive conditions attached to properties in Nature's Valley".

**Attachment III:**  
Motivation and proposal for an Overlay Zone for Nature's Valley.

4. Based on recent discussions with Bitou Municipal officials the NVRA are willing to formulate a series of documents which would be appropriate for Nature's Valley on the basis of an Overlay Zone. Some work has been done on preparing these documents which can be made available for the municipality's consideration at reasonable notice.
5. As the NVRA submission addresses issues of great importance to the NV community we wish to know when and in what manner the NVRA and objectors will be informed of the outcomes of the matters raised and whether they have been successfully resolved or not.

Yours faithfully

DAVID OWEN  
CHAIRMAN, NVRA

**COMMENTS, CONCERNS AND OBJECTIONS TO ASPECTS OF THE BITOU DRAFT ZONING BY-LAW.**

**Introduction**

1. On 21 January 2021 the Municipal Manager of the Bitou municipality (“the municipality”) issued a notice (2/21) that the municipality is in the process of preparing a zoning scheme in terms of section 22(1) of the Western Cape Land Use Planning Act, 3 of 2014 (“WCLUPA”) and section 24(1) of the Spatial Planning and Land Use Management Act, 16 of 2013 (“SPLUMA”) (“the notice”).
2. According to the notice, “as part of the Zoning Scheme” the Municipality has prepared a draft zoning by-law, which specifies conditions for the use and development of land and will replace all existing zoning/town planning schemes in the municipal area (“the draft zoning by-law”).
3. In an email dated 26 January 2021 Mr Minne of the municipality notified all stakeholders that the zoning map and zoning register are not included for comment together with the draft zoning by-law, and that the map and register will be finalized after the zoning by-law and zoning categories have been finalized.
4. The NVRA has a number of concerns in respect of the process being followed by the municipality, as well as the contents of the draft zoning by-law.

**Relevant legal and factual background**

5. In terms of SPLUMA a municipality must, after public consultation, adopt and approve a single land use scheme for its entire area which must (amongst other aspects) include appropriate categories of land use zoning and regulations for the entire municipal area, and give effect to municipal spatial development frameworks and integrated development plans.<sup>1</sup> SPLUMA specifies that a land use scheme must:
  - 5.1 give effect to and be consistent with the municipal spatial development framework and determine the use and development of the land within the municipal area to which it relates, including in order to promote minimal impact on public health, the environment and natural resources;<sup>2</sup> and
  - 5.2 include –
    - (a) scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone;
    - (b) a map indicating the zoning of the municipal area into land use zones; and
    - (c) a register of all amendments to such land use scheme.
6. Therefore, the Bitou municipality has a legal obligation to conduct a public participation process in respect of the zoning map and the register of amendments, as well as the draft zoning by-law. To the extent that the public cannot meaningfully comment on the draft zoning by-law without having sight, simultaneously, of the zoning map and register which are vital components of the zoning scheme as a whole, the municipality’s public consultation process in respect of the draft zoning by-law could be considered inadequate and is susceptible to legal challenge on that basis.

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<sup>1</sup> Section 24(2)(a) and (g).

<sup>2</sup> Section 25(1)(d).

7. In terms of section 28(1) and (2) of SPLUMA if a municipality intends to amend its land use scheme by rezoning land, a public participation process must be undertaken to ensure that all affected parties have the opportunity to make representations on, object to, and appeal the decision. This provision reinforces the point that any amendments to the previous zoning map will have to be put to the public for consultation before being finalized by the municipality.
8. WCLUPA includes a chapter regulating municipal development management, including zoning schemes. In terms of section 22(1) every local municipality must adopt a single zoning scheme for its whole municipal area, providing for at least the matters referred to in section 24. Section 24 specifies the minimum obligatory requirements for a zoning scheme". It provides as follows: *"A zoning scheme must make provision for at least – (a) the zoning of land; (b) the coming into operation of new zonings if new zonings are provided for in the zoning scheme; (c) the keeping of a register to record departures, non-conforming land uses contemplated in section 29(1)(c)(i) and consent uses; and (d) the approval of a zoning map to record the following: (i) the zoning of land units and references to records in the register; and (ii) rezonings and amendments to references to the register, where a land use planning application is approved by the municipality or where a use right has lapsed."*
9. A municipality must make provision for appropriate measures to regulate the coming into operation of a zoning scheme approved in accordance with WCLUPA and of subsequent reviews and amendments thereof and the transition from a zoning scheme in force when WCLUPA came into effect (i.e. then existing town planning and zoning schemes) and a zoning scheme adopted in accordance with WCLUPA to subsequent reviews and amendments thereof.<sup>3</sup>
10. The municipality has a by-law on municipal land use planning, 2015 ("the planning by-law").
11. The planning by-law does not include or incorporate the municipality's zoning scheme. In some municipalities, for example the City of Cape Town, the zoning scheme, referred to as the Development Management Scheme, is incorporated into the municipality's planning by-law ("the Cape Town by-law").
12. In 2019 the municipality gave notice that it had prepared an Integrated Zoning Scheme By-law in terms of section 22(1) of WCLUPA and section 24(1) of SPLUMA. It stipulated that the zoning scheme includes three components – the By-law, the register and the zoning map (reflecting the zoning of all properties in the municipal area). The proposed by-law ("the 2019 draft by-law"), zoning register and zoning maps were made available, including on the municipality's website, for purposes of the public participation process ("the 2019 map").
13. It is not clear why the municipality has not made public the proposed zoning map and register, along with the draft zoning by-law. As stated above, it is legally obliged to do so before these are finalized / amended.
14. Nature's Valley falls within the area of jurisdiction of the municipality. It has a unique character and specific development parameters which apply due to restrictive conditions of title in the title deeds. Nature's Valley is nestled within the Tsitsikamma National Park. Most of the erven are single residential and are of such a nature that wildlife moves freely through the village.
15. There have already been a number of processes aimed at developing an appropriate local spatial development framework for Nature's Valley (the LSDF), and appropriate zoning parameters which would give effect to such a spatial development framework.

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<sup>3</sup> Sections 29 and 33 of WCLUPA.

16. The LSDF has been prepared in consultation with the municipality and has undergone two public participation processes, culminating in the 2018 version of the LSDF.
17. The NVRA has also applied to the municipality for the adoption of an overlay zone for Nature's Valley. The planning by-law makes provision for so-called "overlay" zones, meaning a category of zoning that applies to land or a land unit in addition to the base zoning and that stipulates additional development parameters or use rights that may be more or less restrictive than the base zoning and may include provisions and development parameters relating to environmental protection. Other municipalities, such as Cape Town, make provision for overlay zones in their zoning schemes, and have adopted specific overlay zone areas. It is an established and appropriate planning tool.

#### **The zoning categories in the draft zoning by-law**

18. The draft zoning by-law proposes to introduce new categories of zoning, as well as new development parameters within existing categories of zoning. The proposed changes are far-reaching.
19. Of specific concern to the NVRA is:-
  - there is no category for overlay zonings;
  - changes to the zoning categories that apply in respect of public open spaces and conservation zones;
  - changes to the single residential zone I, II and III categories.
20. It would be in conflict with the planning by-law for the zoning scheme not to provide for overlay zonings. Furthermore, an overlay zoning would be an ideally appropriate manner in which to regulate land use and development parameters in Nature's Valley, in keeping with the LSDF.
21. The municipality is also under a duty and obligation to implement measures that protect the right to the environment in section 24 of the Constitution of the Republic of South Africa, 1996.
22. The 2019 draft by-law included procedures for establishing, reviewing and amending overlay zones. Those provisions have been removed from the draft zoning by-law (i.e. the 2021 version). The NVRA proposes that these provisions be re-inserted.
23. The NVRA further propose that the zoning by-law specifically include a tailor-made overlay zone for Nature's Valley, to be incorporated into the zoning by-law. The motivation is annexed to this document ("the overlay motivation"). The NVRA will submit a draft overlay zone proposal to the municipality for its consideration for inclusion into the draft zoning by-law.
24. The municipality may also wish to consider include overlay zones for other areas such as Keurboomstrand and Covie.
25. The NVRA is concerned that clause 3.3 of the draft by-law may be interpreted so as to preclude overlay zones. Clause 3.3 states that is there is a conflict between this By-Law and any other By-law, this By-Law prevails over the affected provision of the other By-Law in respect of any municipal planning matter. This clause appears to have been "lifted" from by-laws of other municipalities such as the City of Cape Town's where the planning by-law incorporates the zoning scheme. It is clearly not appropriate where there is a planning by-law and a zoning scheme by-law which must be interpreted and applied together and so as to avoid any conflicts in respect of municipal planning.

26. Turning to the other proposed categories of zoning, there are a number of public open space properties in Nature's Valley that are not formally declared as nature reserves, but are practically speaking areas managed for conservation purposes, with no development taking place on them. These are 380 (wetland erf), 381 (indigenous forest), 460 (coastal dune fynbos reserve), 429 (botanical garden) and the front coastal dune (erf 444). This is dealt with in the overlay motivation. Irrespective of whether the zoning of these erven is dealt with as part of an overlay or as public open space / conservation, the proposed zoning categories in the draft zoning by-law are not appropriate and do not protect these spaces sufficiently. The NVRA proposes that provision be made for a further category of public open space zoning which specifies that the primary use is for conservation purposes, that the erven need not be formally declared nature reserves, that there are no consent uses and that no structures shall be erected.
27. As mentioned above, the development parameters that apply to single residential properties in Nature's Valley by virtue of title deed restrictions should be dealt with in an overlay zoning, or as proposed in the LSDF.

#### **The allocation of zoning categories to individual erven**

28. The NVRA has an overriding concern in respect of the process being followed by the municipality in respect of the zoning by-law.
29. As mentioned above, the notice states that the zoning map and register are not being made available as part of this public participation process.
30. Section 1.2 of the draft zoning by-law states: *"the Zoning Scheme of the Bitou Municipality consists of this By-Law, which makes provision for the zoning of land, a separate zoning map that shows the zoning of each property within the municipal area, and a separate register, which inter alia records land use approvals granted for activities that deviate from the zonings shown on the approved zoning map"*.
31. However, apart from the problem of the proposed zoning map and register not having been published for public comment along with the draft zoning by-law, the planning by-law and the current draft zoning by-law do not include any provisions, as legally required, regulating the zoning map and zoning register, including but not limited to, the adoption, amendment and substitution of the zoning map. Those provisions were contained in the draft 2019 zoning scheme by-law but have now been removed. This has resulted in a lacuna and does not comply with section 24 of WCLUPA.
32. Even more fundamentally, it is not transparent and clear what the municipality's intentions are in respect of the proposed zonings in the draft zoning by-law, and when they would become operative in respect of which land units. The municipality does not appear to have a zoning map of every land unit in its area that is accessible to the public which reflects the current zonings.
33. Is the intention for the municipality when it adopts this zoning by-law to effectively make a number of significant changes and amendments to current zonings of land units? When would they become effective and what would the transitional arrangements be? The local community has a material interest in all of these aspects and is entitled to participate in a public consultation process in order to register its comments and objections, before any such amendments are made.

34. As set out above, the draft zoning scheme by-law introduces entirely new categories of zoning, removes others and makes significant changes to existing categories. In those circumstances, in order for interested and affected parties to be able to participate meaningfully in respect of the draft zoning by-law, and in accordance with the legal requirements of procedural fairness and procedural rationality, the municipality should prepare a draft zoning map reflecting any proposed amended rezonings of land units and conduct the public participation process in respect of the draft zoning by-law, together with the proposed amended zoning map.
35. At the very least, in the light of the engagements between the NVRA and the municipality over time in respect of adoption of an LSDF for Nature's Valley and appropriate development parameters, the NVRA submits that it is legally incumbent on the municipality to consult with the NVRA (and the Nature's Valley Trust) in respect of the draft zoning scheme by-law and any proposed significant amendments to the zonings of land units in Nature's Valley.

## **Specific comments on the contents of the Draft Zoning By-Law**

- **Bitou Municipality Zoning By-law,2020**  
The title of the above document needs to be amended to read "Bitou Municipality Draft Zoning By-law 2020" as the by-law has not been finalised. Further it was titled a **draft** document in the advertisement of the public participation process of 21 January 2021. (Municipal Notice No 2 of 2021)
- The **use of language elements** (words, phrases, clauses) together with a telegrammatic style of writing and numerous abbreviations cause confusion, are unclear, create loopholes and can result in contradictions. The use of mathematical signs like :  
< that means "less than"  
>that means "more than"  
≤ that means "a maximum of" and abbreviations like "ngl" that means "natural ground level" are not commonly found in documents intended to inform the general public.
- Further confusion results from incorrect cross reference numbering. Incorrect cross reference numbering in the definitions of Single Residential Zone III that all start with the number I. There is no definition in the zoning by-law that starts with I. Definitions start from 2.
- Definitions with the incorrect cross reference number further add to the confusion, e.g. the cross reference definition given for **self catering** is 2.180, and should be 2.179. The definition of a service station is numbered 2.180.
- Phrases or clauses that are tacked onto definitions, have no meaning and are not defined only serve to confuse and create problems concerning interpretation.  
The following are some examples:  
"without in any way limiting its ordinary meaning"  
"where the context so requires"  
"includes (but is not limited to)"  
"bona fide non-paying guests"  
"unless otherwise stated"  
"and similar activities"  
"to the satisfaction of the Municipality"
- **The NVRA have focused on the zoning, land use and development parameters for Single Residential Zones, Public Open Space Zone and Authority Zone. As outlined in detail in Attachments II and III, we are concerned that the zoning and development parameters proposed are not appropriate for Nature's Valley, and refer to the development rights proposed for Single Res Zone I, II and III as follows:**

**With reference to Single Residential Zone I, the following would apply:**

**Primary Uses** that are land uses permitted without the need to obtain prior municipal approval in terms of the planning by-law, and a list of these uses follow:

Boundary/screen walls up to 2,1m high  
Communications antenna up to 2m high  
Utility network  
Main house including domestic staff quarters and outbuilding

**Permissible Uses** that are land uses additional to primary uses, and they are also permitted without the need to obtain prior municipal approval in terms of the planning by-law, and a list of these follow:

Bed and breakfast establishment  
Home adult care (max of 3 persons)  
Home child care (max of 6 children)  
Home occupation  
Self-catering

**Consent Uses** that mean any land use specified as a consent use in the zoning by-law and is permitted within that zoning with prior municipal approval. The following uses can be approved under consent uses 1 and 2:

Additional house including garage with floorspace larger than 60m<sup>2</sup>  
Communication antenna greater than 2m high  
Guest house  
Home adult care (more than 6 persons)  
Home child care (more than 12 children)  
House shop  
Service workshop ancillary to main house

**Single Residential Zones II and III would (in addition to the Zone I development parameters) allow for the following:**

**Permissible Uses:**

Back Yard shelter  
Home adult care for up to 6 persons  
Home Child care for up to 12 children

**Consent Uses:**

Home Adult care for more than 6 persons  
Home child care for more than 12 children  
House church  
Service workshop ancillary to main house  
Shelter  
Scrap Yard ancillary to main house  
Storage yard ancillary to main house  
Tavern ancillary to main house

**Comment on Definitions**

- **The following are a number of definitions which the NVRA believe need careful consideration and revision:**

**2.9 Ancillary** “means a land use which is directly related and subservient to the predominant or major land use”. Given this definition what would constitute “ancillary structures” to a shelter? Further, ancillary does not express whether such a use would be separate from or joined to the main house.

**2.16 Authority use:** An extremely wide-ranging definition, which would allow municipal property in an established urban environment to be used for just about anything a designated official sees fit.

**2.30 Building Regulations:** Must refer to the National Building Regulations Act 103 of 1977 and all subsequent amendments.

**2.42 Commercial enterprise** means an enterprise for the express purpose of making a profit, with no limited social or charitable objectives. How can this type of commercial enterprise be included as a consent use in a single residential zone?

**2.70 Exemption means** the authority of a designated official to grant a deviation from specific requirements or to exercise a discretion in terms of the zoning by-laws. Although such authority is subject to a list of conditions, they can be easily met when deciding if exemption can be granted.

**2.60 Designated official** in turn means the municipal manager, head of the department responsible for the land use function of the municipality, or any official of the municipality duly authorised by the municipal manager to act as designated official.

This definition shows that **any** municipal official can be authorised as a designated official. This puts a question mark behind the integrity of the exemption process.

The following definition of an important primary land use in the single residential zones I, II, III namely **main house** will show the consequences if exemption may be granted by a designated official:

**2.117 Main house means dwelling unit.**

**2.65 Dwelling unit** is defined as a self-contained, interleading group of rooms with not more than one kitchen used for the living accommodation of a single household (and its bona fide non-paying guests) together with ancillary outbuildings (unless otherwise stated), provided that a designated official may grant exemption from any of the aforementioned requirements.

**2.81 Floor factor:** The definition is not clear. It should state that “it is the calculated number which when multiplied by the site area gives the maximum total floor area of all buildings on the site”.

**2.108 Kitchen:** Means a part of a building equipped for the preparation and cooking of meals but excludes food and drink preparation areas or bar facilities in an entertainment area that may be exempted by a designated official as not comprising a kitchen, and includes cooking facilities forming part of domestic staff quarters.

This is a highly contentious definition. What is the difference between a place being “equipped for the preparation of food” which is defined as a kitchen, and “food and drink preparation area” and “cooking facilities” that are not defined as kitchens?

Further confusion results from the definition of **2.179 Self Catering** that is a commercial enterprise providing accommodation for transient guests and allows them to prepare their own meals. No mention is made of the fact that this would entail at least a small kitchen.

The final important question is how the above examples can be reconciled with the fact that one of the land use conditions applicable to a **dwelling unit or main house** is that it has only one kitchen?

**2.123 Minor building:** This definition should also include carports, which don't seem to appear anywhere else. Perhaps “carport” should have a separate definition?

**2.129 Natural ground level:** No clarity is provided on how the NGL is determined. Surveyors diagrams are all very well, but how does the designated official use the information? Is it the level of the highest contour or is it an average level taken across the site? There must be a standard method adopted for establishing the applicable NGL which should not be left to a designated official to decide.



**2.179 Self-catering:** Surely the definition should limit the number of guests that can be accommodated, as per B and B's and Guesthouse?

**2.194 Structure:** Carport should be listed as a structure.

**2.208 Utility plant:** The definition seems very limited. What about water storage and pumping, electrical substation et al?

- **Definitions of certain land uses/land use terms can hold enormous negative implications for erven that are zoned single residential as the following examples show:**

**2.117 Backyard shelter** means a shelter situated on a land unit that also accommodates a formal dwelling unit.

**2.183 Shelter** is defined as a unit of accommodation intended for human occupation and constructed on an informal basis of any material whatsoever even though the material may not comply with the standards of durability intended by the Building Regulations and includes ancillary structures.

As the term “**shelter**” has the same meaning as in “**backyard shelter**”, it follows that a backyard shelter also includes ancillary structures. Further, as the term “**ancillary structures**” is not specified or limited in number the application could hold far-reaching consequences.

Given the fact that the two terms have the same meaning and that **shelter** is a primary land use under Informal Residential Zone, the logical conclusion is that **backyard shelter** should be a permissible use or consent use 2 under this zoning and not a permissible use under Single Residential Zones, II , III.

**2.195 Tavern** means a commercial enterprise that is ancillary to the living accommodations for a single household and whereby an occupant conducts an establishment for the sale of predominantly alcoholic beverages, and sometimes also food, to be consumed on the premises, and may include ambient live music, but excludes a night club and a restaurant.

Tavern should be a primary land use under Business Zone or Minor Business Zone and not a consent use 2 under Single Residential Zones II and III for the following reasons:

- There is no difference between the land use definition of a tavern and a restaurant and their requirements except that, in the case of the single residential zones, the tavern would be ancillary to the main house.
- They are both commercial enterprises meaning business concerns that sell alcohol, prepare and sell food on the premises for profit and may provide music. Both have to comply with all regulations pertaining to approval for a liquor licence and health regulations for the preparation of food.

**2.103 House Shop** means a commercial enterprise that is ancillary to the dwelling unit whereby an occupant (anybody residing on the property) conducts a retail trade.

**2.185 Shop** means land used for the retail sale of goods to the public and includes a retail concern.

From the above it is clear that there is no difference in the land use definitions and practical applications of a **shop** that is a commercial or business enterprise or concern that conducts a retail trade and a **house shop** that does exactly the same, but is ancillary to the dwelling unit. It should be noted that this ancillary condition does not appear in the relevant tables.

As **house shop** is a business it should fall under Business Zone or Minor Business Zone as a primary or permissible use, or a permissible use under Informal Residential Zone if this is also appropriate, but not as consent use 1 under the Single Residential Zones I, II, III.

**2.181 Service Workshop** is defined as a commercial enterprise, namely a business concern whereby motor vehicles, boats, lawn mowers and other mechanical or similar equipment may be provided with minor servicing but excludes a repair workshop. Given the potentially hazardous and industrial nature of this type of enterprise it is also a primary use under Industrial Zone and cannot be allowed in a single residential zone of which the most important primary use is that of a family unit usually with children.

In turn **2.166 Repair workshop** is defined as exactly the same type of business but falls under consent use 2 in Business Zone and Minor Business Zone. The only difference between the two are the words “minor” and “major” that have to determine the type of servicing allowed in each case. Given this fact and the practical difficulty of what constitutes ‘minor’ as opposed to “major” in many cases of servicing as well as the ambiguity of terms like “mechanical or similar equipment”, it is logical that service workshop should also be a consent use 1 or 2 under Business Zone or Minor Business Zone, if not already appearing there. This type of business which is potentially hazardous should not be allowed in single residential zones where families with children live.

**2.177 Scrapyard** is defined as land that is used for the storing, depositing or collecting of scrap material, the dismantling of second-hand vehicles or machinery for parts and the sale thereof. This hazardous and predominantly industrial enterprise has no place as a consent use 2 in Single Residential Zones II and III. It can only be a consent use in the Industrial Zone.

**2.157 Public Open Space** is one of 33 primary, permissible and consent uses under the **Public Open Space Zone**. It is defined as land that is primarily open but may have ancillary buildings and structures and is set aside for the benefit of the public. A public area may include an area that is primarily vegetated but does not qualify as a nature reserve or nature conservation area.

Public open spaces are an important component of urban design and should accommodate appropriate uses for the people for whose benefit they are intended.

However, where such open spaces showcase any of the many and varied aspects of the of the natural environment, they must be left undisturbed with no development rights or ancillary land uses.

A separate **public space zoning** for the protection and public enjoyment of these areas will achieve the desired outcome.

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## **ATTACHMENT II (NVRA Response 03-03-2021)**

### **Nature's Valley Restrictive Conditions of Title**

#### **Adv David Borgström SC opinion on “The Nature of Restrictive Conditions attached to properties in Nature's Valley dated 19 June 2018**

- The historically well-established single residential character and status of Nature's Valley is a result of the restrictive conditions of title in NV title deeds and the continued commitment of the NV community and owners to preserve and protect this status.

According to the title deed restrictions entrenched in title deeds of the large single residential erven averaging 1000 m<sup>2</sup>, subdivision is prohibited; only one dwelling with normal outbuildings is permitted on the property; a maximum of 50% coverage is allowed and building lines of 6.3 metres on street front and 3,15 metres on the sides and back of property must be maintained.

As a result, 415 of the 426 erven comprising the residential area are zoned single residential zone 1; 7 nature areas are protected public open spaces and only one erf has had limited business rights of a shop since 1953 when the township was established.

The attached opinion of Adv Borgström finds that the restrictive conditions in the title deeds are reciprocal praedial servitudes. This is borne out by comprehensive references to case law judgments.

The practical implications are that the restrictive conditions of title have created a net wherein each owner has binding rights attached to ownership of property in the township to control development on all other properties and is, at the same time, bound by limits on the permissible development of his own property.

These rights remain effective and binding especially to the extent that they impose greater limits on the development of property than those allowed by the draft zoning by-law.

Further the restrictive conditions of title are in the public interest and fulfil the purpose normally ascribed to town planning of a co-ordinated and harmonious layout of the township for the benefit of all property owners as well as preserving the surrounding natural environment of the category I Tsitsikamma Section of the Garden Route National Park.

Finally, it must be noted that restrictive conditions of title that comprise reciprocal praedial servitudes take precedence over provisions of a town planning scheme.

- It is therefore clear that the wide-ranging list of land uses allowed as primary, permissible, consent use 1 and consent use 2 under the category single residential zone I in the draft zoning by-law cannot be applicable to the residential area of NV.

The same opinion was copied to Bitou in 2018 for the purpose of enabling the Municipality to make informed decisions concerning the limitations posed on land use in NV by these reciprocal praedial servitudes.

**Adv.Borgstrom Opinion is attached as a separate document.**

## ATTACHMENT III (NVRA Response 03-03-2021)

### MOTIVATION FOR THE ADOPTION OF AN OVERLAY ZONE FOR NATURE'S VALLEY

- The 2015 Bitou By-law on Municipal Land Use Planning of which the purpose is to regulate and control municipal land use planning, makes provision for an Overlay Zone as a category of zoning that applies to land or a land unit. It stipulates additional development parameters or use rights that may be more (or less) restrictive than base zoning, and it may include provisions and development parameter relating among others to: primary or consent use, subdivision, density limitations, urban form, environmental protection.

A Municipality may adopt overlay zones for specific areas in accordance with section 16 to give expression in a planning context, to the local needs and values of the communities concerned.

An Overlay Zone is adopted by the Municipality as an amendment of the zoning by-law in accordance with Sections 12 and 13 of the Municipal Systems Act and Section 25 of the Land Use Planning Act.

- From the information provided it is clear that the adoption of an Overlay Zone for NV would be the correct land use zoning category to apply to provide for the development limitations entrenched in the restrictive conditions (reciprocal praedial servitudes) of NV title deeds.
- It is therefore cause for grave concern that provision was made for Overlay Zones in the previous draft zoning by-law and that the NVRA applied for the adoption of an overlay zone for NV, but that there is no reference to Overlay Zones as a zoning category in the new Bitou Draft Zoning By-law.
- The NVRA again submits a motivation for the adoption of an Overlay Zone for NV.

#### 1. NATURE'S VALLEY IN CONTEXT

Nature's Valley incorporates the area known as Nature's Valley Township, measuring approximately 93ha in extent.

- 1.1 Unique Natural Environment:** Nature's Valley which lies at the foot of the coastal escarpment and is accessible only from the historic Groot River Pass (R102), is bordered by the protected lagoon and estuary, the sea and the indigenous rain forests of the Tsitsikamma Section of the Garden Route National Park (GRNP). Nature's Valley is one of only a few villages in South Africa that are surrounded by a proclaimed national park. As a result, the village cannot reasonably expand into a sprawling conglomeration of housing and ancillary land uses.

Afro-temperate forest occurring in Natures Valley is one of the 26 Natural Forest Types declared as natural forest in terms of Section 7(3)(a) of the National Forest Act, 1998, Government Notice No 762 of 18 July 2008. The vegetation found in the area falls within the eastern section of the Cape Floristic Region which is one of the six floral kingdoms of the world and has the highest species diversity per unit area in the world.

- 1.2 Single Residential Character:** The almost exclusively "Residential Zone 1" erven of the township have been retained virtually unchanged since the proclamation of the village in 1953. The well-wooded and largely unfenced properties together with forested open spaces play an integral part in maintaining and augmenting the environmental integrity of the unique natural surroundings within which the township falls.

Most of the 397 residences are unpretentious and of simplified design and blend into the natural environment. The provision of engineering services such as electricity cables have been laid underground

which, together with the absence of street lights help preserve the natural ambience. Although home to an increasing number of retirees, Nature's Valley serves primarily as a holiday destination but without the hotels, shopping malls, cinemas and night clubs often associated with many other popular holiday destinations. It therefore provides a much sought-after break from city life.

**1.3 Geographical Constraints:** The township only comprises 406 erven and, as its boundaries are the Groot River Lagoon, the ocean and the Tsitsikamma Section of the GRNP, no further development outside the residential area is possible. These same constraints impose severe restrictions on any further development of existing infrastructure with particular reference to sewage management and availability of water.

**1.4 Owners:** An exceptionally large percentage of owners respect and appreciate the unique natural environment of Nature's Valley and are actively involved in community efforts to protect and retain this invaluable asset for future generations. The Nature's Valley's Trust (NVT) which was established in 2000, is a strong community-based conservation body that has as its main focus to maintain the long-term environmental integrity of Nature's Valley and surrounding areas, by becoming proactively involved in issues that impact on the future of the area. including increasing the environmental awareness of the children who visit NV as well as the children in less privileged areas of Bitou. The Trust has been responsible for the successful rehabilitation of the Fynbos Reserve (Erf 460), once home to the Brenton Blue butterfly, which together with the Phyl Martin Park (Erf 429) are used as important environmental education classrooms for learners and students.

In 2006 the Nature's Valley Urban Conservancy was established through Cape Nature to encourage its members in the residential area to implement and observe best conservation practices-

The Nature's Valley Ratepayers' Association (NVRA) is a longstanding and strong association that preceded the Nature's Valley Local Council. The association aims to serve the best interest of ratepayers and to protect and retain the single residential character of the township and the environmental integrity of its natural surroundings. In 1994 the NVRA was responsible for the establishment of the 30 year Contractual Park Area Agreement with South Africa National Parks and the municipality to protect and manage the front coastal dune (Erf 444) and a large tract of lagoon frontage and flood plain (Erf 434 and 382). A special NVRA sub-committee manages the Phyl Martin Park, a small botanical garden, the wetland (Erf 380) and forest reserve (Erf 381) and the eradication of invasive alien plant species. In the 2018/2019 financial year 62% of all homeowners actively contributed to the NVRA.

## 2. OBJECTIVES

The intended outcomes of implementing an overlay zone for Natures Valley are:

- To uphold the **praedial servitudes** registered against the title deeds that regulate the development of erven in the township, in particular those pertaining to density;
- To prevent overburdening of geographically limited **services infrastructure** particularly sewerage and water supply.
- To protect and enhance the **unique character** of Nature's Valley;
- To protect and enhance **land values**;
- To **protect the environment** and enhance nature conservation within the village;
- To **promote a pedestrian friendly environment** and to curtail unnecessary vehicle movement.
- To promote Natures Valley and surrounds as an **eco-tourist destination**.

## 3. NEED AND DESIRABILITY

### 3.1 Development Prospects

Nature's Valley has no viable expansion prospects due to the Tsitsikamma National Park that surrounds the village of Nature's Valley. The only possibility of new development is residential densification which is undesirable due to the surrounding Tsitsikamma National Park and the inferior services infrastructure which arguably cannot accommodate ~~the~~ a greater demand without the possibility of more regular outages,

water shortages, pollution and a greater health threat due to potential contamination of the Groot River estuary as well as ground and stormwater.

### **3.2 Land Uses**

- With the exception of the single business erf, four park/open space erven, one Telkom erf, the church erf and one guest house all other properties in Nature's Valley are zoned for single residential purposes (Residential Zone 1). The Nature's Valley community has also resisted the rezoning of land by objecting to rezoning applications. Due to the limited extent of development, Nature's Valley's isolation and the seasonal occupation patterns, the sustainability of other types of land uses such as retail and other types of residential uses other than holiday orientated uses, are questionable.
- A strong expectation exists amongst residents and owners that the unique pristine character of Nature's Valley should be maintained and protected at all cost.
- Although Nature's Valley possesses eco-tourism potential, there is and has historically been strong opposition to any form of rezoning that would impact on the established single residential character of the village. The single residential properties do provide the opportunity for accommodating tourists who are attuned to the ambience of Natures Valley and this presents a sustainable option for the development of eco-tourism.

### **3.3 Services Infrastructure**

- Nature's Valley's demand for electricity has shown a steady increase over the past two decades however the infrastructure appears adequate for the foreseeable future provided subdivision and densification are avoided.
- Civil services infrastructure, especially sewerage infrastructure (or the lack thereof) requires urgent attention and an innovative approach to cope even with the present volumes and to avoid the contamination of natural water resources which could pose a health threat to residents and visitors.
- The potable water supply relies solely on water from the Groot River which, combined with limited reservoir storage is already constrained during periods of high occupancy in Natures Valley
- The stormwater drainage system is inadequate and flooding causes damage to a number of low-lying properties during heavy rains.

### **3.4 Movement and Roads**

- Nature's Valley has limited accessibility due to its location. As far as linkages with Plettenberg Bay and other areas are concerned, the only access is via the R102, the old Groot River pass road. Nature's Valley is situated approximately 30 kilometres from the nearest shopping centres and work opportunities. For this reason, Nature's Valley cannot function as a "dormitory town" from which employees commute on a daily basis.
- The roads within the township of Natures Valley are narrow and not suitable for heavy or high volumes of traffic. Large sections are in urgent need of maintenance to prevent irreversible deterioration.

### **3.5 Natural environment**

- Based on the current environmental legal framework in South Africa, should application be made today for the establishment of Nature's Valley, the town would most probably never come into being. This is due to the -stringent requirements surrounding sensitive habitats and the requirement for appropriate

buffer zones as a mitigation measure around such habitats. In Nature's Valley, the following habitats occur; Coastal Forest, Ridges, Wetlands, Coastal Dune Fynbos and Estuarine habitat.

- The village impacts on its surrounding sensitive environment in many ways, including impacts on water quality and edge effects on the surrounding indigenous forest. Although all possible steps are taken by the NVRA, NVT and residents to curtail these impacts, development or encroachment on existing functional habitat can be regarded as a risk to the environment.
- It must be deduced that Nature's Valley is absolutely unique and vastly different to most other coastal towns or villages in South Africa. Planning and development in Nature's Valley must therefore be closely scrutinised, so as to ensure responsible and sustainable co-existence with the environment.
- Apart from the indigenous flora in the township and surrounds, the animal and birdlife is prolific. Bushbuck, baboons, monkeys, bush-pig, grey mongoose, caracul, cape otter and fish eagles are regularly observed. There is recently recorded evidence that Leopard still inhabit the nearby mountains and forest. This type of environment, in an urban setting, is truly unique but would not survive the impact of densification.

#### 4. REMAINING HABITATS UNDER DEVELOPMENT PRESSURE

- **Parks/Open Spaces**

Each of the four park erven have a specific use or function and represent a different type of habitat namely wetland reserve (Erf 380), afro-montane indigenous forest (Erf 381), coastal dune fynbos reserve (Erf 460), botanical garden (Erf 429) and front coastal dune (Erf 444). The loss of any one of the parks would result in a loss of environmentally sensitive areas and consequent negative impacts on the ambience and sense of place of Nature's Valley. Open spaces are also used by the Nature's Valley Trust for the purpose of syllabus approved Environmental Education of school children.

- **Wetland**

Wetland is defined by the National Water Act, 1998 (Act No. 36 of 1998) as:

*"Land which is transitional between terrestrial and aquatic ecosystems where the water table is usually at or near the surface, or the land is periodically covered by shallow water, that naturally supports vegetation typically adapted to life in saturated soil."*

In 2003, the Department Water Affairs and Forestry published: "A practical field procedure for identification and delineation of wetlands and riparian areas", according to which wetlands can be delineated and then protected. The foundation of the method is based on the fact that wetlands have several distinguishing features including the following:

- The presence of water at or near the ground surface
- Distinctive hydromorphic (wet) soils
- Vegetation adapted to saturated soils
- The presence of alluvial soils in stream systems

These conditions exist on Erf 380 and must therefore be protected in terms of the National Water Act and National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA).

- **Indigenous Forest Habitat (Afro-montane)**

Erf 381 hosts indigenous forest trees and habitat believed to be 60 years or older. The National Heritage Act refers to "landscapes and natural features of cultural significance", and especially those older than 60 years. In terms of the Act, these trees have natural heritage value based on their age, let

alone their value and therefore enjoy protection in terms of the National Forest Act, 1998 read with the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA).

- **Botanical Garden**

The Phyl Martin Park was established as a park during 1955, and developed as a botanical garden a few years later. It currently incorporates an indigenous park landscape, botanical garden and nursery. The nursery fulfils an important role with the rehabilitation of the ecology of Nature's Valley from exogenous to an indigenous flora environment. The park was established by members of the Natures Valley community and property owners have taken an active role in its maintenance since inception.

- **Fynbos Reserve**

Erf 460 in Natures Valley contains a rare remaining example of coastal dune Fynbos habitat within its boundaries and as mentioned, once home to the Brenton Blue Butterfly. The Fynbos Reserve now serves as an important park and facility for environmental education. The NV Trust organises environmentally focussed classes for children from NV and surrounding communities in this unique natural park.

Fynbos as a vegetation type is under severe pressure, and any opportunity to preserve even small areas should be taken within the context of South Africa's responsibility as the only custodian of this vegetation type in the world.

- **Estuarine Habitat**

Erven 382 and 434 fall outside the proposed "urban edge" of the village. Some sections form part of the estuarine system and are occasionally flooded (i.e. a wetland). The remaining area adjacent to Lagoon Drive acts as a buffer between the built-up area, and the Groot River Lagoon / Estuary System. This buffer (although not sufficient – it would be 200m or more in terms of current legislation) is critical as an interface between human activity and the lagoon itself.

These erven, which form part of the estuary environment, are protected by the National Environmental Management Act, and the Integrated Coastal Management Act, 2008 (Act 24 of 2008). They are managed by SANParks in terms of the Contractual National Park Agreement between SANParks, Bitou and the Nature's

Valley Ratepayers' Association (signed in January 1994) in terms of which they are maintained and protected for conservation purposes.

The "island erven" within the Grootrivier estuary, which originally formed part of the NV Development plan are contrary to responsible environmental management and for this reason were never developed. In 1988 all the erven on the island were expropriated in the name of the Republic of South Africa and included in the then Tsitsikamma National Park.

- **Front Coastal Dune**

Erf 444 is a scarce remaining example of a pristine undeveloped front coastal dune and is managed by SANParks according to the Contractual Park Agreement of which it forms part. Erf 444 is protected by the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008) as well as the Municipal Systems Act, 2003 (Act 32 of 2000).



## 5. OVERLAY ZONE DEVELOPMENT GUIDELINES

The following development guidelines are proposed for the overlay zone applicable to Natures Valley.

### 5.1 Building Restrictions

Maintain the existing restrictive conditions of title applicable to “Residential Zone 1” even in Natures Valley.

- No subdivision.
- Single dwelling with normal outbuildings (Subject to clearer definition in line with Bitou Zoning Scheme definitions)
- Maximum coverage: 50%
- Street boundary building line: 6,3m
- Lateral and rear boundary building line: 3,15m
- Maximum building height: 12,5m (The more stringent Bitou Zoning Scheme restriction of 8,5m above NGL, to apply)

The aforementioned restrictive conditions of title are regarded as reciprocal praedial servitudes, as confirmed in various court judgments and legal opinions, inter alia:

- *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others 2001.*
- *Van Rensburg and Another NNO v Naidoo and Others NNO, 2011.*
- *Van Rensburg Supreme Court of Appeal decision 2011.*
- *Opinion for the Natures Valley Ratepayers Association regarding the nature of Restrictive Conditions attached to properties in Natures Valley by David Borgstrum SC, 20 June 2018.*

### 5.2 Open Spaces

Maintain parks and open spaces as indicated on the Map of Natures Valley included as part of the Bitou Draft Zoning Scheme By-Law.

### 5.3 Natures Valley Local Spatial Development Framework (NV LSDF)

To ensure that the aims and development guidelines as set out in the NV LSDF dated 24<sup>th</sup> October 2018 are adhered to in the long-term interest of the community. The LSDF has been prepared in consultation with and approval of Bitou Municipality and has undergone two public participation processes in 2014 and again, in revised form, in 2018. All comments by interested and effected parties have been incorporated. The document fairly reflects the wishes of the owners of property in Natures Valley.

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