

RMA FORM 5



Submission on publicly notified Proposed Porirua District Plan

Clause 6 of the First Schedule, Resource Management Act 1991

To: Porirua City Council

Submitter details:

Full Name	<i>Last</i> Cave		<i>First</i> Murry
Company/Organisation <i>if applicable</i>	NA		
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This is a on the **Proposed District Plan** for Porirua.

~~I could~~ I could not
gain an advantage in trade competition through this submission.
(Please tick relevant box)

If **you could** gain an advantage in trade competition through this submission please complete point four below:

I am I am not
directly affected by an effect of the subject matter of the submission that:
(a) adversely affects the environment; and
(b) does not relate to trade competition or the effects of trade competition.
(Please tick relevant box if applicable)

Note:

If you are a person who could gain an advantage in trade competition through the submission, your right to make a submission may be limited by clause 6(4) of Part 1 of Schedule 1 of the Resource Management Act 1991.

I do wish ~~I do not wish~~

To be heard in support of my submission
(Please tick relevant box)

I will ~~I will not~~

Consider presenting a joint case with other submitters, who make a similar submission, at a hearing.
(Please tick relevant box)

Please complete section below (insert additional boxes per provision you are submitting on):

<p>The specific provision of the proposal that my submission relates to:</p> <p>NE-Natural Environment</p> <p>NE-O1 Natural character, landscapes and features and ecosystems</p> <p>Proposed SNA035 Karehana Bay Bush</p>
<p>Do you: Support? Oppose? Amend?</p>
<p>What decision are you seeking from Council? What action would you like: Retain? Amend? Add? Delete?</p>
<ol style="list-style-type: none"> 1. Recognise that we have asked for boundaries of the proposed SNA035 Karehana Bay Bush to be amended since our 2018 submission and Council has not engaged with us to address our concerns 2. Redraw the boundaries of SNA 035 to ensure that our rights as landowners are protected 3. Recognise that the SNA proposal is ultra vires under s.76 (4A) of the Resource Management Act. 4. Recognise that the SNA proposal is ultra vires and non-compliant with s. 85 (3B) of the Resource Management Act since the proposal both makes the land incapable of reasonable use and places an unfair and unreasonable burden on ourselves who have the primary interest in this land. 5. That including urban allotments within a SNA is contrary to regional and national policy frameworks. 6. That the s.32 process undertaken by Council is inadequate and does not reflect the issues and concerns that ourselves and other landowners will have with respect to the imposition of SNAs over urban allotments 7. That Council notes that its adoption of SNAs over urban allotments is not a process that has been contemplated by any other territorial authority within New Zealand and has not been considered in the draft National Policy Statement for Indigenous Biodiversity and as this document will be sent back to regional councils for further consultation, this issue will be flagged as an area of concern. 8. Note and take account of the detailed documentation provided as an annex below.

Please return this form no later than **5pm on Friday 20 November 2020** to:

Proposed District Plan, Environment and City Planning, Porirua City Council, PO Box 50-218,
 PORIRUA CITY or
 email dpreview@pcc.govt.nz

Signature of submitter
(or person authorised to
sign
on behalf of submitter):



Date: 19 November 2020

*A signature is not required if you make
your submission by electronic means*

Annexure

2018 consultation

1. We were first made aware of the proposal to include a large part of our urban allotment at 82 Cluny Road Plimmerton in an SNA in a letter from Porirua City Council Dated 8th of June 2018 but were unable to respond promptly due to being overseas for part of the period leading up to the closing of submissions on the proposed district Plan.

2. On the 29th of October 2018 we wrote a letter submitting on the proposed district plan. We noted that;

- 2.1. *The aerial photography on which your assessment is made were acquired over the summer of 2012-13 and is thus 5 years out of date.*
- 2.2. *The boundaries have been drawn in a way which contradicts the parameters set out in the Wildlands report on which the proposal is based*
- 2.3. *There is no indication of what compensation is proposed for such a significant loss of property value which in our instance has been assessed as being around one quarter of a million dollars.*
- 2.4. *We refer to the criteria set out in the Wildlands report.*

Ecological site boundaries in the GIS layer were clipped to property boundaries, mostly in urban areas, to prevent the ecological site overlapping onto neighbouring private land. Such overlaps typically comprised overhanging branches, are unlikely to have high significant ecological value, could needlessly antagonise landowners, and may cause issues from a planning perspective.

Blaschke et al. (2011a) refined Ecological Site boundaries, by creating four meter buffers around existing dwellings and following existing property or covenant boundaries. We deemed these rules to be appropriate.

2.5 *It is clear that these criteria have not been followed when drawing the SNA boundary and **we seek to have the SNA boundary redrawn to exclude our property.***

3. The response we received from Council on the 7th of November 2018 did not address our concerns but did include the following points.

We will continue to consult with affected landowners about these areas to ensure the mapping is correct.

You indicate that there may be an error in the mapping or assessment of the significant natural area as it relates to your property. We are happy to arrange for our ecologist to visit your site.

Based on the feedback we receive from the draft District Plan as well as from landowners, we will refine these objectives and policies as well as develop rules relating to how we manage these Significant Natural Areas. We will also update the mapping of these areas based on site visits from our ecologist. In late 2019 we will also aim to notify the Proposed District Plan. You will then have another opportunity to submit on how we manage as well as how we have identified these areas through this process.

4. This response was inadequate and did not address our concerns and we note;

4.1 Council has not consulted with us subsequently and we have not had any correspondence from the council with respect to this proposed district plan between that letter of 7th November 2018 and correspondence initiated by ourselves on the 3rd of October 2020.

4.2 Council's response to our concern did not acknowledge that we wished to have the SNA redrawn to exclude our property. The suggestion to having an ecologist visit our property may have been in the interest of Council but did not align with our wishes to ensure that our land remained capable of reasonable use.

4.3 Council did not consult with us in late 2019 despite stating that they would do so in their letter of 7th November 2018.

2020 Proposed District Plan

5. The 2020 Proposed Porirua District Plan (PPDP) was notified on 28th August 2020 and included 686.83 M² of our property at 82 Cluny Road Plimmerton Lot 1 DP 368896 in Significant Natural Area 035 Karehana Bay Bush (page 8 of 48 Schedule 7) PPDP. The PPDP defines a Significant Natural Area (**SNA**) as "*an area of significant indigenous vegetation or significant habitat of indigenous fauna identified in SCHED7 - Significant Natural Areas*" and further describes SNAs as part of the strategic objective "

The natural character, landscapes and features and ecosystems that contribute to Porirua's character".

6. The PPDP notes that "*the District Plan must give effect to the t for the Wellington Region and must not be inconsistent with Regional Plans produced by the Greater Wellington Regional Council. The District Plan must also have regard to any proposed regional policy statement or regional plan*".

7. The Greater Wellington Regional Council Regional Policy Statement is thus the key

underpinning Policy for the implementation of SNA's in Porirua District.

8. The Greater Wellington Regional Council Regional Policy Statement

8.1 The Greater Wellington Regional Policy Statement (RPS) considers Indigenous Biodiversity in Section 3.6. and established Objective 16 *“Indigenous ecosystems and habitats with significant biodiversity values are maintained and restored to a healthy functioning state.”*

8.2 The RPS established the following Policies.

8.3 Policy 23: Identifying indigenous ecosystems and habitats with significant indigenous biodiversity values – district and regional plans

District and regional plans shall identify and evaluate indigenous ecosystems and habitats with significant indigenous biodiversity values; these ecosystems and habitats will be considered significant if they meet one or more of the following criteria:

(a) Representativeness: the ecosystems or habitats that are typical and characteristic examples of the full range of the original or current natural diversity of ecosystem and habitat types in a district or in the region, and:

- (i) are no longer commonplace (less than about 30% remaining); or
- (ii) are poorly represented in existing protected areas (less than about 20% legally protected).

(b) Rarity: the ecosystem or habitat has biological or physical features that are scarce or threatened in a local, regional or national context. This can include individual species, rare and distinctive biological communities and physical features that are unusual or rare.

(c) Diversity: the ecosystem or habitat has a natural diversity of ecological units, ecosystems, species and physical features within an area.

(d) Ecological context of an area: the ecosystem or habitat:

- (i) enhances connectivity or otherwise buffers representative, rare or diverse indigenous ecosystems and habitats; or
- (ii) provides seasonal or core habitat for protected or threatened indigenous species.

(e) Tangata whenua values: the ecosystem or habitat contains characteristics of special spiritual, historical or cultural significance to tangata whenua, identified in accordance with tikanga Māori.

Explanation

Policy 23 sets out criteria as guidance that must be considered in *identifying* indigenous *ecosystems* and *habitats* with significant *biodiversity* values. Wellington Regional Council,

and district and city councils are required to assess indigenous ecosystems and habitats against all the criteria but the relevance of each will depend on the individual cases. To be classed as having significant biodiversity values, an indigenous ecosystem or habitat must fit one or more of the listed criteria. Wellington Regional Council and district and city councils will need to *engage directly with land owners and work collaboratively with them to identify areas, undertake field evaluation, and assess significance*. Policy 23 will ensure that significant biodiversity values are identified in district and regional plans in a consistent way.

8.4 Policy 24: Protecting indigenous ecosystems and habitats with significant indigenous biodiversity values – district and regional plans

District and regional plans shall include policies, rules and methods to protect indigenous ecosystems and habitats with significant indigenous biodiversity values from inappropriate subdivision, use and development.

Policy 24 is not intended to prevent change, but rather to ensure that change is carefully considered and is appropriate in relation to the biodiversity values identified in policy 23.

8.5 Policy 47: Managing effects on indigenous ecosystems and habitats with significant indigenous biodiversity values – consideration

When considering an application for a resource consent, notice of requirement, or a change, variation or review of a district or regional plan, a determination shall be made as to whether an activity may affect indigenous ecosystems and habitats with significant indigenous biodiversity values, and in determining whether the proposed activity is inappropriate particular regard shall be given to:

- (a) maintaining connections within, or corridors between, habitats of indigenous flora and fauna, and/or enhancing the connectivity between fragmented indigenous habitats;
- (b) providing adequate buffering around areas of significant indigenous ecosystems and habitats from other land uses;
- (c) managing wetlands for the purpose of aquatic ecosystem health;
- (d) avoiding the cumulative adverse effects of the incremental loss of indigenous ecosystems and habitats;
- (e) providing seasonal or core habitat for indigenous species;
- (f) protecting the life supporting capacity of indigenous ecosystems and habitats;
- (g) remedying or mitigating adverse effects on the indigenous biodiversity values where avoiding adverse effects is not practicably achievable; and
- (h) the need for a precautionary approach when assessing the potential for adverse effects on indigenous ecosystems and habitats.

Explanation

Policy 47 provides an interim assessment framework for councils, resource consent applicants and other interested parties, prior to the identification of *ecosystems* and *habitats* with significant *indigenous biodiversity* values in accordance with policy 23, and the adoption of plan provisions for protection in accordance with policy 24. Remedying and mitigating effects can include offsetting, where appropriate.

8.6 Policy 64: Supporting a whole of catchment approach – non-regulatory

Take a whole of catchment approach that recognises the inter-relationship between land and water, and support environmental enhancement initiatives to restore and enhance:

- (a) coastal features, ecosystems and habitats;
- (b) aquatic ecosystems and habitats; and
- (c) indigenous ecosystems and habitat

Explanation

Taking a whole of catchment approach is promoted within this Regional Policy Statement. It means considering the full mix of purposes, uses or activities within a catchment, in terms of how these interact and contribute to outcomes within the catchment and for receiving environments beyond – such as in relation to *indigenous ecosystems*, soil productivity, water quality, erosion and stormwater control, or *natural hazards*. This approach suggests a need to work with multiple parties to establish shared objectives for a catchment and to ensure uses and activities are working towards the same goals or at least are not working against their attainment.

Irrelevant sections omitted

Setting right the effects of historical activities that have reduced the extent and quality of indigenous ecosystems and habitats in the region can be facilitated by providing information about the importance of these ecosystems and habitats, and by *providing financial incentives* to promote their maintenance, enhancement and restoration. Wellington Regional Council and district and city councils can, through their operations, play a role in the restoration and enhancement of indigenous ecosystems and habitats – such as, in reserve management plans, pest control, stormwater management, and roadside vegetation management. Providing assistance to community groups and promoting initiatives involving community participation are key elements that will help implement policy 64.

8.8 The RPS established the following methods to support the policies.

8.9 Method 21: Information to assist with the identification of indigenous ecosystems and habitats with significant indigenous biodiversity values

Prepare and disseminate information to assist with the interpretation of the criteria set out in policies 23 and 24, which require the identification and protection of indigenous ecosystems and habitats with significant indigenous biodiversity values.

8.10 Method 32: Engagement with tangata whenua, stakeholders, landowners and the community in the identification and protection of significant values

Involve iwi, hapū, marae or whānau, stakeholders, landowners and the community in the:

- (a) identification and protection of significant places, sites and areas with significant historic heritage values;
- (b) identification and protection of outstanding natural features and landscapes, and managing the values of special amenity landscapes;
- (c) identification and protection of indigenous ecosystems and habitats with significant biodiversity values.

8.11 Method 54: Assist landowners to maintain, enhance and restore indigenous ecosystems

Assist landowners to maintain, enhance and/or restore indigenous ecosystems including by, but not limited to:

- (a) assisting with the costs of legally protecting indigenous ecosystems by way of open space covenants with Queen Elizabeth the Second National Trust (QEII);
- (b) assisting with the costs of controlling pest plants and animals; and
- (c) supporting landowners to restore significant indigenous ecosystems by fencing and planting.

9. The PPDP is poorly aligned with the RPS

9.1 A key point of the RPS is that it does not articulate SNA's as a mechanism or method for protecting indigenous biodiversity but rather focuses on means of supporting landowners in particular as outlined in methods 32 and 54 which are focused on firstly, engagement with landowners (this is something that has been absent in the limited consultation undertaken by Council), and secondly assisting and supporting landowners. The RPS also notes that "The restoration of ecosystems relies upon the good will and actions of landowners".

9.2 It is also clear that where the RPS biodiversity focus was on private land, the approach was facilitative. Further the references to QEII Covenants, assistance with the cost of controlling pests, and supporting fencing and planting indicates that the focus was on rural land and not on urban allotments.

9.3. It can be concluded that the PPDP has departed significantly from the policies, objectives and methods promulgated in the Greater Wellington Regional Council's RPS.

9.4. The RPS was also informed by the National Priorities for Action for Protecting Biodiversity on Private Land (2007).

10. National Priorities for Action for Protecting Biodiversity on Private Land

10.1 This report compiled priorities for rare species and noted that "*Private landowners have a crucial role to play in saving New Zealand's at-risk native plants and animals. Some of our most rare and threatened ecosystems and species are now found only on private*

land”

10.2 It also noted that “The New Zealand Plant Conservation Network has compiled threatened plant lists for local authorities in the North and South Island” and equally important, references Molloy J, Bell B, Clout M, de Lange P, Gibbs G, Given D, Norton D, Smith N, Stephens T. 2002. *Classifying Species According to Threat of Extinction: A system for New Zealand*. Threatened Species Occasional Publication 22. Wellington: Department of Conservation. This report was updated as **Conservation status of New Zealand indigenous vascular plants, 2012**.

11. Implications for 82 Cluny Road

11.1 On page 12 of 48 schedule 7 of the PPDP stated for 82 Cluny Road Lot 1 DP 368896 contained “A group of no less than 65 trees is located in the northeastern half of the property. The stand comprises the following indigenous and non-local indigenous species: *hangehange* (*Geniostoma ligustrifolium*), *kohekohe* (*Dysoxylum spectabile*), *kōhūhū* (*Pittosporum tenuifolium*), *māhoe* (*Melicactus ramiflorus*), *ngaio* (*Myoporum laetum*), *red māpou* (*Myrsine australis*), *tītoki* (*Alectryon excelsus*), and *pūriri* (*Vitex lucens*).”

11.2 In the listing above, Council has relied on a report by Wildlands Consultants prepared in draft in January 2018 entitled ASSESSMENT OF ECOLOGICAL SITE SIGNIFICANCE IN PORIRUA CITY – METHODOLOGY. This report was superseded by a report METHODOLOGY FOR THE ASSESSMENT OF ECOLOGICAL SITE SIGNIFICANCE IN PORIRUA CITY which has the same date. A spreadsheet describing urban allotments was provide by Council and is dated 24th June 2020.

Official Information Request

11.3. An official information request to Council dated 3rd of October 2020 sought the following;

11.3.1 “A working pdf of the full plan given that the downloadable version when you do find it (under print rather than a direct download option) is buggy and causes Acrobat Pro to crash.”

11.3.2 “A copy of the final Wildlands report Assessment of Ecological Site Significance in Porirua City_methodology. The version on the website is only a draft.”

11.3.3 “Any other reports or advice provided by Wildlands prepared in relation to the proposed District Plan.”

11.3.4 “A copy of the third database referred to in section 2.8 of the Wildlands draft methodology report in a readily readable form.”

11.3.5 “Reports and advice received or prepared in relation to the impact of the proposed Significant Natural Areas on landowners where these fall within Allotments including all advice, reports with respect to Issue 5, page 33 of the section 32 Evaluation report, Ecosystems and Indigenous Biodiversity”

11.3.6 “Reports and advice as to the reasons why the outlines of the SNA’s were not drawn to exclude allotments under 4000m² and how the Council proposes to meet the criteria of

S.76 (4A) and in particular s76 4(A) (a) of the RMA given that the proposed solution to issue 5 on page 33 section 32 Evaluation report, Ecosystems and Indigenous Biodiversity.”

Official Information Act Response

12.1 The response provided a copy of the full PPDP and final Wildlands report noting that the only changes to the Wildlands report were grammatical (it is noted in 11.2 that the title has changed but the date remains January 2018).

12.2 The response provided the full database as 2 spreadsheets, one a Master SNA database updated in August 2020 and the other titled Wildlands urban allotment database dated 24 June 2020.

12.3 The response advised that there were no reports or advice on the impact of the proposed Significant Natural Areas on landowners where these fall within Allotments including all advice, reports with respect to Issue 5, page 33 of the section 32 Evaluation report, Ecosystems and Indigenous Biodiversity, apart from some legally privileged advice regarding the process for identifying trees on an urban allotment within a schedule.

12.4 The response regarding “Reports and advice as to the reasons why the outlines of the SNA’s were not drawn to exclude allotments under 4000m² and how the Council proposes to meet the criteria of S.76 (4A) and in particular s76 4(A) (a) of the RMA...” did not address the information requested. Stating;

“National and regional policy requires us to identify and map Significant Natural Areas on all land regardless of the size of underlying parcels. In order to restrict felling of trees on urban allotments there are some additional requirements in the Resource Management Act as outlined in Schedule 8:

Under section 76 (4A) and (4B) of the Resource Management Act 1991, a rule within a District Plan may only restrict the felling, damage or removal of one or more trees or groups of trees within a urban property (defined as an urban environment allotment at s76(4C)) if a schedule in the plan identifies the relevant tree or group and the allotment is described by street address or legal description. This schedule is included to comply with section 76.”

13. Implications with respect to the PPDP and SNA035

13.1 Given the significance of the issues associated with establishing SNA’s over urban allotments it is rather surprising that Council has not sought further advice following the Wildlands report of January 2018. Indeed given that the Wildlands urban allotments is dated June 2020 and the Master SNA database was updated in August 2020 it is highly unlikely that Council has not obtained further advice since January 2018.

13.2 The Wildlands final report in January 2018 noted firstly that; ***Ecological site boundaries in the GIS layer were clipped to property boundaries, mostly in***

urban areas, to prevent the ecological site overlapping onto neighbouring private land. Such overlaps typically comprised overhanging branches, are unlikely to have high significant ecological value, could needlessly antagonise landowners, and may cause issues from a planning perspective. This was cited to in our correspondence with Council in 2018 and referred to in paragraph 2.4 above.

13.3 The Wildlands final report in January 2018 also noted that:

“We identified all allotments that are within the urban environment, are smaller than 4,000 m², and did not include a Department of Conservation reserve. These allotments may, or may not, include parts of PCC reserves, or be connected to the reticulated water/sewage system or have industrial, commercial purposes or dwelling house buildings on them. *These matters will need to be determined at a later stage by PCC.*”

13.4 The Wildlands final report also included a NEXT STEPS section which states that.

“This project assessed *potential* Ecological Sites in Porirua City and created a combined database of urban and rural sites, which is consistent with those created for other city councils within the Wellington Region. These *potential* Ecological Sites will be further refined through feedback from Council officers. *Public consultation, initiated by Porirua City Council, is also likely to result in further modification, additions, and/or exclusions to sites.*” This has not happened.

13.4 Given that the response to the official information act request states that no further reports or advice (after January 2018) was obtained, it is hard to establish how Council was able to finalise the boundaries of the SNAs within urban allotments as it would appear that the appropriate work has not been done and while it would be expected as stated by Wildlands that “*Public consultation, initiated by Porirua City Council, is also likely to result in further modification, additions, and/or exclusions to sites*” this has not been the case and thus there has been a deficiency of process.

14. Reliance on s76 of the RMA to justify application of SNAs over urban allotments

14.1. Based on the use of desktop studies, it is hard to establish how Council was also able to establish the position stated in its Section 32 Evaluation report Part Two which relies on a loose interpretation of s.76 of the RMA (Page 6, section 32 part 2 evaluation report). The statement below appears to assume, as did the Official Information request response, that all that is required is to include a property by address or legal description. This assumption does not address the fundamental issue which is that it is critical to identify which trees or groups of trees require protection under a plan and the reasons why such protection is needed at that address or legal description.

14.2 In the section 32 part 2 evaluation report, Council states

Section 76 (4A) - (4D) of the RMA limits the scope of regulations in regard to tree protection rules applicable to “urban environment allotments” defined within the RMA as generally meaning a serviced residential zoned property within the urban area. Broad or general tree protection provisions cannot restrict the felling, trimming, damaging, or removal of trees within urban environment allotments, unless a schedule clearly identifies the property by address or legal description and the subject trees are identified.

14.3 In the case of 82 Cluny Road and 131 other properties, no ecological assessment has been undertaken and the Wildlands report on which the SNA boundaries are based only undertook a desktop study. It must be presumed in the absence of the required work that section 76 of the RMA cannot be relied on as an appropriate basis to establish SNA's over those properties. Further, even where ecological surveys have been completed, there is the issue of informed consent for access. If a land owner was not advised that the consequences of the survey was to establish the boundaries of an SNA over that property then access was not properly informed and thus open to challenge.

14.4 In the case of 82 Cluny Road , it is clear that the statement at 11.1 (above) cannot be relied on as the basis to impose an SNA over a significant portion of the property. The Wildlands report and the related database do not provide any meaningful basis as to how they could determine that there was “no less than 65 trees” and that the species were *hangehange, kohekohe, kōhūhū, māhoe, ngaio, red māpou, tītoki, and pūriri*. It is not clear how Wildlands could determine from the available aerial imagery (see below), for example, that there was not less than 65 trees and the species present in that area. The identification of *pūriri* is especially problematic since its presence is well out of its natural range and thus if present will have been planted. We note that there is 1 planted *pūriri* on the property and can speculate that was identified if Wildlands used binoculars from Airlie Rd to view the property. The *pūriri* is not, however, in the area identified for inclusion in the SNA.



14.5 Furthermore, based on Wildlands reliance on a desktop study and presumably the rather limited value 2012-23 aerial imagery, it is not clear how Wildlands determined which properties to include or exclude. As shown below, at a desktop level, the vegetation in No 82 cannot be distinguished from the adjacent Lot 44 DP 6067, Lot 43 DP 6067, Part Lot 42 DP 6067, Lot 40-41 & Part Lot 42 DP 6067, or Lot 2 DP 46974, but on those properties the boundaries have been drawn to the lot boundaries. That is the appropriate course of action and we are at a loss to establish, on the basis of the information provided and presumably available, why the same approach was not taken for No's 82 and 80.



15. Poor alignment of the 82 taxa with the SNA035 Karehana Bay Bush vegetation

15.1 No evidence is provided in the Wildlands report and database establishing why the mix of trees in No 82 Cluny Road is significant and require placement in an SNA. It is noted that in the report **Conservation status of New Zealand indigenous vascular plants, 2012** all of the species listed in the PPDP and in the Wildlands urban allotment database (2020) for 82 Cluny road are classed as “Not threatened; Resident native taxa that have large stable populations”. As the 2012 report notes; “Taxa have been assessed according to the criteria of Townsend et al. (2008), grouped by conservation status, then alphabetically by scientific name. Categories are ordered by degree of loss, with Extinct at the top of the list and Not Threatened at the bottom.”

15.2 In addition, notwithstanding that lack of certainty about how the 82 Cluny road species list was established, it is also different from the species list that defines the Karehana Bay Bush SNA (SNA 035) and lacks some key species. As the PPDP notes at page 8 of schedule 7.

SNA035 Karehana Bay Bush This site has been identified as a Key Native Ecosystems and includes areas protected by the PCC covenants (0443,1432, 2444). It contains a sizable area of forest and scrub on the hills, comprising stands of remnant tawa-kohekohe forest with emergent pukatea, hīnau, miro, mātai and rewarewa, which are adjoined and often buffered by areas of kānuka (presumably *Kunzea robusta*; Threatened-Nationally Vulnerable) and mānuka (*Leptospermum scoparium*; At Risk-

Declining) scrub. A small raupō (*Typha orientalis*) wetland occurs in one gully. More than 150 indigenous plant species are known from the KNE site including the New Zealand carrot (*Daucus glochidiatus*; Threatened-Nationally Vulnerable), large-leaved milk tree (*Tūrepo*; *Streblus banksii*; At Risk-Relict), dwarf mistletoe (*Korthalsella salicornioides*).

15.3 The taxa referred to above differ from the taxa *inferred* to be present at 82 Cluny Road (*hangehange, kohekohe, kōhūhū, māhoe, ngaio, red māpou, tītoki, and pūriri*). Kohekohe would be the main taxa in common if the Wildlands report can be relied on which is not possible. Wildlands also does not cite Manuka, Kanuka, Pukatea, Hinau, Miro, Maitai or Rewarewa for 82 Cluny Road but these are described for the the Karehana Bay Bush SNA. Species considered significant for the Kohekohe-Tawa ecosystem in “The report Forest Ecosystems of the Wellington Region (2018)” are also absent including Rimu, Kahikatea, Kawakawa, Pukatea, Porokaiwhiri, and northern Rata.

15.4 It can be concluded that neither the Wildlands report or the PPDP provide evidence that establishes that the vegetation at 82 Cluny Road can be aligned with that for the Karehana Bay Bush SNA.

16. Section 85 of the RMA

16.1 Section 85 of the RMA is a section of the Act that has until recently received little attention and has relatively few authorities in the Environment Court that pertains to the section although that is changing. As Barton in “The Legitimacy of Regulation” (2003) notes;

Section 85(2) allows a land owner to challenge a provision in a plan if it renders that land incapable of reasonable use. He or she may do so in a submission during the regular plan-making process, or by applying for a private plan change under clause 21 of the First Schedule. An alternative exists under section 85(3) for the Environment Court to act where a rule both renders land incapable of reasonable use and places an unfair and unreasonable burden on any person having an interest in the land.

16.2 Barton also notes;

Consultation, notification, openness, submissions, hearings, and appeals by way of reference to the Environment Court figure very prominently. They are significant constraints on the power of councils to make rules and other provisions in plans. Citizens, communities and land owners can participate and express their views about the fairness or unfairness of proposed plans. Land owner groups like Federated Farmers are capable users of these procedures. A second safeguard is that final decisions on plans are made by elected councillors, who are receptive to the views of their ratepayers, and who generally prefer to be seen to be acting fairly and reasonably as they go about their work. Many of them wish to get re-elected. This sensitivity to public opinion supplements the statutory procedures and can save

land owners the time and expense of pursuing the formal options such as references to delete proposals for restrictive rules.

16.3 Further Barton noted

These safeguards mean that the Fable of the Awakening Landowner does not have a lot to do with reality. (“Then the landowner wakes up one day to find that a proposed plan has been declared that over a third of the farm is a Significant Natural Area because it is kiwi habitat or similar.”) The reality is that such a proposal would not last long. If the SNA is a mistake it will never stand scrutiny. If it is not, and one third of the farm is indeed significant, then probably it will have attracted environmental attention and restrictions already, perhaps under the Forests Act as well as the RMA, If not, few knowledgeable land owners or valuers would overlook the possibility in appraising the potential of the land for development.

16.4. As Barton implies, SNAs are a tool for protecting significant areas on rural land and this is a key point (see below) as the proposed use of SNAs covering urban allotments does not appear to a process followed by any other local or territorial authority in New Zealand.

16.5 A key authority with respect to s.85 of the RMA is Stevens vs CCC (C38/98) and while it deals with the impacts of a proposed plan on a derelict heritage building, the authority has found wide use in subsequent cases. We don’t canvas the authority in detail but note some points.

16.6 In clause 38, for example, it was observed;

“Nor is this case similar to, for example, a rule in a rural area whereby a territorial authority makes clearance of indigenous vegetation a discretionary activity. In such a case other factors may come into play: while the land may not be able to be used for grazing or other farming or forestry it might be possible to allow it to be used for residential purposes or even subdivided forth at purpose. And of course as part of a discretionary consent some vegetation could be removed for a building site. Alternatively it might be possible to fence the area off if it is not a large part of the title so that the land, as a whole, can be seen as having a reasonable use.”

16.7 Again we see the clear distinction between rural and urban land use and a key point implicit is that a restriction on vegetation clearance (or by extrapolation an SNA) on rural land is not necessarily unreasonable or unfair because the area of land available overall to the landowner if not a large part of the title does not render the remainder unusable. Further, the judge contrasted this with the urban section with a derelict heritage house noting in clause 39;

“There are no other choices in this case. The house on the property is squarely in the middle of the quadrangular part of the section and realistically no other use can be made of the land. The Council's heritage listing imposes an all or nothing (binary) quality to the land owner's options for the property.”

16.8 In other words, as is typical for a residential allotment, space is constrained and a restriction on its use if significant, can be seen as an impediment making the property incapable of reasonable use and imposing an unfair and unreasonable burden on the landowner.

16.9 A decision of the Environment Court 2020 #078 is also relevant with the judging noting;

“We agree with Ms Steven QC, that in broad terms s 85 reflects the principle that the burden on a private landowner must be in proportion to the public benefit to be gained from the restriction imposed by the rule, and that as well, there is a need to ensure that the restriction is not so great so as to preclude the reasonable economic use of the land concerned”. And

“We agree with Mr Schulte that the case law about reasonable use tells us more about what reasonable use is not than what it is. We also agree with Ms McIndoe that the definition directs focus to:

(a) the potential use of land, with there being no direction to consider financial hardship or commercial viability; and

(b) land use activities whose actual or potential effect on any aspect of the environment would not be significant.”

“We also agree with Mr Schulte’s analysis that, under s 85, a reasonable use appears to be one that:

(a) is permitted by the District Plan or can be achieved by a resource consent, so long as it is not a non-complying activity or *will create significant effects on the environment to persons other than the applicant*; and

(b) is viable, but does not need to be the optimal or best use of land; and

(c) is open to the landowner to pursue, whether or not the landowner considers pursuit of that activity their preferred or best option.”

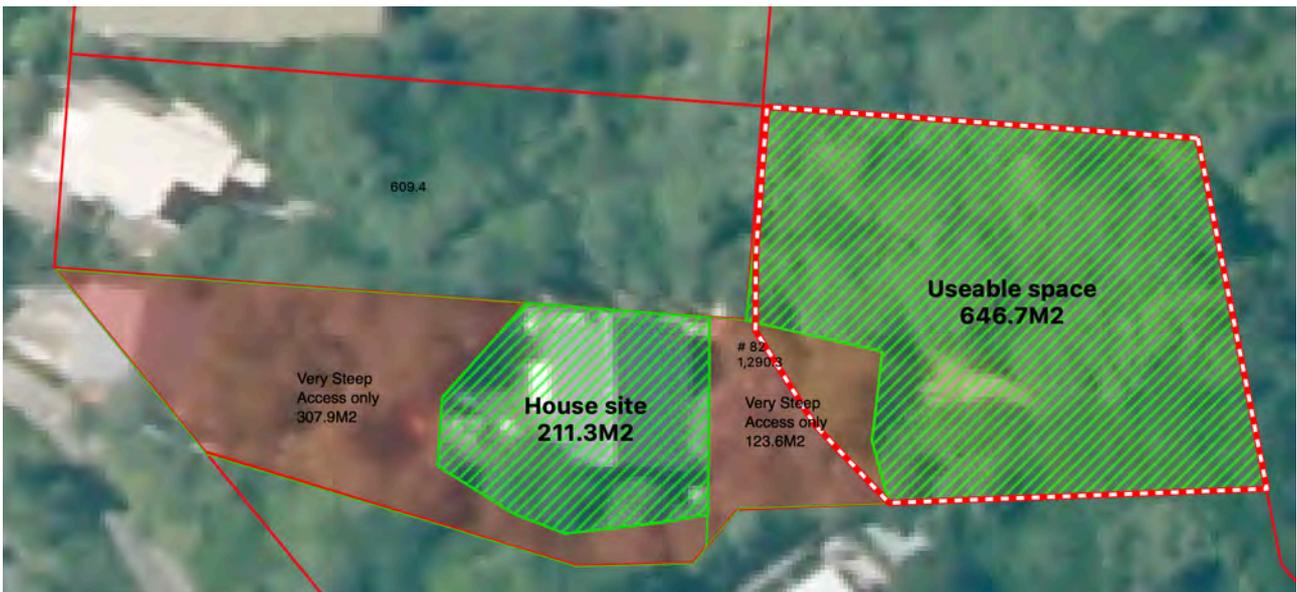
17. Implications of s85 of the RMA to No 82 Cluny Road

17.1 Councils proposal to include a significant part of No.82 Cluny Road in SNA035 clearly imposes an unfair and unreasonable burden on us its owners and also renders it incapable of the reasonable use we as landowners should have the expectation of being available to us.

17.2 No.82 Cluny road is an urban allotment of 1290.3m². The land comprises a very steep narrow slope of 307.9m² from the road to the present confined occupied house and facilities site which is constructed on a cut and fill of 211.3m². We have been told by people with knowledge of the area that the house site sits at the top of what was originally considered the accessway to the originally proposed house site higher in the property and the original and most logical house site now sits within the area of the proposed SNA in the PPDP. Behind the house is a steep constructed bank and a very steep slope giving access to the main part of the section which occupies 123.6m². The remainder of the section lies above that and is the primary useable space on the property apart from the confined footprint around the house. This useable space occupies 646.7m² but would be completely covered by the area within the proposed SNA in the PPDP. This is shown in the map below.



17.3 The same map as above but including the proposed SNA is shown in the red dashed line below and occupies an area of 686.83m² is shown below and as can be seen occupies a very large part of the useable land within the section .



17.4 The area of the proposed SNA on 82 Cluny road relative to the useable space and very steep space available for access only is shown in table form below and this graphically highlights the impacts the proposed SNA in the PPDP would have on the property and in our view this clearly imposes an unfair and unreasonable burden on us its owners and also renders it incapable of the reasonable use we as landowners should have the expectation of being available to us.

82 Cluny Road	M²
Total Area	1290.3
Steep access way to house	307.9
House site and facilities	211.3
Steep area and bank behind house	123.6

Useable area at top of section	646.7
Proposed SNA	686.83
SNA Percent of total area	53%
SNA Percent of top useable area	106%
SNA Percent of total useable space	80%

17.5 Furthermore, the proposed SNA also impacts on our existing use of the top useable part of the section and the 3 main elements of that use is shown in the map below. Area 1 is a flat working space and includes a garden shed, storage for firewood. Area 2 is a flat area supported by a 1m retaining wall and which is where we have had architectural plans drawn up for a studio (The present house is quite small and longer term we consider putting in a studio as being a practicable way to increase the amount of living space available on the property. Area 3 is a flat area used for managing the organic (wood) waste the property generates, ie chipping branches etc. The area between area 1 and area 2 is in grass as is a large portion of the area included between the SE boundary of the proposed SNA and the garden shed as the trees previously at the top of the bank in this area were lost in a significant storm a couple of years ago.



18. Section 32 matters

18.1 Section 32 of the RMA and the Councils s.32 report part 2 was discussed above. It is an area that has been subject to considerable case law. As Barton in “The Legitimacy of Regulation” (2003) notes;

“Let us bear in mind the safeguards that are built into the RMA to constrain the way that the rule-making powers of section 76 and its like are used. The first is the process for plan- making that is set out in the First Schedule. Consultation,

notification, openness, submissions, hearings, and appeals by way of reference to the Environment Court figure very prominently. They are significant constraints on the power of councils to make rules and other provisions in plans. Citizens, communities and land owners can participate and express their views about the fairness or unfairness of proposed plans.” And

“Section 32 requires a council to consider a set of matters as it proposes provisions for its plan. Provisions containing rules will be particularly relevant. Are the provisions necessary in achieving the purpose of the Act? Are other means possible? What are the reasons for and against the provisions? How do they look if we evaluate the likely benefits and costs of the plan? Is the council satisfied that the provisions are necessary and the most appropriate means? The council must document its work on these matters, and its success in justifying the provisions of its proposed plan will inevitably figure in debate in the plan hearings and any reference. Section 32 is a significant control on the regulatory powers of the council.”

18.2 It is our view that the section 32 Evaluation report part 2 has failed to address the issue of imposing SNAs onto urban allotments. On page 6 it notes;

Section 76 - Urban Environment Allotments:

Section 76 (4A) - (4D) of the RMA limits the scope of regulations in regard to tree protection rules applicable to “urban environment allotments” defined within the RMA as generally meaning a serviced residential zoned property within the urban area. Broad or general tree protection provisions cannot restrict the felling, trimming, damaging, or removal of trees within urban environment allotments, unless a schedule clearly identifies the property by address or legal description and the subject trees are identified.

18.3 There is no discussion about what methods, alternatives or options are available to Council to meet its plan objectives and indeed whether or not those objectives are necessary or appropriate with respect to urban allotments. Nor is there any discussion about the application of SNAs to urban allotments and whether or not this is appropriate. It would be anticipated that given that SNAs are a tool that have been applied elsewhere, a discussion about their applicability, particularly to urban allotments.

18.4 There appears to be a blanket assumption that s.76 of the RMA can be shoehorned into a SNA framework when this has not been contemplated nor is likely to be in any other territorial authority. Indeed, in all instances that we have found, territorial authorities have only considered SNAs as a tool available for use in the rural environment. but as Porirua Council appears to be the only Council to have contemplated their use in an urban allotment it would be expected that this area would be critically assessed. This is particularly the case as urban allotments are generally not large and even the imposition of an SNA over part of the allotment would have a far more significant impact than an SNA in a larger rural property.

18.5 The discussion of s.76 in the section 32 evaluation is extremely limited as is covered only by the précis in 18.2 above and also in a table on page 33 shown below. We referenced s.76 earlier and have pointed out that it is not enough to merely put a particular lot into a schedule to meet the needs of the section. Indeed the approach of Council has been to do the exact opposite of what s.76 requires which is impose a blanket tree protection rule over an urban allotment.

18.6 S.76 of the RMA envisages that particular trees or groves of trees are identified and it is hard to envisage that a limited scope desktop study where the primary tool available is low resolution aerial imagery is adequate to meet the thresholds for s.76 that have been canvassed in case law.

<p>Issue 5: The SNA controls will not protect indigenous biodiversity on Urban Environment Allotments unless specific measures are imposed.</p>	<ul style="list-style-type: none"> . RMA prevent rules imposing blanket tree protection within Urban Environment Allotments (defined within s76 of the RMA) unless the lot is and all relevant trees are identified. . This means SNA provisions regarding tree removal from within urban SNAs will be ultra vires unless the requirements of s76 RMA are met. . The result would be biodiversity provisions and objective purpose will not be effective within urban zones. 	<ul style="list-style-type: none"> . Include a schedule of all SNAs within Urban Environment Allotments in accordance with the s76 information requirements. . Include reference to the schedule within the SNA rule framework to ensure the provisions still apply and biodiversity is protected in accordance with the proposed objective.

18.7 An equally fundamental problem is with the Council’s lack of consultation with affected landowners. We flagged our concerns in our submission in 2018 but were not consulted with in the consultation round in 2019. Instead Council relied on the use of social media which is an opt in rather than opt out and a search of Facebook for “Proposed District Plan” and “Consultation 2019” did not yield anything that would flag an area of interest to a concerned citizen that may be profoundly affected by such a significant change. Council did undertake direct consultation with selected entities but did not consult with all of the landowners significantly affected by the SNA proposals in the PPDP. The relatively limited number of responses received and summarised in the s.32 Evaluation

report part 2 appendix 1 Summary of feedback relating to Ecosystems and Indigenous Biodiversity reflects the lack of consultation.