

**Ombudsman finding Tainui Reserve (Appendix 1)
Provided by the Ombudsman's Office; August 22, 2024**

Appendix 1. Extract from my letter to Ms Maxwell, dated 12 February 2024

[...] Complaint 1: the Council's decision making in relation to Tainui Reserve

... You have complained that the Council's decision to allow mountain biking in Tainui Reserve is unreasonable. Your particular concerns are that:

1. there was flawed and inadequate consultation in relation to the RMP process carried out in 2015, and no clear mandate to establish a network of mountain bike tracks;
2. the RMP only approved the construction of one track, however the Council was planning to develop all tracks shown on the plans included in the 2015 RMP;
3. there was no consultation of reserve users before the works commenced on the new mountain bike track;
4. there was no health and safety audit before the development of the new mountain bike track and this led to a dangerous situation, particularly for walkers;
5. the Council is failing to protect Hikanui Pā site from mountain bikers; and
6. the manner in which the Council responded to your complaints about these issues was inappropriate.

[...]

Issue 1: the 2015 RMP process

[...] It is apparent that the draft RMP was prepared with impacts of mountain biking on other park users in mind. For example, the 2015 RMP includes:

2.6 Informal Sporting Activities

The reserves within the District are used for a number of informal sporting activities, including mountain biking. Council needs to ensure that adequate provision is made for these activities, while taking into account the potential impact of these activities on the reserves, reserve users and adjoining neighbours.

Objective

2.6.1 Mountain biking is to be provided for consistent with the need to preserve popular walking routes.

Policies

2.6.2 Upgrade mountain bike routes to provide access to the popular Te Mata Park bike routes existing and proposed.

2.6.3 The Objectives and Policies of Section 2.6 of the District Wide Reserve Management Plan related to Informal Sporting Facilities shall also apply where relevant.

The terms of the RMP indicate that there is an acknowledgement of the reality that mountain biking is a popular sport in the Hawkes Bay.

For example it states:

The Hawke's Bay Mountain Bike Club (HBMTBC) is the largest mountain bike club in New Zealand with over 1600 members and more than 100km of purpose-built mountain bike (MTB) trails within three privately owned pine forests. The jewel in the crown is the Pan Pac Eskdale MTB Park, ten minutes north of Napier, which is one of New Zealand's premier bike parks set within 356ha of forest.

There are other relevant observations within the 2015 RMP about the popularity of the sport.

You are aware of the report of the Parks Policy Planner to the Reserve Management Plan Subcommittee, which states:

6.38 Experience has shown that dogs, bikes and pedestrians do not mix well together on walking tracks. Clear separation of mountain bike tracks is desirable particularly on hills, where high speeds and blind corners create dangerous situations for walkers, bikers and dogs. The current use of the four reserves by mountain bikes is relatively low at present but this is expected to increase over time. Downhill mountain biking with braking can also create a lot of erosion and make walking tracks increasingly hazardous to walkers, due to the creation of deep ruts.

6.39 Mountain biking is increasingly popular in [neighbouring] Te Mata Park which comprises single downhill tracks. Tauroa Road and Tainui, Tauroa, Tanner and Hikanui Reserves all can offer the potential to extend the downhill bike riding network in Havelock North and the local clubs have expressed interest in these extended offerings. Mountain bike downhill single tracks are narrow and winding with banked corners with a natural or gravel surface and these are typically not suited for walkers.

6.40 The Draft Plan included a number of potentially new separate mountain bike tracks in the four reserves which could be developed over time. Clear signage and clearly marked routes will be needed to ensure bikes keep to designated bike tracks.

6.41 Given the popularity of dog walking in Tainui Reserve, a conservative approach should be taken initially, with only one new bike track being created initially in the Tainui Reserve...

Seven submissions raised concern over the mixing of cyclists and walkers and asked that the tracks be separated, including your submission. The 2015 RMP does include separate mountain bike tracks in the Tainui, Tauroa Road, Tanner Street and Hikanui Drive Reserves.

Given the above statutory and RMP provisions and the consideration that was given to the impact of mountain biking in these reserves, I consider that it was open to the Council to include specific provision for mountain bike tracks in the 2015 RMP.

THE ADMINISTRATIVE STEPS AND CONSULTATION

Section 41 of the Reserves Act prescribes the manner in which the Council must prepare RMPs. In accordance with this section, I understand that the Council developed the 2015 RMP as follows:

1. it gave public notice of its intention to prepare it, inviting suggestions by 31 July 2014;

2. it formally adopted the RMP in draft form on 10 March 2015;
3. it publicly notified the draft RMP for consultation 3 June 2015, with a submission closing date of 14 August 2015;
4. on 4 November 2015, the Reserve Management Plan Subcommittee met to hear submissions on draft RMP;
5. on 8 December 2015, the District Development Committee adopted the Reserve Management Subcommittee recommendations, thus adopting the 2015 RMP; and
6. in addition to the statutory requirements, the Council held a workshop on 19 February 2015 and held targeted consultation with local iwi and the Hawkes Bay Mountain Bike Club.

I cannot see how the Council's consultation was flawed or inadequate, given that it followed the RMP process prescribed in the Reserves Act.

Issue 2: track development

A. DEVELOPMENT OF ALL TRACKS SHOWN IN THE LANDSCAPE PLAN INCLUDED IN THE 2015 RMP

[See below extract from my letter to Ms Maxwell, dated ...]

B. TRACK DEVELOPED ON THE LOWER GROVE NEAR KEIRUNGA ROAD

You have also raised an issue with a track developed on the Lower Grove near Keirunga Road which is not included in the 2015 RMP. This track runs next to the existing path between the Keirunga Road entrance and the Keith Sands Drive entrance.

It is not approved in the 2015 RMP or acknowledged as a mountain bike track on the Landscape Plans therein. It is proposed by the Council for the track to be removed as part of the new RMP process.

The Council has explained that this track is an existing desire line track that was already being used by mountain bikers and, as it was an effective means to retain the separation between bikers and walkers, it was formalised as part of the network.

I understand that there were no works undertaken on this track, it was simply to be acknowledged as mountain bike track in the new signage to be installed. It would have been preferable for this track to have been recorded in the 2015 RMP as an existing track. However, given the circumstances, it does not appear that the Council has acted unreasonably by acknowledging this track in this manner. In any event, the track is proposed to be removed by the Council as part of the new RMP.

Issue 3: lack of consultation of reserve users before the works commenced on the new mountain bike track

[...] The Council has accepted that more notice to the community before the track development would have been desirable. I note that the Council acted relatively quickly in updating the community when it became apparent that there were questions about the track development that was occurring.

There is no prescribed consultation requirement in relation to the implementation of an adopted RMP. The Local Government Act 2002 prescribes consultation requirements in relation to

decisions. Here, the decision to proceed with the development of a mountain bike track was made as part of the Reserves Act process.

I understand that your concerns include that there was a lack of transparency in the Council's arrangements with the Club. You have said that this should have triggered further consultation and submissions on whether mountain bike tracks should be established. However, the 2015 RMP does signal that the track development would be actioned by a mountain bike club.

Given the above, it does not appear that the Council has acted unreasonably in the circumstances of this case.

Issue 4: there was no health and safety audit before the development of the new mountain bike track

I understand that your key issues are:

1. there was no health and safety assessment before the development of the new mountain bike track and, when a health and safety audit was undertaken, it excluded all walking paths; and
2. there was a failure to put in place adequate signage alerting park users that some of the paths were shared.

I note that you are particularly concerned about safety at the exit from Hikanui Reserve onto Tauroa Road and certain pinch points where mountain bike tracks meet walking tracks.

HEALTH AND SAFETY ASSESSMENT

I understand that the Council acted on your concerns and those of Councillor Heaps regarding track safety by engaging Peak Outdoor Safety & Emergency Management to undertake a safety audit. [...]

The Council advises that all safety improvements to the tracks recommended in this report were implemented. One recommendation was to develop a new uphill loop for mountain bikers coming down the new track, and to develop a clear signage system for the mountain bike trails.

It states that:

...where there is the possibility of completely separating cyclists and walkers this should be utilised. This could potentially be addressed by making the upper part of the Shared Pathway a Mountain Bike Trail and continue this to the top of the reserve.... This would help reduce current cyclist confusion over how to get to, or return to the start of the cycle track.

The Council advises that a new uphill track is a matter addressed in the new draft RMP. Further, a barrier has been installed to slow cyclists at the Tauroa Road exit from Hikanui Reserve and I understand that configuration changes have been made where the mountain bikers join the shared path.

The correspondence you have provided indicates that where the Council has implemented safety measures you do not consider that these are sufficient. There may be a continued conflict between different reserve users, as expected in an environment that caters to a

wide range of people and activities. The Council is not responsible for eliminating this conflict, nor to ensure the

absolute safety of people who use the park. I note that the Peak Report indicates that this is not possible. It states:

...it must be recognised that no audit can guarantee the elimination of all possible safety concerns, as there are a multitude of elements that are never completely within the control of the trail engineering and signage.

Notwithstanding that the Council had undertaken a health and safety audit, there is no statutory requirement for the Council to do so as part of its RMP processes. On the basis of the audit and the implementation of its recommendations, it appears that the Council has not acted unreasonably in addressing health and safety concerns. Further, the new RMP process provides an appropriate process by which to make submissions about the park, including raising any concerns about configuration or safety.

ADEQUACY OF SIGNAGE

[...] While the erection of clearer signage would have been helpful as soon as the new mountain bike track had been developed, I do not consider that this in itself makes the Council's actions in relation to signage unreasonable.

The Council has addressed the recommendations within the Peak Report with regard to signage. It appears that the Council has taken reasonable steps to ensure that signage is clear. I note that signage is intended to be upgraded in accordance with any amendments to tracks that are part of the new RMP.

Issue 5: protection of the Hikanui pā site from mountain bikers

[...] The draft RMP provides for all of the measures outlined in the [Hikanui Pā Conservation] Management Plan and details which of these are to be implemented in the short, medium or long term of the 10-year life of the RMP. This is a timeframe acknowledged within the Hikanui Pā Conservation and Management Plan.

The Council clearly acknowledges the need to protect Hikanui pā from a number of threats, of which cycling is one. I understand that you consider that the Council should have taken more action to protect the pā site from mountain biking sooner. However, the Council has taken short term steps to understand and mitigate the risk of cyclists in accordance with the information that it has had at the time. It is also implementing further methods of protection in accordance with the Management Plan as part of the action plans set out in the RMP.

On the information before me, it does not appear that the Council has acted unreasonably.

Issue 6: the manner in which the Council has responded to your complaints about Tainui Reserve

[...] I observe that your correspondence to the Council was persistent (almost daily at times), repetitive and sometimes inflammatory. In the circumstances, I do not see that it is

unreasonable that you have a single point of contact at the Council and I can see that it would be difficult to manage the key issues that you raise and respond to them. [...]

Complaint 3: COVID-19 track closures

[...] Analysis

You consider that by not closing the track sooner, the Council defied the Prime Minister's and Director-General of Health's directives. However, in accordance with the abovementioned orders and guidance, it does not appear that the Council itself breached any specific rules related to the directives. Nor do I consider that the directives made it clear that the only reasonable approach for a council to take would be to close a track such as this.

The Tainui Park mountain bike track is described in the Peak Safety report as follows:
...While grading is definitely subjective it should be noted that this trail has a number of jumps that require jumping skills. There are some dropping corners on the trail and some exposure on the outside edges of some of the corners.

Therefore in my opinion, this trail grade may be a 3 for a rider with jumping skills but present challenges beyond grade 3 for a rider not experienced in trails of this style. There is one particular jump after a dropping corner that feeds the rider into the jump take-off and loads up the bikes suspension "kicking" the rider if they are not prepared for this feature.

*Based on the auditor's experience, this style of track is prone to rider error on the jumps, causing injury, more so that a non-jump style trail of the same grade ...
This observation is not to suggest that this trail is unduly unsafe. The risk is consistent with other trails of similar style and grade around the country...
There are some corners that are dropping and off camber and require good braking and concerning control.*

It would appear from the Sport NZ guidance that this track was considered to be in the 'high risk' category, however this is subject to the more equivocal statements in that guidance and the alert level orders about experience levels. Further, the initial advice was that mountain biking in local parks as opposed to 'trails' was acceptable.

You state that when the track was eventually closed, the track was closed in name only because the tape barrier used to bar access was 'useless', the signage was stolen and there was no effort to monitor the usage. You state that this facilitated around 4000 breaches and the Council should have taken additional measures such as installing gate barriers.

The Council has explained that the removal of signs and tape that identified that recreation facilities were closed throughout lockdown was a common occurrence, not only in Tainui Reserve, but other parks, reserves and playgrounds in the District. It advises that the Council worked to the best of its abilities, within the restrictions placed on its own staff to stay home, to replace signs and tape as soon as it could.

I also understand Mr Smith emailed you on 27 April 2020 stating that: '*The Police advise us that they intend to visit the reserve as part of their patrols, and we intend to have a temporary city assist presence around the reserve in an educational role.*'

Playgrounds and other facilities in parks were closed by most councils but different steps were taken to manage this from signage to taping off the facilities. Councils took these practical steps because these are places where people might congregate and would not be able to meet the social distancing requirements. However, the directives themselves are aimed at individuals using the facilities. It appears that it was open to councils to facilitate this as they practicably could and as they saw fit.

Extract from my letter to Ms Maxwell, dated 12 February 2024

[Issue 2: track development

A. DEVELOPMENT OF ALL TRACKS SHOWN IN THE LANDSCAPE PLAN INCLUDED IN THE 2015 RMP]

B.

[...] Based on the additional information Council has provided, it does not appear it was planning to develop significantly more tracks than were approved in the 2015 Adopted RMP, as per your complaint.

As outlined above, actions 4 and 5 of the 2015 Adopted RMP state that 1100m of new mountain bike tracks would be constructed in Hikanui and Tainui Reserves, 600m in Tauroa Reserve and 400m in Tanner Reserve. I have not considered Tauroa Reserve and Tanner Reserve, since these do not appear to be in dispute.

The Council-produced map, referred to above, demonstrates the proposed mountain bike pathway network in the 2015 Adopted RMP (this combines the various concept plans in the 2015 Adopted RMP into one map).

The Council's map shows the proposed Mangarau MTB track, so clearly there was an intent to develop it at some point. It has advised that just over 1100m of track has now been constructed (872m in Tainui and 261m in Hikanui) i.e. very near to the amount of track approved in the 2015 Adopted RMP. It has explained that the deviation stems from minor alignment differentiations to account for topographical challenges (as explained above) and the inclusion of an existing desire line track (see footnote 1). Therefore, I understand that the only track the Council was intending to develop, but which may not have been subject to formal approval, is the Mangarau MTB track.

The Officer's Report does recommend at paragraph 6.41 that '*only one new bike track [be] created initially in the Tainui Reserve*' to address submissions about the hazards of mixing of dogs, bikes and pedestrians.

Whilst the Council has pointed out that the Officer's Report contains recommendations of the Parks Policy Advisor, and it is for the Subcommittee to ultimately decide whether to adopt his recommendations, I do not think it can be ruled out that, on the advice of the Parks Policy Advisor, the resolution of the Subcommittee was to remove the Mangarau MTB track, and this is why it no longer showed up in the action plan in the 2015 Adopted RMP (rather than this simply be an administrative error, as the Council has contended).

This would have addressed submissions about concerns over mixing bikes and pedestrians, and the Parks Policy Advisor's recommendation that only one track be developed in Tainui initially.

That said, I do have some sympathy for the Council's position that its failure to approve this track as an 'action item' in the 2015 Adopted RMP was an administrative error capable of correction and that it was the Council's intention all along to develop all of those tracks

identified on the concept plans appended to the 2015 Adopted RMP. 'Remedy 4' does state that the *'submissions*

*be allowed **in part** insofar as the Plan be amended to show separate mountain bike tracks through . . . Tainui Reserve' [emphasis added].* This could be read as the Council dismissing some of the Parks Policy Advisor's recommendations (such as his suggestion only one track be developed in Tainui Reserve initially), and only adopting his recommendation to have separate mountain bike paths. As the Council has pointed out, the discussion is not minuted and therefore I cannot be sure.

Ultimately, it is not necessary for me to make a factual finding on this point given the superseding events. As outlined above, the Mangarau MTB track was never constructed and indeed under the 2022 Draft RMP, the Council no longer proposes to construct this mountain bike track. In the circumstances, it cannot be said that the Council has acted unreasonably. To require the Council to now clarify the error in the 2015 Adopted Plan, which has been superseded by a new 2022 Draft RMP, is only likely to cause further confusion for the community.