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Investigating Alternatives Under The RMA

1. **Te Maru o Ngati Rangiwewehi v Rotorua District Council and Bay of Plenty Regional Council A095/2008** (the “Taniwha Springs” case) provides an update on the place of “alternatives” in determining consent applications.

The Facts

2. The case involved an application by Rotorua District Council to continue abstraction of water from Taniwha Springs. Upon expiry of the original water consent, the Council applied to continue its activity. The springs are an important Taonga of the local iwi Ngati Rangiwewehi, taken from them under the Public Works Act in 1966.
3. The consent authority found consideration of alternatives had been “cursory at best”, granting a further 25 year consent, but at a much reduced daily volume. The Council appealed seeking greater volume. Ngati Rangiwewehi appealed seeking a 10 year “run out” consent to force the Council to properly investigate and implement an alternative, whilst maintaining adequate water supplies in the interim.
4. The Environment Court granted a 10 year consent on this basis, finding:
 - 4.1. the technical merits of groundwater were amply proven by Ngati Rangiwewehi;
 - 4.2. the economics of that alternative were reasonable, with any cost being less than the adverse effects imposed on Ngati Rangiwewehi; and
 - 4.3. the council had rejected groundwater without having adequately investigated its feasibility.
5. The Court encouraged the Council to “bite the bullet” and implement an alternative to avoid effects on Ngati Rangiwewehi.

Alternatives Generally

6. Alternatives are generally relevant to large scale projects with an aspect of necessity such as, in this case, water supply. This means that it is typically not a question of whether the activity will proceed, but where and how.
7. **Taniwha Springs** reaffirms that, where the proposed activity will have significant adverse effects on matter of “national importance” under Part 2, all consent decisions require consideration of alternatives. This is in spite of consideration of alternatives being specified in the Act only in relation to designations, but not in respect of resource consents per se.
8. The Court was safe in relying on the High Court in **TV3 Networks Services Ltd v Waikato District Council**. However **Taniwha Springs** bolsters this, by

accepting the application of the Privy Council's important **McGuire v Hastings District Council** decision (a designation case) to resource consents generally.

9. As noted, Taniwha Springs accepts the application of alternatives to section 6 matters of "national importance" only. The author however considers that merits of alternatives are relevant where there will be significant effects on any Part 2 matter, not merely those of "national importance". This is consistent with the dicta of the **McGuire** case in particular. Where Part 2 values with slightly lower protection (ie section 7 and 8) are relevant a lower intensity of review, as occurs in some judicial review contexts, could be utilised.

Relief – Declining Consent and Effects on Term

10. Where an activity does not yet exist or is not an ongoing essential service, failure to reasonably consider alternatives can lead to an application being declined – see for instance **Te Runanga o Taumarere** or **Bungalo Holdings Limited**.
11. **Taniwha Springs** was a novel case however where a continuing but necessary public activity (supply of drinking water) was affected. Declining consent was not an option. Given the clear availability of an alternative water supply which would take some 10 years to implement, the Court provided a consent for this interim period only. This placed the onus on the applicant to work through alternatives and then make a fresh, fully informed decision and consent application. This reinforces that the Court is prepared to use a shortened term of consent as a pragmatic tool in achieving sustainable management.

Procedural Consideration or Competing Merits Assessment?

12. Most successful alternatives cases are based on inadequate consideration of alternatives by the applicant – essentially a procedural issue. This allows the Court to give clear indications to the applicant about what should happen, without having to overtly decline consent based on the preferable merits of the alternative.
13. Previous cases such as **Fleetwing Farms** have emphasised that applications must be treated on their own merits, rather than considering competing claims to a site or resource. This is not particularly consistent with the Court making a merits based decision between a proposal and its alternatives.
14. However, it is time for the alternatives test to be truly recognised as an exception to the **Fleetwing** rule. The whole basis of alternatives is that they do consider competing claims of values strongly protected by the Act, as well as the proposed activity itself. As characterised in **Friends of Ngawha**, consideration of alternatives is:

... a way of testing whether a proposed development of resources is reasonable in prevailing circumstances.

15. This, together with the Privy Council's strong obiter comments in **McGuire**, confirm that the in appropriate cases a reasonable alternative will be so preferable that consent for the activity sought will have to be declined. **TV3 Network Services** is one existing case where consent was declined on the

substantive basis that better alternatives were available. No cases will follow, though little precedent yet exists.

Public Authorities and Economic Considerations

16. **Taniwha Springs** adopted comments from **Rodney District Council v Auckland Regional Council A022/1994** that works costs incurred by public authorities are executive matters for which they have political responsibility. This suggests that the Court cannot disturb a Council's properly reasoned decision that an alternative is too expensive.
17. This is a troubling proposition, deserving closer examination in appropriate circumstances. If correct, it severely limits the Court's ability to make a merits based decision in respect of alternatives to public projects. Whilst this is a matter for detailed analysis elsewhere, it is submitted that the Court can and should interfere in appropriate situations.
18. It appears inconsistent with the Act that a Council could trump the Act's Part 2 balancing simply by citing its economic prerogative. The Court should have some deference to a Council's view on economic / funding matters, but the extent of this must be case specific. There is simply no legislative provision in the Act which requires the Court to yield to public authorities on this question. Rather, the balancing provisions of Part 2, which include economic considerations, provide ample scope for the Court to take all of these considerations into account.

Conclusion - How Important Are Alternatives After All?

19. **Taniwha Springs** is a reminder of the efforts required from an appellant to achieve results. Extensive and costly retention of suitably qualified experts is essential. Convincing the Court to modify what is likely to be a significant public project is no easy task, and should not be lightly undertaken.
20. **Taniwha Springs** is however a salutary reminder to public authorities that consideration of alternatives is a substantive and onerous task. Failure to consider alternatives to Taniwha Springs led to a shortened consent and a clear message to the Council to implement an alternative, even where the activity was pre-existing, and the Council owned the land (albeit by compulsory acquisition).
21. Yet many unsuccessful alternatives cases are run by environmental or public interest groups. Most cases fail due to a mismatch between the views of the appellants and the Court as to seriousness of effects, or feasibility of alternatives.
22. Successful alternatives cases are therefore rare. **Taniwha Springs, TV3 Network Services, McGuire** and **Te Runanga o Taumarere** stand out in the case of Maori values. **Bungalo Holdings Limited v North Shore City Council** is a successful non-Maori case where significant restrictions would otherwise have been imposed on private land through designation. These few successful cases show that the prospect of a very real alternative, together with significant adverse effects, will be required to secure relief.

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