



Ministry for the
Environment
Manatū Mō Te Taiao

AN EVERYDAY GUIDE TO THE RMA → SERIES 6.3

The Environment Court: Awarding and Securing Costs



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Introduction

The Resource Management Act 1991 (RMA) is the main law protecting our environment. It's designed to ensure activities like building houses, clearing bush, moving earth, taking water from streams or burning rubbish won't harm our neighbours and our communities, or threaten the air, water, soil and ecosystems that we and future generations need to survive.

The RMA allows you to participate in decisions about the environment that affect you. However, if a decision is made that you are unhappy with, you may be able to appeal it under the RMA to the Environment Court.

The Environment Court may order any party to pay costs to another party. This guide explains costs, how and why they are awarded, and what things you should bear in mind if you are considering bringing proceedings in the Environment Court. It's particularly important to understand that the court can order a security for costs before allowing any appeal to proceed.

What are costs?

The Environment Court may order any party to pay money to another party, or to the Crown, to help offset expenses incurred in a hearing. For example, someone appealing a council's decision to issue a resource consent (known as the appellant) might be ordered to pay the person who originally applied for the consent (the applicant) or the council.

The Court only awards costs if a party applies for them. The Environment Court is given the discretion to decide whether it is reasonable to impose costs, and to determine the appropriate amount.

Awarding costs

Costs can be awarded on one of two bases:

- » **Full costs** – where a party is awarded the full cost incurred in a hearing. For instance, someone may be ordered to pay all the solicitor's bills for the other party (known as *solicitor and clients' costs*). This is unusual but may happen where a party fails to comply with a Court Order, acts in contempt of the Court, or in other exceptional circumstances.

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- » **Reasonable costs** – this is more common. The Court assesses what costs are reasonable, based on the circumstances of the case. One party is ordered to pay this sum to another. This will not be full cost recovery but may cover some expenses including:
 - payments to lawyers and other representatives
 - payments to expert witnesses
 - fees charged by the Environment Court for lodging an appeal
 - disbursements – for example, toll calls, faxes, photocopying
 - travel expenses to witnesses and lawyers.

In some cases, costs are awarded to compensate an applicant for delays in processing development proposals, or for the expenses of applying for resource consent.

Security for costs

Sometimes, the Environment Court may be asked by the respondent to an appeal to make an order securing costs before allowing an appeal to be heard. This may be requested if it's suspected that the person bringing the appeal may not have sufficient financial resources to pay costs should their appeal be unsuccessful.

The Environment Court does not have to grant any request for a security for costs and will need to consider the interest of all sides. Generally, security for costs will only be ordered if the Environment Court has concerns about the appeal and how it is justified.

If there is a security for costs order against you, then you will need to pay a deposit of money. The Environment Court will determine how much depending on the nature of the case and the likely costs that may be involved.

Even if an order for security for costs is granted and the appeal is lost, this does not automatically mean that costs will be awarded. If an appeal has been lodged that raises appropriate RMA issues, if time has not been wasted through the process, and if the appeal has been presented fairly, then the Environment Court may decide that each side will be responsible for their own costs. In that case, any money deposited would be returned to the appellant.

What should I take into account when considering making an appeal?

Before lodging an appeal, and throughout the life of an appeal, you should consider the issue of costs. You need to think not only about the costs you might face, but also about the costs that your appeal and its conduct might cause for others.

The Court's primary concern is to avoid unnecessary costs, and behaviour that leads to unnecessary costs. To understand what matters the Court does not tolerate:

- » looking at similar cases to find out what factors influenced the Court's costs decisions
- » talking to other people or groups who have taken part in appeals so you can understand potential pitfalls
- » seeking legal assistance and/or the advice of a resource management professional.

What is the purpose of costs?

The purpose of awarding costs is to compensate a party for costs incurred, where it is just to do so. Appeal hearings can be expensive for everyone involved. The awarding of costs encourages parties to exercise their appeal rights responsibly. Costs are not intended to penalise an unsuccessful party or to discourage people from participating in appeals. The Environment Court will only decide to award costs if it is justified in the circumstances of the case.



When are costs awarded?

The Environment Court has no rule or general practice that says the unsuccessful party in an appeal must pay the other party's costs. The Court considers each case on its own merits.

The Court has Practice Notes which are guidelines on how the Court approaches costs and what is required of the parties. They are not rules or laws, but they should normally be complied with.

Copies of the Practice Notes are available free of charge from the Registrar of the Environment Court, PO Box 5027, Wellington or on www.courts.govt.nz/courts/environment-court

Some reasons why the Court has ordered parties to pay costs in previous appeal hearings include the following.

Not following good practice

You should conduct your case efficiently, economically and responsibly, and follow the official procedures.

You should avoid unnecessarily extending the time it takes to hear the appeal and the costs of other parties – otherwise, you will probably have to contribute to those costs. What matters is not the number of arguments you put forward, but the relevance of your arguments and the evidence you present to support them. Providing a statement or advising the Court about undisputed facts will help.

In the past, costs have been awarded against parties who:

- » conducted long cross-examinations of expert witnesses that did not produce any significant information
- » did not present evidence that properly supported their claims.

Failing to narrow the case

You should narrow your concerns to specific points as early as possible. This will avoid excessive time and money being spent on matters which are not relevant. It will also allow other parties to decide what they need to address.

An appellant has the right to appeal every aspect of the application, proposed policy statement, or plan in question. However, you cannot ask for an entire plan or policy statement to be withdrawn. If you don't specify that your appeal relates only to certain provisions or conditions, the respondent may feel it necessary to prepare a comprehensive case covering all aspects of the application or plan, not only those which concern you. Any costs unnecessarily incurred in this way can be included in a costs application.

Late withdrawal of an appeal

Costs may be awarded against you if you lodge an appeal and later decide to withdraw it. This is to compensate other parties for the expenses they have incurred in preparing their case, up to the point that they were made aware of your intention to withdraw.

When the Court comes to decide whether you should pay costs, it will consider whether you left your decision to withdraw too late, or whether you notified the other parties as early as you could about your intention to withdraw. If other parties have had to prepare evidence before you withdrew, then the Court may consider that their costs should be compensated.

Using an appeal to argue general issues

Appeals on resource consents should relate only to the applicant's proposal and its predicted environmental effects. Costs have been awarded against parties who have raised general environmental issues that should have been dealt with during the development of a district or regional plan, or where they have appealed on political or emotional grounds. If relevant resource management grounds cannot be found in an appeal, then a costs award may result.

Raising irrelevant matters

Before lodging an appeal, you should make sure you know which issues fall under the RMA. Costs have been awarded against parties who raised matters in their appeals which could not be dealt with under the RMA. Similarly, costs have resulted where parties seek outcomes that the Court has no power to impose – for example, where an appellant seeks that a 'controlled activity'

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consent be declined, while the RMA requires that consent be granted for those types of activity.

Costs have also been awarded where irrelevant evidence has been introduced, unnecessarily increasing the time spent on the appeal.

If you are in any doubt about what is relevant, you should seek independent advice.

Ignoring a warning about costs

The Environment Court is not required to warn parties formally about the possibility of having to pay costs. However, sometimes the Court does warn parties that their conduct may result in costs being awarded against them. Appellants who ignore this advice have been ordered to pay costs.

If you receive a warning, you should make sure you or your representative takes notice. Remember that while your lawyer may get the warning, you will be responsible for the costs.

Other factors

Other factors that may be taken into account in deciding whether to order community groups or individuals to pay costs (and the quantity of those costs) can include, but are not limited to:

- » whether the appellant was concerned about environmental effects, and whether the case did anything to avoid, remedy or mitigate adverse effects
- » whether the parties' case sought to promote a public good or private benefits
- » whether particular points raised were overly technical and without merit
- » whether there has been a failure to explore the possibility of settlement, if the Court considers that it might have been achieved
- » where the Court's process has been abused – either through frivolous or vexatious cases, or action based on trade competition.

Seek professional advice

While it is not essential to be represented by a professional when presenting your case to the Environment Court, a resource management professional (ie, a **planner** or a **lawyer**) can pull various aspects of your case together. They can talk to you about the likely success of the proceedings, based on previous Court decisions and the law. This is important due to the ability of the Environment Court to order parties to pay costs. They can also ensure the right procedures are followed, including making sure your action is lodged correctly and served on the necessary people, and that evidence is exchanged with the other parties. **Community law centres** (and, in some areas, **environmental law centres**) can also provide assistance.

You should think carefully about what **specialist input** you might need to support your case. This might include hiring a professional to give evidence on an aspect of your case (eg, a traffic engineer or landscape architect).

If you have limited resources, it may be most beneficial to focus on obtaining specialist input to support your case.

Incorporated societies

If you are a member of a public group that is an incorporated society, you cannot be made personally liable for costs. It is advisable to become incorporated before lodging your initial submission so there is a consistent entity for all parties to deal with. However, the Resource Management Amendment Act (No 4) 1996 provides that where a group becomes incorporated during the appeal process, it is to be treated as the successor of the unincorporated group, provided it is composed of substantially the same members. Your group may still need to prove that the incorporated society is its proper successor.

You can contact the Ministry of Economic Development (Companies Office) for a guide to the Incorporated Societies Act 1908. You will need a minimum of 15 members to establish an incorporated society, and the process of incorporation can take between one and two weeks. See www.societies.govt.nz/cms



Who can be liable for costs?

Any party involved in an appeal can be liable for costs. That is, costs may be faced by:

- » the main appellant
- » a party appearing in support of or in opposition to an appeal
- » an interested party who was not involved in the original application (eg, for a resource consent, or for a plan change) but who joins the appeal once it has been lodged

and even, in appropriate circumstances:

- » the respondent, and
- » the applicant.

Individuals and groups are not necessarily exempt from having to pay costs. It is valid for a group to enter an appeal if they are a submitter or have an interest greater than the public generally, but the case still needs to raise significant issues relevant to the appeal and be presented in a professional manner.

The Environment Court may make an order for costs if it considers one party has been unfairly burdened. Generally, it will not consider the party's ability to pay costs, even if this is raised as an argument against costs being imposed.

A lack of prior knowledge about the risk of having to pay costs, or the inability to pay them, is not enough to stop the Environment Court deciding to award costs against you.

Costs are less likely to be awarded where the appeal is against a proposed plan or policy statement. Though costs are generally not awarded against public bodies (central or local government), there are exceptions. Examples include where a council has acted inappropriately by refusing to hear submitters, has tried to impose unjustified burdens on landowners, has not sought adequate advice, or has not taken sufficient care in preparing its case.

How are costs applied for?

Costs will only be awarded where a party applies for them. The desire to seek costs should be communicated to the Court before the conclusion of the appeal.

The party seeking costs will be asked to provide:

- » reasons why it is appropriate that they be awarded costs
- » proof of the actual costs incurred.

The party who is being asked to pay costs then has the right of replying to the application. The Court may grant further rights of reply. The Court's decision will normally be made on the papers filed and will be issued in due course.

Can I appeal the decision?

There are limited rights of appeal against a decision to award costs. This is due to the fact that the decision involves a broad discretion, and also because Environment Court decisions can be appealed to the High Court on points of law only. However, the High Court is not a cost review authority and may also impose costs if it considers the appeal against costs was inappropriate.

Legal advice should be sought if you are considering appealing a costs decision.

Legal aid

Legal aid is available from two main sources:

- » **Legal aid** is available to some *individuals* (not groups or representative bodies) who lodge appeals. Eligibility for legal aid is determined by the Legal Services Board in Wellington. The Legal Services Act 1991 limits the amount of costs that can be paid by a person who receives legal aid.
- » The **Environmental Legal Assistance Fund** provides *non-profit groups* with funding to help prepare, mediate and/or present resource management cases to the Environment Court and other courts. More information is available from the Ministry for the Environment or online at www.mfe.govt.nz/withyou/funding/ela-information-guide.html (Note, however, that the Environmental Legal Assistance Fund can not be used to pay any costs awarded.)



Checklist when considering making an appeal



- Explore other alternatives to lodging an appeal.
- Research previous decisions to check if there are aspects to your appeal that could result in costs being awarded against you.
- Consider hiring a lawyer to present your appeal, or at least consult an appropriate legal professional about your case.
- Consider teaming up with other appellants to present a combined case.
- If you lodge an appeal and then change your mind, notify the respondent and the Environment Court without delay.
- Narrow your concerns to specific points and inform the other parties in the appeal about these as early as possible.
- Don't raise issues that should be dealt with in another forum, or which are outside the scope of the RMA or your original submission.
- Conduct your appeal efficiently, economically and responsibly. Try to avoid dragging out the proceedings unnecessarily.
- If the Environment Court warns you that your conduct is likely to lead to you having to pay costs, change your approach.
- Remain aware of the need to avoid causing other parties to incur unnecessary costs.





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Disclaimer

Although every effort has been made to ensure that this guide is as accurate as possible, the Ministry for the Environment will not be held responsible for any action arising out of its use. Direct reference should be made to the Resource Management Act and further expert advice sought if necessary.

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↳ www.rma.govt.nz

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