



The Environment Court: Awarding and securing costs

4.3



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. If the reader is uncertain about issues raised in this guide then direct reference should be made to the Resource Management Act and further expert advice sought if necessary.

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Introduction

The Resource Management Act 1991 (RMA) sets out the framework for regional and local councils to manage activities and effects on the environment. The overall purpose is to promote sustainable management of resources. This involves considering how our activities affect the environment now and in the future.

The RMA also enables councils to regulate land use and the provision of infrastructure, which are essential parts of New Zealand's planning system.

The RMA means that regional and local councils set rules and requirements to manage activities ranging from building houses, clearing vegetation, moving earth, taking water from a stream, or burning rubbish. The purpose of the rules are to ensure activities won't harm our neighbours or communities, or damage the air, water, soil, and ecosystems that we and future generations need to survive.

The RMA allows you to participate, by making a submission, in certain decisions by your local council about the environment, and in some instances allows you to **appeal** these decisions to the **Environment Court**.

The Environment Court may order any party to pay costs to another party.

About this guide

This guide is the last in a series of 13 guides called An Everyday Guide to the Resource Management Act (see more details about the series below).

It explains costs, how and why they are awarded, and what you should bear in mind if you are considering bringing proceedings in the Environment Court.

It's important to understand that, before allowing an appeal to proceed, the court can order you to pay a security for costs.

The guide has a glossary of RMA terms at the end. Words defined in the glossary are coloured **brown**.

About the everyday guides

This guide is one in a series of 13 called An Everyday Guide to the Resource Management Act. The series is intended to help people work with their councils. If you're dealing with the Environmental Protection Authority (EPA), a board of inquiry, or the Environment Court (see the glossary to learn more about these), you might need more technical advice from the EPA (www.epa.govt.nz) or the Environment Court (environmentcourt.govt.nz).

For more information about specific parts of the RMA process, see the [full set of guides](#) on our website.

MORE INFORMATION

- [You and the Environment Court](#)
- [You, mediation and the Environment Court](#)

What are costs?

Costs are the professional fees, court fees, and other expenses involved in taking an appeal to the Environment Court.

The court may order any **party** to pay money to another party, or to the Crown, to help them recoup some of the money they spent during the appeal.

The court has the discretion to decide whether it is reasonable to impose costs, and to determine the amount.

The court only awards costs if a party applies for them. See [How do I apply for costs?](#)

Examples of costs

- Payments to lawyers and other representatives
- Payments to expert witnesses.
- Environment Court fees for lodging an appeal.
- Administrative costs such as photocopying.
- Travel expenses for witnesses and lawyers.

Awarding costs

The court may award costs to any party of the proceedings to compensate for unnecessary costs incurred as a result of the actions of other parties.

‘**Award costs**’ means the Judge orders one party to make a payment to another party.

There are two types of costs:

1. **Full costs** – 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 when a party fails to comply with a court order, acts in contempt of the court, or in other exceptional circumstances.
2. **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 reimbursement of costs, but may cover some expenses – see [Examples of costs](#).

Security for costs

Sometimes, the respondent to an appeal may ask the Environment Court to make an order securing costs before allowing an appeal to be heard. They may request this if it's suspected that the person bringing the appeal (the **appellant**) may not have enough money to pay costs if their appeal fails.

The court does not have to grant any request for a security for costs, and will need to consider the interests of all sides.

If you are the appellant and there is a security for costs order against you, you will need to pay a deposit of money. The court will decide how much, depending on the nature of the case and the likely costs.

Even if the court grants an order for security for costs and the appeal is lost, this does not automatically mean that costs will be awarded. The court may decide that each side will be responsible for their own costs if:

- an appeal raises appropriate RMA issues
- time has not been wasted through the process
- the appeal has been presented fairly.

In this case, the appellant would receive back their deposit as security for costs.

Points to consider before making an appeal

Before lodging an appeal, and during 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 might cause for others.

The court's main concern is to avoid unnecessary costs, and it does not tolerate certain matters and behaviour that lead to such costs. To understand these, you should consider:

- looking at similar cases to find out what factors influenced the court's decisions on costs
- talking to other people or groups who have taken part in appeals so you can understand potential pitfalls

seeking legal assistance 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 (fair) to do so. Appeal hearings can be expensive for everyone involved. Awarding costs encourages parties to use 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 award costs if it considers this justified in the circumstances of the case.

Direct referrals

The court can order an **applicant** to pay a council's costs for its involvement in assisting the court in a **direct referral**. This includes the costs of preparing a council planning report and appearing at the court hearing. When the court is using its discretion to award costs in direct referral cases, there is also a presumption that the applicant will be ordered to pay Crown costs, and expenses the court incurs.

Reasons for awarding costs

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.

PRACTICE NOTE

The Environment Court has practice notes which are guidelines on how it 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 notes are available free at:
environmentcourt.govt.nz/about/practice-note/.

The Environment Court Practice Note 2014 states:

- The court will normally award costs against the appellant where an appeal is withdrawn after being set down for hearing.
- The court will not normally award costs to any party in an appeal against a proposed policy statement or plan change.

Below are some reasons from previous appeal hearings, where the court has ordered parties to pay costs.

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:

- held 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 limit your concerns to specific points as early as possible. This will avoid spending too much time and money on irrelevant matters. It will also allow other parties to decide what they need to address.

Your appeal must specify which parts of a **plan** or application you have an interest in. Otherwise the respondent may feel they need to prepare a comprehensive case covering all aspects of the application or plan, not just those which concern you. The respondent can include any costs unnecessarily incurred in this way in an application for costs.

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 their expenses in preparing their case, up to the point that they were made aware of your intention to withdraw.

When the court decides whether you should pay costs, it will consider whether:

- you left your decision to withdraw too late, or
- you notified the other parties as early as you could about your intention to withdraw.

If other parties had expenses in preparing evidence before you withdrew, the court may decide that you should pay for these.

Using an appeal to argue general issues

Appeals on **resource consents** should relate only to the applicant's proposal and its likely 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 an appeal lacks relevant resource management grounds, a costs award may result.

Raising irrelevant matters

Before lodging an appeal, 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.

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. Parties 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 the court may take into account in deciding whether to order parties to pay costs (and the amount of those costs) can include, but are not limited to:

- whether the appeal was about environmental effects, and whether the outcome of the appeal resulted in avoiding, remedying, or mitigating any adverse effects
- whether the 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 – through frivolous or **vexatious** cases, failure to follow court directions, or action based on trade competition.

Seek professional advice

Although it is not essential for a professional to represent you when presenting your case to the Environment Court, a resource management professional (eg, 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. They can also ensure you follow the right procedures, including making sure you lodge the appeal correctly and serve it on the necessary people, and that you exchange evidence with the other parties. Community law centres (and, in some areas, environmental law centres) can also help you.

You should think carefully about any 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).

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 RMA provides that if 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 will need a minimum of 15 members to establish an incorporated society, and the process of incorporation can take between one and two weeks.

MORE INFORMATION

- www.societies.govt.nz/cms

Who can be liable for costs?

Any party involved in an appeal can be **liable** for costs. That is, the following people may have to pay costs:

- the main **appellant**
- a **party** appearing in support of or against 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
- the respondent
- the applicant.

Individuals in 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 imposing costs.

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 generally not awarded against public bodies (central or local government). However, there are exceptions where the public body has failed to perform its duties properly or has acted unreasonably. 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 do I apply for costs?

Costs will only be awarded where a party applies for them. You should inform the court that are seeking costs, before the appeal process ends.

If you are seeking costs, the court will ask you to give:

- reasons why it is appropriate that you are awarded costs
- proof of the actual costs.

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 will normally base its decision on the papers you provide and it will issue the decision in due course.

Can I appeal the decision to award costs?

There are limited rights of appeal against a decision to award costs. This is because the decision involves a broad discretion, and also because Environment Court decisions can be appealed to the High Court on points of law only. The High Court may also impose costs if it considers the appeal against costs was inappropriate.

You should seek legal advice if you are considering appealing a costs decision.

Legal aid

Legal aid is available from two main sources:

1. **Legal aid** is available to some individuals (not groups or representative bodies) who lodge appeals. The Legal Services Board in Wellington decides who is eligible. The Legal Services Act 1991 limits the amount of costs that can be paid by a person who receives legal aid.
2. The Environmental Legal Assistance Fund gives funding to non-profit groups to help them prepare, mediate, or present resource management cases to the Environment Court and other courts. For more information visit the [Environmental Legal Assistance Fund section](#) on our website.

Note: The Environmental Legal Assistance Fund cannot be used to pay any costs awarded.

Contacts

For more information, or to lodge a case in the Environment Court, contact the court registry closest to you.

Auckland Registry

The Deputy Registrar
Level 2, Specialist Courts and Tribunals, 41 Federal Street
PO Box 7147, Wellesley Street
Auckland 1141
Phone (09) 916 9091 Fax (09) 916 9090

Wellington Registry

The Deputy Registrar
5th Floor, District Court Building, 49 Ballance Street
PO Box 5027, Wellington 6145
Phone (04) 918 8300 Fax (04) 918 8303

Christchurch Registry

The Deputy Registrar
Level 1, District Court Building, 282 Durham Street
PO Box 2069, Christchurch 8140
Phone (03) 365 0905 Fax (03) 365 1740

The Environment Court: www.courts.govt.nz/courts/environment-court.

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.
- 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.
- If you lodge an appeal and then change your mind, notify the respondent and the Environment Court without delay – see [Contacts](#).
- 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.
- Remember not to cause unnecessary costs for other parties.

Glossary

The purpose of this glossary is to assist with understanding the meaning of terms used in this guide. Some of these terms have specific legislative definitions in section 2 of the RMA.

Appeal	Request for a decision to be changed, predominantly to the Environment Court.
Appellant	Person or group making an appeal.
Applicant	The person applying for a resource consent, change to an existing resource consent's conditions, or a private plan change.
Award costs	The Judge orders one party to make a payment to another party.
Cross-examination	Where submitters or applicants (including their lawyers) are allowed to question other parties in a hearing. This is not usually allowed in first-instance hearings under the RMA, but may be allowed in some hearings (eg, of nationally significant proposals, direct referral applications, or freshwater planning instruments) as well as in Environment Court hearings.
Direct referral	A process where, at the request of the applicant, the council decides that the Environment Court will determine applications without the need for a council hearing and decision.
Environment Court	A specialist court where people can appeal decisions made by councils under the RMA on a policy statement or plan, or on a resource consent application; or where they can apply for an enforcement order or seek a declaration.
Legal aid	Payment from public funds allowed, in cases of need, to help pay for legal advice or proceedings.
 LIABLE [for costs]	Legally responsible.
Party	A person, group, or organisation taking part in an appeal or other legal proceedings.
Plan	A plan defined under the RMA, including regional policy statements, regional plans, and district plans.
Proceedings	A case being considered by a court.

Resource consent	Permission from the local council for an activity that might affect the environment, and that isn't allowed 'as of right' in the district or regional plan.
Resource Management Act 1991 (RMA)	New Zealand's main piece of environmental legislation. It provides a framework for managing the effects of activities on the environment.
Submission	Comments, opinions, concerns, support, or opposition about a proposed notified resource consent, notice of requirement, or a proposed policy statement or plan.
Submitter	People who have made a submission about a proposal.
Vexatious [case]	Causing or tending to cause annoyance, or frustration.