

INTEREST GROUPS BEWARE OF COSTS!

The possibility of a hostile decision as to costs must be in the back of any party's mind when considering taking a case to the Tribunal.

The recent award by the Planning Tribunal of costs in the order of \$37,000 against the "Fast ferry" opponents "Save the Sounds - Stop the Wash", highlights a risk that interest groups run in taking an issue to the Tribunal.

On completion of a Planning Tribunal hearing, the Tribunal has the power and discretion under section 285(1)(a) of the *Resource Management Act 1991* (RMA) to order a party to pay the costs incurred by other parties, as it considers reasonable. The possibility of a hostile decision as to costs must therefore be a consideration in the back of any party's mind when considering appealing a case to the Tribunal. This is especially so if the party is a non-profit organisation with limited means, which is often the case with most "interest groups".

Interest groups can range from groups of residents formed to challenge a certain aspect of council policy, to environmental watchdog groups such as the Royal Forest and Bird Society, to groups of people with common interests such as Federated Farmers. When considering the question of costs in cases where such groups have appealed a decision or issue to the Tribunal, there is tension between two competing considerations.

PUBLIC INTEREST FACTOR

The first consideration is the "public interest" factor. Interest groups play an important part in the resource management process. Public participation is central to the resource management process, particularly in the formulation of planning instruments which will affect the lives of the citizens within the territory governed by them (*M and N Wyatt v Auckland City Council* W108/95). Interest groups also act as watchdogs for interests

which cannot protect themselves.

In many cases, however, the costs of taking a case to hearing will be beyond the scope that such an appellant can countenance as a non-profit-making body. This may have the result of unfairly deterring objectors of limited means. If the possibility of being ordered to pay costs incurred by other parties is added to this, it sometimes results in individuals or voluntary associations not appealing decisions or taking part in appeals because they may be unable or unwilling to meet costs orders that could be made. When this occurs, the Tribunal loses the benefit it might have had from the interest group's case.

DETERRENCE FACTOR

The flip side of the coin is that there may exist vexatious interest groups who believe all change and development is undesirable (whether or not the development or proposal is reasonable or necessary), or who have a certain "bone to pick" with the council. An example of this is found in the case of *M and N Wyatt v Auckland City Council* (W108/95), where a group used the facts of one application as a springboard to advance general political views concerning aspects of the council's wider resource management policy.

The possibility of being awarded to pay costs incurred by another party provides an incentive for litigants to examine rigorously whether they have seriously arguable cases, and may have a deterrent effect which will protect the developer or the council in question from the unnecessary expense of a vexatious appeal.

QUESTION OF COSTS

When considering the question of costs, the public interest factor will be of significance to the Tri-

bunal, but it will not override the Tribunal's responsibility to consider each application for costs on its own circumstances. In the case of *Peninsula Watchdog Group Inc v Waikato Regional Council* (A26/95), the Tribunal recognised this responsibility and said that as a matter of law it would be inappropriate to adopt a blanket practice of not ordering voluntary organisations to pay costs. In *Te Puke Branch of the New Zealand Royal Forest and Bird Society Inc v Bay of Plenty Regional Council* (A82/95) it was held that to do this irrespective of differing circumstances would mean placing an artificial fetter on the Tribunal's discretion as to costs conferred by the RMA. This is not to say, however, that a non-profit-making body will in general have costs awarded against it, if its case on appeal fails fully to succeed.

Against the public interest factor will be weighed the deterrence factor. This will involve deliberation of whether the appellant gave due and careful consideration as to whether to appeal. In *Heritage Mining NL; Tairua Harbour and Water Sheds Protection Society v Waikato Regional Council* (A61/95) the Tribunal said that lay groups must be careful to ensure that when proceedings are taken to appeal level, the decision to do so is made with due responsibility given the costs to be incurred on all sides before the Tribunal. In *Wyatt*, the Tribunal said that the unrestricted right to appear before the Planning Tribunal must be understood to carry with it the correlative duty to act responsibly. This involves considering all other available ways of achieving the desired result. Presentation of the appeal should always be in the most economic way possible, commensurate with the right to appear and the objective sought.

If the appellant has not acted

responsibly in bringing the appeal, the deterrence consideration will require that the appellant bear the costs of the appeal.

SPECIFIC CONSIDERATIONS

Specific factors to be taken into account by the Tribunal on the question of costs have emerged from such general considerations as those discussed above. The cases indicate that the existence of one or more of the following factors will increase the likelihood of the Tribunal awarding costs against the appellant:

- Late withdrawal of an appeal.
- Not having a seriously arguable case.
- Taking an issue to appeal when there is another equally effective but more economic means of dealing with it.
- Unnecessary prolonging of the case at hearing.
- Conduct by the appellant which causes the other parties to incur additional unnecessary expense, such as failing to narrow the issues on appeal until a late stage.
- A purported representation of a community or interest group by an individual without a mandate from that group.

CONCLUSION

It would be prudent for any interest group considering an appeal to the Planning Tribunal to be aware of, and consider carefully, the principles generated by the above cases concerning costs. An appeal run in accordance with these guidelines will have a greater chance of achieving a ruling that costs should lie where they fall; or even, though more rarely, a ruling that the applicant or respondent pay the appellant's costs (as was the case in *Action for Environment Inc and Porirua Environment Network Inc v Wellington Regional Council* W111/95). Disregard for these guidelines could result in a heavy order of costs being made against the interest group. ■

BY
JODI TILLER
SOLICITOR
SIMPSON GRIERSON