

## Environment - Switzerland

### Supreme Court decides on asbestos-contaminated buildings

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#### Legal background

Article 32c of the Federal Act on the Protection of the Environment<sup>(1)</sup> requires the cantons to ensure that contaminated sites are cleaned up. This obligation refers only to landfills and other sites that are contaminated with waste. The act defines 'waste' as movables of which the owner disposed or which it is in the public interest that the owner do so (Article 7(6) of the act).

Article 32d(4) of the act contains certain rules on the costs of such a clean-up. As a general rule, the 'polluter pays' principle applies. In certain cases, the local community bears these costs, especially if it is not possible to identify the polluter or if the polluter is insolvent. If several polluters are involved and one of them so requests, the competent authority determines the cost allocation to each polluter.

Article 2(1) of the Ordinance on Contaminated Sites<sup>(2)</sup> distinguishes between three different kinds of contaminated site:

- waste disposal sites (eg, inoperative or still operative landfills, with the exception of sites with unpolluted excavated or unpolluted waste material);
- industrial business facilities (eg, sites that are contaminated by installations or activities using materials that are hazardous to the environment, whether in operation or not); and
- accident sites (eg, sites that are contaminated due to extraordinary incidents, including but not limited to incidents in relation to the operation of certain activities).

#### Decision

The Federal Supreme Court was asked to consider a case in which a buyer of a real property found asbestos during renovation works and requested from the cantonal authority a decision on the allocation of the decontamination costs between the buyer and the former owner in accordance with Article 32d(4) of the act.

In the first cantonal instance, the authority decided that the real property was not a contaminated site within the meaning of the act, and that therefore it was not competent to determine the cost allocation. This decision was not accepted by the buyer, who appealed to the Geneva Administrative Court. That court approved the appeal.

According to the administrative court, asbestos qualifies as waste within the definition of the act. Therefore, the real property had to be considered as a contaminated site under Article 2(1) of the Ordinance on Contaminated Sites, and the cantonal authority was competent to decide on the allocation of the decontamination costs. At the final stage, in the appeal decision made by the Federal Environment Office before the Supreme Court, the court repealed the Geneva Administrative Court judgment.

The Supreme Court first examined whether asbestos used in the construction of a building can be qualified as waste under Article 7(6) of the act. According to the court, the answer is delicate because, at the time of the construction of the real property, asbestos was used for its specific features and not as a waste material. At that time no public interest required disposal of the asbestos. However, the court held that the question could be left open because, in any event, a building which was contaminated with asbestos did not qualify as a contaminated site under the meaning of the act.

With respect to the real property in question, the court denied the existence of one of the three kinds of contaminated site as defined in Article 2(1) of the ordinance. The real

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property was not a waste disposal site under Article 2(1)(a) of the ordinance because at the time of the construction the asbestos was intentionally used for its specific features as construction material to be added during the construction. The asbestos was not used as a material to be disposed of. In addition, the court found it to be clear that a building used for office and residential purposes does not serve for the disposal of waste.

Further, the court stated that the real property was not an industrial business facility contaminated by installations or activities using materials that are hazardous to the environment, in the sense of Article 2(2)(b) of the ordinance. On the contrary, the premises were used for commercial and hospitality purposes. The premises were not used as a place which dealt with asbestos or where asbestos was manufactured.

Finally, the court considered that the real property was clearly not an accident site that was contaminated due to an extraordinary incident in relation to the operation of certain activities in the property, within Article 2(2)(b) of the ordinance. The fact that the building material or the structure of the building contained asbestos obviously did not cause any accidents.

In accordance with the majority of legal doctrine, the court considered that the list of contaminated sites contained in Article 2(1)(a-c) of the ordinance was exhaustive and that no other sites could be qualified as contaminated sites. Therefore, the court held that the cantonal authority was not competent to allocate the decontamination costs, thus confirming the authority's first instance decision.<sup>(3)</sup>

## Comment

Real properties that have been constructed with materials containing asbestos are not contaminated sites under the Act on the Protection of the Environment. Accordingly, the obligations regarding the decontamination and the costs allocation provided by the act are inapplicable. This means that the local community need not bear the decontamination costs if it is not possible to identify the polluter or if the polluter is insolvent.

In case of a purchase of real property, the parties should provide for specific warranties in the contract. From a buyer's perspective, the seller should warrant the absence of an asbestos contamination. From a seller's perspective, it should be stated that an exclusion of the warranty also covers asbestos contamination that is discovered later.

In case of the renovation or demolition of a real property containing asbestos, there are various rules and procedures for the decontamination. Several are compulsory and are intended to protect employees' health. In general, implementation and enforcement are under the competence of the cantons.

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## Endnotes

(1) *Bundesgesetz vom Oktober 7 1983 über den Umweltschutz (Umweltschutzgesetz)*, SR 814.01.

(2) *Verordnung vom August 26 1998 über die Sanierung von belasteten Standorten (Altlasten-Verordnung)*, SR 814. 680.

(3) BGE 136 II 142.

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