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Environment - Switzerland

Distribution of Costs for Noise Abatement Measures

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Background
Facts
Decision

Background

The fundamental 'polluter pays' principle common to the environmental law of many countries is also part of Swiss environmental law. According to this principle the originator bears the costs for the avoidance and clean-up of pollution. Since 2000 the polluter pays principle has been explicitly set forth in Article 74(2)(2) of the Constitution.⁽¹⁾ The principle is further based on Article 2 of the Environmental Protection Act.⁽²⁾ A recent judgment of the Federal Court⁽³⁾ clarifies that the principle is also valid with regard to noise pollution. Furthermore, the principle applies to the state that is the originator of a motorway.

Facts

An important transnational motorway crosses densely built-up areas of Basel-Land Canton. There is also land for development near the motorway. Owing to the noise from the road, the construction possibilities for this land were either nonexistent or very limited, as there are restrictions concerning the acoustic insulation and possible use of such sites. In order to offset these limitations the local municipality called for a reclassification of the affected sites. The municipality also issued a new rule as part of its legislation on rural roads, whereby the owners of the land had to bear the costs of the construction of a noise barrier separating the land from the motorway.

The owner of one of the pieces of land for development objected to this cost allocation and took the matter to court. The Federal Court finally decided the case and overturned the judgments of the lower courts in favour of the claimant.

Decision

The court found that the municipality was responsible for introducing cost sharing among the landowners. The court further stated that, in principle, the municipality had determined the persons liable for contributions correctly. In addition, the court held that the computation of the contributions complied with the general principles that (i) each landowner contributes a share that is proportional to the advantages for its own real estate, and (ii) the sum of the contributions for the construction of the noise barrier may not exceed the necessary expenditure of the municipality.

The court also examined whether the polluter pays principle applied to the case. For this purpose, the court qualified the construction of the noise barrier under environmental law.

The land next to the motorway was part of an area designated for residential use, but was not yet suitable for development. Areas designated for residential use are subject to a 'planning level' of noise pollution. Unless the planning level for noise can be observed, particularly by taking structural measures, such areas must be used for purposes less sensitive to noise than residential developments. The court held that this rule gives effect to the basic principle of land planning law, according to which residential areas must be protected from damaging and troublesome noise. In this case the court decided that the planning level was observed by the construction of the noise barrier. Thus, it was possible to develop the land as a residential area.⁽⁴⁾

Swiss environmental law does not regulate the distribution of costs in such cases. Therefore, the court

decided that the polluter pays principle applied in this case. However, the canton or municipality in question must have a particular law which allows the costs to be passed on to the originator. The court assumed that this requirement was fulfilled in this case.

In a previous Federal Court decision the total cost of the construction of noise protection measures was passed on to the owner of a piece of real estate which was similarly intended for housing, but was not yet suitable for building and was excessively burdened with noise.⁽⁵⁾ In the present case the court distinguished that the necessary noise protection measures may not be passed on to the landowners in their entirety, as this would be a breach of the polluter pays principle. The state, as the originator of the motorway, must also bear part of the cost. However, the court did not decide on the detailed allocation of the costs; therefore, the lower courts will have to decide this. The Federal Court held that the criteria of proportionality and adequacy apply to contributions made. Hence, an appreciation of the costs and benefits of noise protection measures is required.

Previously, it had been assumed that real estate owners were required to bear the cost of noise protection measures.⁽⁶⁾ Nevertheless, the Federal Court's judgment was criticized for establishing that the polluter pays principle should be interpreted as a guiding principle⁽⁷⁾ and that the originators of buildings or facilities that cause excessive noise should be obliged to take noise reduction and protection measures.⁽⁸⁾ Consequently, the recent doctrine does not treat the neighbouring landowners as disturbers, which would externalize the internal costs of noisy buildings or facilities, such as the motorway in this case.⁽⁹⁾ The decision of the Federal Court can only be the first step in the necessary development of cost transparency in the area of noise protection.⁽¹⁰⁾

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Endnotes

(1) April 18 1999 (SR 101).

(2) October 7 1983 (SR 814.01).

(3) June 2 2006 (BGE 132 II 371).

(4) Article 24(2) of the Environmental Protection Act provides that an area intended for housing may be prepared for building only insofar as the planning level can be met. The provision does not prescribe that an area intended for housing must be used differently if there is a default of the planning level (Heribert Rausch, Arnold Marti and Alain Griffel, "*Umweltrecht*" edited by Walter Haller, Zurich/Basel/Geneva 2004, N 304).

(5) February 23 1994 (BGE 120 Ib 76). This case involved noise protection measures in a concrete building permit procedure.

(6) See the references cited by Alain Griffel, "*Die Grundprinzipien des schweizerischen Umweltrechts*", Zurich 2001, Nos 261 *et seq.*; Rausch, Marti and Griffel, N 111.

(7) Thomas Herzog, "*Wer zahlt gelenkten Lärmschutz?*" SJZ 9/2007, 217 *et seq.*

(8) This has been established only in rudimentary form in respect of the construction of national highways. Article 3(lit)(m), Article 15, and Article 15(a) of the National Highways Ordinance, December 18 1995 (SR 725.111).

(9) Alain Griffel, "*Lärmschutzwand entlang einer Autobahn; Kostentragung*", (review of the judgment BGE 132 II 317), URP 6/2006, 702 *et seq.*

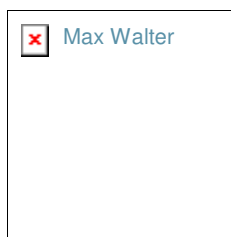
(10) See Peter Hänni, "*Umweltschutz. Lärm. Lärmschutzmassnahmen*", (review of the judgment BGE 132 II 317), BR 2005, 25. In 1999 the Commission of the National Assembly drafted an amendment of the Swiss Federal Constitution on cost transparency in the transport sector. Ultimately, this amendment was not enacted (see Griffel (*supra* at note 6), No 329 and Rausch, Marti and Griffel, N 93).

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