

Recent jurisprudence on construction activities in aquatic areas

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Legal framework

First decision

Second decision

Third decision

Construction activities that are undertaken close to waters are limited by federal water protection laws and allowed only in exceptional cases.⁽¹⁾ The Federal Supreme Court recently decided three cases concerning construction activities in aquatic areas, clarifying the requirements for such activities.

Legal framework

Pursuant to Article 41c of the Federal Waters Protection Ordinance, only fixed installations that serve the public interest – such as footpaths, hiking trails, run-of-river power plants and bridges – may be built in aquatic areas. In densely built-up areas, authorities may authorise exceptions for installations that meet zoning requirements, provided that there are no overriding interests to the contrary. Further, the continued existence of installations in aquatic surroundings that were lawfully constructed and can be used as intended is, in principle, protected.

First decision

The first case concerned two multi-family houses with some commercial premises and a garage that were located near to a river in Lucerne Canton.⁽²⁾ The court analysed in detail the exception for densely built-up areas, which would allow for the planned construction if there were no overriding interests to the contrary.

Based on a detailed interpretation of the ordinance, the court held that the exception is aimed at heavily built-up areas in urban quarters and village centres that are crossed by rivers. In such areas, the exception allows for concentrated urban development and the closure of gaps between buildings. The exception does not apply to peripheral areas with no overriding interest in the concentrated development of aquatic surroundings. The court further held that, as an exception to the water protection principles, the term 'densely built up' must be interpreted restrictively.

Considering the location of the relevant land parcels in relation to the main part of the village and the fact that only a few parcels in the area were built up, the court held, in contrast to the lower instances, that the parcels were located in a peripheral area of the community and were not densely built up. Accordingly, the project could not be approved.

Second decision

The second case concerned a single-family house with a garage that was located on the lakefront of Lake Zurich.⁽³⁾

In this case, the court considered that the relevant land parcel was located in the main settlement area of the Zurich agglomeration, and that the relevant section of the lakefront was a densely built-up

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area with a side wall and buildings close together.

In addition, the court pointed out that where the requirement of a densely built-up area is fulfilled, a comprehensive weighing of interests is required to assess whether overriding public interests conflict with the planned construction. In particular, the following must be considered:

- flood protection;
- the protection of nature and the landscape; and
- the public interest in easy access to waters.

In order to respect the discretionary power of the first-instance authority with regard to this weighing of interests, the court sent the case back to the first-instance authority, not the court of lower instance.

Third decision

The third case concerned the installation of solar panels on the roof of a boathouse on the lakefront of Lake Zurich.⁽⁴⁾ The main issue was the scope of protection for existing installations that are located in aquatic surroundings.

The court first analysed whether the installation could be approved based on the Federal Act on Land Use Planning.⁽⁵⁾ According to the act, buildings and installations outside of building zones that no longer comply with the zoning requirements are protected if they can still be used as intended. Such buildings may be amended or extended moderately on approval, if they were built in accordance with the act. The primary goals of land use planning remain reserved in any case. The court held that these requirements were fulfilled and that an approval based on land use planning was possible.

The court further analysed the scope of protection for the existing installation pursuant to the water protection ordinance in relation to the land use planning act. The ordinance protects the continued existence of installations in aquatic surroundings, provided that they were lawfully constructed and can be used as intended.

The court held that in this regard, the water protection ordinance has no independent meaning if the land use planning act applies – in particular, because the ordinance is based on a lower legislative level than the act. In contrast, the court left open the question of whether the ordinance grants the same level of protection for existing installations as the act if the latter does not apply.

As a result, the planned installation was covered by the statutory ownership guarantee and could be approved.

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Endnotes

(1) Federal Act on the Protection of Waters, SR 814.20 and Federal Waters Protection Ordinance, SR 814.201.

(2) Federal Supreme Court, 1C_565/2013 (BGE 140 II 428).

(3) Federal Supreme Court, 1C_803/2013 (BGE 140 II 437).

(4) Federal Supreme Court, 1C_345/2014.

(5) SR 700.

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