

# OSBORN

## **New York City's Proposed In-Place Asbestos Inspection Law - What It Means For Building Owners**

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**John E. Osborn**

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The New York City Council is currently considering passage of an "in-place" asbestos inspection law which would require virtually every governmental, commercial and residential building in New York City to be inspected for friable asbestos over a "phase in" period. The Federal Government is considering similar legislation.

Presently, the Asbestos Hazard Emergency Response Act (AHERA), which requires asbestos inspections of schools, is the only law at the *federal* level requiring building inspections. To date, *local* law has required that an inspection be performed before a renovation or demolition of a building is undertaken. Lender requirements frequently necessitate an inspection before making a mortgage loan or undertaking a refinancing.

As the New York City has considered the "in-place" legislation, three variables have clouded the backdrop and confused the criteria by which the proposed law is being considered.

### **Is Asbestos a Health Threat?**

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The first issue is the rather confused debate which has been spawned in the press as to whether asbestos is really dangerous. Although the source of the confusion is somewhat hard to pin down, the original premise of studies undertaken during late 1988 and early 1989 seems to have been: in-place asbestos does not constitute a health risk unless it becomes friable – therefore, not all asbestos need be removed.

Is asbestos a 'deadly fiber' which must be removed from all buildings because there is no safe level of exposure, or, on the other hand, is there a 'fiber phobia' and 'asbestos panic' in the United States which must be curtailed because needless removal subjects workers to cancer?

## Is the Removal Expense Justified?

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The second and more recent issue that looms over New York City is: with a faltering economy, should the city pass an in-place asbestos law, thus imposing additional costs on already crippled owners of health care facilities, office buildings and high rise apartment complexes? In fact, the asbestos issue threatens to erode the city's tax base, as a suit has demanded that the city reduce the assessed valuation of a large office building which contains asbestos.

## Is Ignorance Bliss?

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Finally, if the in-place asbestos laws are passed, will they be a blessing or a curse for the building owner? Will more information about buildings and the asbestos in them lead to enlightenment and stability...or frenzy?

## Laying the Foundations of Asbestos Management

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Whether or not the New York City and federal in-place laws are passed, it is important that the following message is delivered to building owners, loudly and clearly:

*If you own asbestos-containing material (ACM) in it, you are responsible for managing it prudently.  
You also face potential legal liability relating to the asbestos.*

Does that potential legal liability scare you? It shouldn't – if you have educated yourself about asbestos and your legal liabilities.

Anyone who buys, sells or owns and maintains real estate must be informed about asbestos.

To assist you in your quest for knowledge, following are the answers to five questions which building owners frequently ask about asbestos. In the sidebar are *The Ten Asbestos Commandments*, which, if practiced, will significantly limit your potential legal liability.

*Does asbestos threaten the health of building occupants?* No, not until it becomes airborne.

*Does asbestos create a health risk to unprotected workers disturbing asbestos or to people in adjacent work areas if they are exposed during removal?* Yes, there is significant evidence that asbestos causes disease and death to unprotected workers.

*What are the recent studies and articles that we have been hearing about and should they lower our concerns as building owners?* The studies which have been reported in the press are:

- A December 1988 symposium at Harvard University's Energy and Environmental Policy Center called the "International Symposium on the Health Aspects of Exposure to Asbestos in Buildings."

The event was cosponsored by the Institute of Real Estate Management, the National Association of Realtors, the Safe Buildings Alliance and the Urban Legend Institute. It brought together health experts from several countries, and led to a report released in August 1989 branding the public's concern with asbestos as "fiber phobia." The symposium report concluded that risks posed by in-place asbestos are very low and suggested that money spent for asbestos abatement would be better spent for abating greater risks like cigarette smoking.

- On June 29, 1989, the prestigious *New England Journal of Medicine* printed an article by Bernard Gee, professor of pulmonary medicine at the Yale University School of Medicine and Brooke Mossman, associate professor of pathology at the University of Vermont School of Medicine. They concluded that the risks posed by nonoccupational exposures to in-place asbestos do not warrant the expenditure of what they termed "unprecedented expenses on the order of \$100 billion to \$150 billion that could result from asbestos abatement." They had also participated in the Harvard Symposium.
- On January 19, 1990, *Science* magazine published an article written by Mossman and Gee and three other experts, including Morton Corn, a former Undersecretary of Labor in the Ford Administration and currently a professor and director of the Division of Environmental Health Engineering at Johns Hopkins University's School of Hygiene and Public Health. He also participated in the Harvard Symposium. In the section of the article entitled "Public Policy" the authors wrote:

"The available data and comparative risk assessments indicate that chrysotile asbestos, the type of fiber found predominantly in U.S. Schools and buildings, is not a health risk in the nonoccupational environment. Clearly the asbestos panic in the U.S. must be curtailed, especially because unwarranted and poorly controlled asbestos abatement results in unnecessary risks to removal workers who may develop asbestos related cancers in later decades."

Based on this information, the press took a number of leaps in logic, running such headlines as:

"Study Opposes Removal of Asbestos"

"Health Risks of Asbestos Downplayed"

"Risk is Seen in Needless Removal of Asbestos"

"Health Experts Say Billions May be Wasted by Removing Banned Insulation Material"

Does this mean that you can now "let down your guard" about asbestos? No! You are still responsible for the safe removal or in-place management of your asbestos. No one ever said that you had to remove all of your asbestos. But if you don't remove it and it later becomes damaged and causes a health problem, you are in the front line in terms of liability!

*As a building owner, shouldn't I oppose the in-place asbestos legislation which is pending – won't simply highlight and bring into more prominent view what my liabilities are, and might this not cause more people to sue me or raise issues with me?*

The federal and New York City in-place laws simply spell out and mandate a "responsible asbestos policy" for building owners; they require that buildings be inspected to see if there is an asbestos problem, and if there is a problem, that a solution be set forth and implemented.

Keep in mind that when a study was conducted of New York City buildings, of the 900 buildings examined, 84% had asbestos in poor or fair condition, you are responsible for it. If it is adequate and cost-effective to

use methods of encapsulation, that is your prerogative. Certainly many of you, given asbestos in "poor" condition, would opt for a safe, well-supervised, professional removal.

In that same study, 500,000 or 2/3 of all buildings in New York City were shown to contain ACM; and 80% of all office buildings over 7 stories were found to contain asbestos.

Appropriately, the New York City Department of Environmental Protection and the Environmental Protection Agency are focusing on issuing guidelines for asbestos operations and maintenance (O&M) programs. Economics will be a significant factor when considering a removal project vs. an O&M program. This decision process should be no different than determining whether to remove and replace a retaining wall or to patch it, shore it and caulk it for the next ten years.

*Won't the in-place asbestos requirements cause the building owner to spend more money sooner?*

As a practical matter, this would certainly appear to be the case.

To address this issue, an examination must be made as to what currently triggers asbestos inspections in commercial buildings. Those factors which force an owner to address asbestos issues now are:

1. Reports required before any renovation or demolition takes place; renovation of tenant space; sprinkler, plumbing or electrical installation or modification;
2. Lender requirements upon purchasing or refinancing; or
3. Purchaser requirements that asbestos be addressed prior to sale.

If in-place legislation is passed, unless the asbestos in the building has already been addressed, the building owner would have to address it. If the building owner has no inventory of what asbestos is in the building and what is being done about it, the building owner is wide open to liability - in-place law or not.

## Conclusion

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In conclusion, "the asbestos buck stops with the building owner." If the building owner acts prudently and promptly, most asbestos problems are addressable by expenditures of readily ascertainable amounts of money.

If the building owner hides his head in the sand and does not address asbestos problems, virtually unlimited liability may be faced later when that owner is left without a defense or an ability to document it. There have been two waves of occupational deaths due to asbestos: those people who manufactured and installed it. The new wave will be those who worked on the ceilings and walls of the buildings where it was present.

In-place law or not, building owners must not allow themselves to be bankrupted by a multimillion dollar verdict when a facility management staff member develops an asbestos related disease. Building owners should not be put in a weak bargaining position when they first discover, at the eleventh hour in a refinancing or a sale of a building, that there is an asbestos problem.

The key to avoiding these catastrophes is adopting a proactive stance on asbestos. Building owners should conduct an asbestos inspection *now*, because in terms of protecting and guarding against massive liability, you cannot afford to wait until you are *forced* to by passage of in-place laws.

**The Ten Asbestos Commandments: Whether or Not the Laws Requiring In-Place Inspection of Buildings are Passed, the Following Rules Should be Followed:**

**Rule 1**

Take a detailed inventory of all asbestos in the building, of its condition and what is being done about it; keep this inventory updated and make sure that it is reviewed before any renovation is undertaken. If sued, the building owner is not "off the hook" merely because he didn't know of an asbestos problem; the building owner is held to the standard of "what a reasonably prudent Owner in New York City should have known under the circumstances." In 1990 terms, there is a lot that a building owner "should have known" about asbestos.

**Rule 2**

Once an inventory shows the presence of asbestos, prepare a written operations and maintenance (O&M) plan and make sure that all relevant personnel are familiar with it. Make sure that the O&M plan is kept up-to-date.

**Rule 3**

Hire a facilities management staff carefully and make sure that they are fully aware of all aspects of asbestos maintenance and removal. Make sure that they attend formal training on an ongoing basis.

**Rule 4**

Set up a consistent and well-organized record keeping system relating to asbestos management and monitor it to assure that it is being followed.

**Rule 5**

Formulate a written plan for addressing emergencies relating to in-place asbestos (for example: a burst heating pipe or a water leak) and make sure that facilities management personnel are fully trained in these procedures. It is important that emergencies be addressed promptly and thoroughly and that proper contemporaneous documentation be kept. The twenty-four hour phone numbers of the asbestos management team should be made available to facilities management personnel; the owner's engineer, lawyer, and publicist. It is important that a chain of command be identified and that a coordinator be appointed for this important function.

**Rule 6**

Develop a hands-on program; know first-hand the quality of the asbestos management program. Don't rely on the advice of others. If you are an owner or an executive of the owner, know all of the facts and ask questions.

**Rule 7**

Don't rely on insurance. Expense, policy limits, sunset clauses, exclusions, the claims made nature of coverage, the long delayed manifestation of asbestos related liability and questionable long-term stability of insurance companies preclude our reliance.

If an abatement is being conducted, make sure that the contractor obtains *occurrence* insurance from a stable and rated insurer.

**Rule 8**

Don't rely on contract clauses which purport to give you protection. Indemnity clauses or other assurances provided by prior owners, abatement contractors, transporters or others are only as good as their future solvency.

However, even though it is not a complete answer, make sure that proper protection is obtained when a purchase, sale or lease is entered or when an abatement contractor is hired.

**Rule 9**

Worry about where removed asbestos is being disposed. If the asbestos is removed and improperly disposed, the owner may be sued to clean up the dump site years later. Although the asbestos in the building is not subject to the Superfund laws, once it is incorporated into the dump site, it is subject to the Superfund and other strict liability laws. The owner, then, could be responsible for a multimillion dollar cleanup even though he did not dispose of the asbestos.

**Rule 10**

Be candid about the presence of asbestos with tenants, potential purchasers, regulatory authorities and the public. Formulate an "enlightened" public relations plan and follow it. The worst legal exposure is often due not to the presence of asbestos but to the lengths that are taken to conceal its presence. Be careful: perceptions, especially in the case of an emergency, may govern. A panicky response leads to improper handling. Instruct the team to be calm, and to avoid guessing or speculating about the facts.