

Federal Supreme Court decision on compensation due to limitation of secondary homes

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The Federal Supreme Court recently addressed for the first time whether the prohibition to build secondary homes on private property entitles landowners to compensation.⁽¹⁾ This ruling was confirmed and further elaborated by a subsequent decision a few weeks later.⁽²⁾

Facts

The concerned plot of land is located in the canton of Valais. Pursuant to the local land use plan, it is situated in a medium-density tourist area. The owner of this property planned to build a chalet with four flats and sell them as secondary or principal homes.

On 19 December 2012 the municipality granted the construction permit, against which six objections were raised. In the last instance, the building permit was refused by the Federal Supreme Court.

As a response to this negative decision, the owner brought a claim against the municipality for compensation for approximately Sfr500,000. The owner reasoned that the rights arising out of his property had been restricted by the new regulations on secondary homes to such an extent that the result equalled a material expropriation.⁽³⁾

Legal framework

Constitutional limits on secondary homes

On 11 March 2012 the Swiss voters adopted a popular initiative to limit the number of second homes to a maximum of 20% per community. The aim of this initiative was to protect landscapes and avoid the excessive construction of secondary homes that remain unused for the majority of the year. With the approval of the initiative, Article 75b on the restriction of secondary homes was introduced into the Federal Constitution with immediate effect (for further details please see "[Parliament adopts new federal rules on second homes](#)").

In March 2018, six years after the vote, 373 of the 2,222 Swiss communities had a quota of secondary homes above 20%, some of them even considerably above 60%. However, some communities were creative and merged with other communities so that their percentage of secondary homes was reduced to below 20%.

Transitional rules for pending construction permits

After the adoption of the initiative, the Federal Supreme Court took several decisions on the transitional application of the new constitutional rule until the new Federal Act on Secondary Homes and the related ordinance came into effect on 1 January 2016.⁽⁴⁾

In particular, the court held that the new restrictions apply to all building permit procedures which had not been decided at first instance before 11 March 2012. Thus, for all concerned proceedings, the

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communities were entitled to grant new construction permits only if the 20% threshold had not been exceeded (for further details please see "[Parliament adopts new federal rules on second homes](#)").

In May 2018 the court held that even if a permit had been granted by the first instance before the deadline of 11 March 2012, if it has not entered into force before 1 January 2016, the new regulations apply and obtaining permission thus depends on the threshold of 20% not being exceeded.⁽⁵⁾

Principal homes are not affected by these restrictions and may be built independently of the percentage of secondary homes.

Guarantee of proprietorship

The constitutional guarantee of proprietorship protects private property. As a guarantee of continued existence, it protects the assets of the individual against state intervention. The owner has the right to retain, use and dispose of its property according to its own discretion.⁽⁶⁾

However, under certain strictly defined conditions, property may be impaired. Only if such an infringement exceeds a certain level or affects an individual particularly strongly will it constitute a material expropriation and entitle the landowner to full compensation.

According to case law, a material expropriation is given if the previous or future possible intended use of property is made impossible or difficult by prohibitions or specific requirements. This entitles landowners to compensation. On the other hand, there is no recognition of a serious interference and no entitlement to compensation if the possibilities of development are merely reduced and a reasonable use remains possible.

Decision

In the case at hand, the Federal Supreme Court rejected the landowner's claim for compensation. It held that landownership is defined not only by the private law regime, but also by constitutional law and the provisions adopted thereunder.

The court held that – just like any law – the law governing the guarantee of proprietorship at a certain point in time may change. The guarantee of proprietorship is not unlimited but granted only within the boundaries set by the legal system in the public interest. The legislature has the power to change the law.

Besides the constitutional guarantee of proprietorship, there are other constitutional provisions of equal importance, such as forest conservation, water protection and the protection of the environment which affect and shape the content of private property protection. Just like those provisions, the newly implemented rules on secondary homes affect the content of private property. These rules contain a spatial planning policy and a provision directly applicable at the constitutional level, defining the remaining possibilities to build secondary homes throughout Switzerland. While there was no restriction on the building of secondary homes before the initiative was adopted, the 20% limit has applied since 11 March 2012.

Pursuant to the Federal Supreme Court, such new definitions of the content of property, through which previously existing rights are withdrawn, must be accepted by those affected without compensation. There is no entitlement to the preservation of the previous legal and proprietary system.

Since the court decided that the withdrawal of the rights depended on a change in the legislation and not on the impairment of the guarantee of proprietorship, it did not deem it necessary to assess whether the requirements for material expropriation had been met.

Even though the court rejected the claim of compensation, it mentioned that compensation may be possible under exceptional circumstances. This would apply if:

- a new law leads to gross inequalities;
- the impairment reaches the extent of an expropriation; and
- this effect was not intended or considered by the legislature.

Comment

In the case at hand, the Federal Supreme Court ruled on the consequences of the withdrawal of a previously established right through an amendment of the law. The court clarified that the concept of private property is not a fixed notion inaccessible to change. If the legislature decides to amend its meaning, the legal system provides the means to follow through. If such an amendment withdraws previously established rights, landowners are not entitled to claim compensation, as this withdrawal does not constitute an impairment on private property but results from a change of its guaranteed content. There is no entitlement to a permanent definition of the concept of private property.

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Endnotes

- (1) Federal Supreme Court, 1C_216/2017.
- (2) Federal Supreme Court, 1C_364/2017.
- (3) Federal Supreme Court, 1C_216/2017.
- (4) Federal Act on Second Homes, SR 702; Federal Ordinance on Second Homes, SR 702.1.
- (5) Federal Supreme Court, 1C_238/2017.
- (6) Federal Administrative Court, A-5647/2016.

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