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## Real Estate - Switzerland



### Parliament adopts new federal rules on second homes

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#### Introduction

On March 11 2012 the Swiss people adopted – by a slim majority of 50.6% – an initiative regarding second homes. As a consequence, on January 1 2013 the Federal Ordinance on Second Homes entered into force to govern the transitional implementation of the new constitutional provision restricting second homes. In March 2015 Parliament adopted the Federal Act on Second Homes, which is expected to enter into force in early 2016<sup>(1)</sup> and will govern the final implementation of the new rules.

#### Initiative

As a result of the popular initiative to stop the unlimited construction of second homes, new Article 75b was added to the Constitution. The initiative aimed to limit the number of second homes to 20% of the housing stock in order to protect the alpine environment and prevent local inhabitants from being displaced from their homes due to increasing rental fees. It provides that no more than 20% of the total number of residential units and of the gross residential floor area in any municipality may be used as second homes.

Article 75b of the Constitution will be implemented by way of a federal act. Article 197(9) of the Constitution instructs the federal government to issue an appropriate ordinance for the transitional implementation of the new rules if the federal act does not come into force within two years after the popular vote. Therefore, the Swiss government enacted the ordinance on January 1 2013. The ordinance will remain in force until it is replaced by the federal act implementing Article 75b of the Constitution.

#### Impact on building permits and pending procedures

After the adoption of the constitutional provisions but before the ordinance entered into force, various municipalities in which second homes make up more than 20% of the housing stock continued to grant building permits, arguing that the ordinance would apply only to building permits granted on or after January 1 2013. Several cantonal administrative courts decided that this procedure was legally permissible.

The Federal Supreme Court halted this practice by ruling that the constitutional provisions limiting the amount of second homes to 20% were directly applicable. According to the court:

- the limitation regarding the building of second homes applied directly as of March 11 2012, resulting in building permits for second homes granted by the relevant municipalities between March 11 2012 and December 31 2012 being subject to challenge;
- permits for second homes granted by the relevant municipalities after December 31 2012 were void under the law; and
- permits granted before March 11 2012 were not affected by the new rules, regardless of when they took effect.<sup>(2)</sup>

#### Federal Ordinance on Second Homes

The ordinance applies to municipalities in which second homes make up more than 20% of the housing stock. It contains an annex with a list of such municipalities. The list is updated occasionally

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and, at present, lists 440 out of approximately 2,300 Swiss municipalities.

According to the ordinance, 'second homes' are defined as homes that are not permanently used by persons domiciled in the municipality or for employment or educational purposes. Excluded from the scope of application of the ordinance are homes that existed or for which a legally effective permit was obtained before March 11 2012. Such homes may be converted from primary to secondary homes and vice versa, provided that the allowable gross floor area and existing use restrictions are observed. No such conversion is allowed if it is abusive (eg, if it would result in a new primary home being built).

In accordance with the key element of new Article 75b of the Constitution, municipalities with a share of second homes that is higher than 20% may no longer grant building permits for new second homes. Generally, such municipalities may issue building permits for new houses only if:

- the house is to be used as the primary home; or
- the house is not individually equipped and is permanently and exclusively offered for short-term use by guests based on customary conditions, and either:
  - the home is managed as tourist accommodation; or
  - the owner lives in the same house (eg, 'granny flats').

The ordinance provides for exceptions and allows second homes without limiting their use in the case of:

- hotels which have operated for at least 25 years if, through no fault of the owner, the hotel business cannot continue on an economically sound basis; and
- buildings dominating the landscape and situated outside the building zone, which may be converted into second homes if the character of the landscape depends on the existence of the buildings and their permanent preservation can be ensured only by using them as second homes.

### **Federal Act on Second Homes**

The act is expected to enter into force in early 2016, as will the new Ordinance on Second Homes, which will include implementing provisions. The act follows the key principles set out in the ordinance and provides more detailed rules. However, there are certain differences between the act and the ordinance currently in place.

In contrast to the ordinance, the act does not contain a list of the municipalities with a share of second homes that is higher than 20%. Rather, the act requires municipalities to prepare an annual inventory of homes. Pursuant to the new ordinance, the Federal Office for Spatial Development will determine the number of second homes based on these inventories. If a municipality does not prepare an inventory, it is assumed that its share of second homes exceeds 20%.

The act declares that a 'secondary home' is a home that neither qualifies as a primary home nor equates to a primary home. For the purposes of the act, a 'primary home' is a home which is used by at least one person with his or her permanent place of residence in the municipality.

Homes that equate to 'primary homes' are homes:

- permanently used for employment and educational purposes;
- permanently used by a private household that uses another home in the same building;
- permanently used by persons who are not obliged to notify their presence to the municipal council, in particular diplomatic staff and asylum seekers;
- that have been empty for a maximum of two years and are habitable and offered for sale or permanent lease;
- homes used for agricultural purposes that are, due to high altitude, not accessible for agricultural purposes all year round;
- used by companies for short-term accommodation of staff;
- used as service accommodation for persons working in the hospitality industry, hospitals and institutions; and
- legally used on a temporary basis for a purpose other than living.

The act prohibits the issue of permits for new second homes in municipalities with a share of second homes that is higher than 20%. Further, where the share of second homes in a municipality is below 20% and would exceed 20% if an additional building permit were granted, such permit may not be granted.

The act provides the following exceptions to this rule:

- The grant of building permits for tourist accommodation and for granny flats is allowed provided that such homes are permanently and exclusively offered for short-term use by guests based on customary conditions.
- Structured accommodation businesses may cross-subsidise by way of building and operating or selling second homes without restricted use, provided that the business requires such homes to continue on an economically sound basis and such second homes do not conflict with other prevailing interests. However, such homes may not exceed 33% of the useable area

if they are operated by the business. If they are sold, this limit is 20%.

- Structured accommodation businesses which have operated for at least 25 years may convert up to 50% of the useable area into second homes, provided that:
  - the business cannot be converted into tourist accommodation;
  - through no fault of the owner, the business cannot continue on an economically sound basis; and
  - the conversion into second homes does not conflict with other prevailing interests.
- New second homes may be permitted in protected buildings within the building zone if the maintenance of these buildings cannot otherwise be guaranteed and if this does not conflict with other prevailing interests.

Like the ordinance, the act allows new second homes outside the building zone if the requirements under the spatial planning laws are fulfilled.

The use of homes that already existed or had obtained a legally effective permit before March 11 2012 is not restricted. Pre-existing homes may be renewed and rebuilt without restriction, provided that the useable area is not exceeded. The act also allows the extension of pre-existing homes by up to 30% of the useable area, provided that no new homes are created.

To ensure compliance, the act requires that second home-related use restrictions be annotated in the Land Register. It also sets down penalties for misconduct, such as imprisonment and monetary fines.

### Cantonal and communal rules

Although the new federal second homes regime is strict, the cantons may establish further, stricter regulations. In addition, the cantons may establish regulations to promote the use of second homes, hotel businesses and reasonably priced main homes.

Pre-existing cantonal regulations remain in effect to the extent that they do not conflict with the federal rules.

### Comment

The act provides for the more detailed regulation of second homes than the ordinance. Nevertheless, further clarification is needed. For instance, the authorities and courts will have to decide the extent to which the use of pre-existing homes may be changed and when such change is abusive.

In addition, the new constitutional provisions and the underlying materials do not provide clear guidance in all areas. This is reflected in, for example, the inconsistency between the Federal Supreme Court's position and the ordinance and the act with regard to the scope of application of the new regime. Pursuant to the court, building permits granted before March 11 2012 are not subject to the new rules and remain valid, regardless of when they took legal effect. In contrast, both the ordinance and the act require that pre-existing homes – which are not subject to the new restrictions – have obtained a legally effective building permit before March 11 2012.

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### Endnotes

(1) The referendum period expired on July 9 2015 without a referendum being filed.

(2) Decision of the Federal Supreme Court, BGE 139 II 243.

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