

Lex Weber: The Calm before the Storm

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The Swiss people have opted to limit the number of second homes in each municipality to 20%. Article 75b of the Federal Constitution was adopted in a ballot initiative on 11 March 2012 and the Federal Act on Second Homes was enacted by parliament on 20 March 2015 (hereinafter: the Act); the Federal Council shall determine the date of entry into force. The Act should be complemented by an ordinance of the Federal Council. Among other things, it leaves a number of subsidiary legislative competencies to the cantons, which are free to impose additional restrictions. The (provisional) Ordinance on Second Homes dated 22 August 2012 over the validity of which a lot of ink has flowed, shall be automatically repealed as soon as the new Act enters into force.

The Act will have a particularly marked impact on those municipalities that have second homes in excess of the 20% threshold (hereinafter "the affected municipalities"). The impact will manifest itself primarily in the form of (i) a ban on building new second homes, and (ii) certain restrictions in regard to the possibility of modifying existing homes. It is worth noting that the Act imposes no restrictions on building/converting premises that are not

homes (e.g. commercial buildings, warehouses, offices etc.).

A list of the affected municipalities is to be drawn up and then subject to review intermittently, on the basis of an inventory that each municipality must prepare annually, and which allows it to determine the ratio of homes to second homes within its borders.

Impact on new buildings

In the affected municipalities, the only homes for which a building permit can still be obtained (a home being defined as a place which includes a kitchen):

- *primary residence or lodgings deemed to be equivalent to primary residences*: a primary residence is a lodging in which at least one person effectively resides. The concept of lodgings deemed to be equivalent to primary residences targets in particular those cases such as lodgings occupied for the purpose of gainful activity, training, by diplomatic personnel, or by company employees etc.;

- *Lodgings used for tourist accommodation*, of which two types are allowed:

- a) *Lodgings rented out for a short period of time in the context of an organised hospitality establishment* (this concept is similar to that of a hotel). It is up to the Federal Council to define the concept of organised accommodation establishment. This definition will probably require the effective existence of services common to hotels (reception, restaurant, room service etc.), as well as compliance

with certain architectural requirements (these lodgings may not allow one to live in them autonomously without recourse to the hotel's services);

b) Tourist accommodation *located in the same building as the owner's* principle place of residence (of the type "*bed and breakfast*"), the purpose being to allow the local population to play a role in hospitality;

- *Second homes*, but only in the following cases:

a) In order to afford the possibility for a fair return to an owner wishing to invest in the construction or renovation of a hotel, the Act allows for the construction of *second homes linked to this hotel*. The conditions vary depending on whether or not this concerns an existing or old hotel:

- An existing establishment may reallocate 50% of its primary usable surface area for use as a second home if it can demonstrate that it has been used for at least 25 years, and that it is no longer viable without the owner and/or operator being at fault for this lack of viability;

- A new establishment may be authorised to allocate between 20% (in the event of sale) and 33% (in the event of rent) of its primary usable surface area for use as a second home. In order to qualify, one must demonstrate that income from this real estate operation shall be reinvested in the construction of the hotel, that the hotel would not

be viable without said allocation, and that an architectural and functional singularity exists between the hotel and the second homes;

b) The owner of a *protected or heritage building* may be authorised to convert it to a second home subject to the condition that he or she does not prejudice the protected architectural aspects and can demonstrate that conserving the building is contingent on the possibility of converting it. This provision is addressed for example, to the "*mayens*", "*rustici*" and other chalets typical to mountainous areas.

Building permits for homes that fall within the above mentioned categories shall be subject to constraints that must be indicated in the land register and must also be complied with by any [future] purchaser.

In the affected municipalities, the construction of other homes shall henceforth be strictly prohibited, namely:

- Second homes (beyond the exceptions mentioned above, linked to a hotel or protected building). It is worth noting that the Act defines the term "second home" in negative terms, as "*any home that is not the primary residence, nor lodgings deemed to be equivalent to primary residences*";
- Homes deemed to be "holiday homes" or "quasi-hotels" that are offered for rent to third parties for some of the year, and occupied by their owners for the rest of the year. This variation, that those behind the ballot initiative themselves considered to be allowed

under the "Lex Weber", was [ultimately] not authorised by the Swiss parliament.

Impact on existing homes

The Act makes an exception for "homes built under the law previously in force", as well as for homes which existed before 11 March 2012, or which were in possession of a valid building permit on this date. For these homes:

- They may be freely disposed of: they can be used freely as primary residences or second homes. The owner of such a home may thus rent it out to persons wishing to use it as their home without fear of losing its status as a second home. By the same token, if he occupies the place himself as a primary residence, he is not deprived of the possibility to sell it thereafter as a second home;
- They can be renovated, converted or rebuilt without losing their status under the law previously in force. It is even possible to create new units of second homes at this time (e.g. by dividing a second home into two new second homes);
- The primary usable surface area can be expanded by 30%, subject to the condition that this does not lead to the creation of any new second home units. If the expansion exceeds 30%, the home shall lose its status under the law previously in force, and it shall no longer be eligible to be classified as a second home.

Conclusion

The Act resolves a large number of legal uncertainties in existence since 11 March 2012. Nevertheless, it still contains a number of lacunae and internal contradictions, probably due to legislative deliberations that took place in an atmosphere of tension. Practitioners have nothing but their regrets in this regard. It will be up to the courts to address these shortcomings.

The Act otherwise contains a number of harsh criminal provisions, intended to dissuade anyone from the temptation to circumvent it, particularly by establishing fictitious residences.