

Update

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Second Home Initiative: Ordinance on Second Homes adopted by Federal Council

On 22 August 2012, the Federal Council adopted the ordinance on Second Homes. As implementing legislation, the ordinance should clarify various questions in connection with the initiative on second homes accepted by the Swiss voters (see Newsflash May 2012). This updated Newsflash sets out the main features for the key regulations of the ordinance as well as persisting legal uncertainties in this respect.

1. Background

By accepting the second home initiative, the Swiss voters resolved to restrict the second home quota to 20% of the homes and the gross floor space of each Swiss municipality. The respective articles of the Federal Constitution (Art. 75b and 197 para. 9 Cst.) need to be concretised through the federal implementing legislation. The working group established for this purpose by the Federal Department of the Environment, Transport, Energy and Communications has elaborated a draft of the respective implementing ordinance in cooperation with several interested organisations and submitted it to the Federal Council for its review. After having incorporated various changes into the draft ordinance, the Federal Council approved the final draft and adopted the Ordinance on Second Homes on 22 August 2012. This ordinance shall clarify the "most urgent questions" in connection with the second home initiative and will enter into force on 1 January 2013.

2. Scope of the Ordinance on Second Homes

The Ordinance on Second Homes applies to the construction of new second homes in municipalities with a second home quota of over 20% of the homes. The 20% restriction on the gross floor space has, however, not been incorporated into the ordinance. A list of municipalities whose second home quota is suspected to exceed the maximum of 20% is attached to the ordinance. This list will be updated by the Federal Office of Spatial Development at least once

per year. By providing evidence, the municipalities may, however, disprove the assumption that their second home quota exceeds 20%.

While only a few municipalities will take the opportunity to disprove the presumed qualification, there is a certain risk that further municipalities (in particular, municipalities close to well-known tourist centers) will be added to this list based on the annual evaluation. It is still unclear how pending construction projects will be treated in such case.

3. The Term Second Home

According to the ordinance, all "homes, whose user is not domiciled in the municipality" are deemed to be second homes pursuant to the respective article 75b of the Federal Constitution. Therefore, the domicile in the sense of the Swiss Civil Code constitutes the main criterion, i.e. the place at which a person is living with the intention to stay permanently and having his/her center of life. However, the ordinance goes beyond this definition by requiring that the owner actually uses his domicile throughout the whole year. In case of doubt, the evaluation of various elements (e.g. deposit of identity papers, leisure time activities, and others) is necessary to determine the domicile. This can lead, in case a person is living at several places, to some uncertainty.

4. Construction of New Second Homes

In principle, the ordinance provides that in municipalities with a second home quota of over 20% construction permits for new second homes must not be granted. The legislator provides, however, for certain exceptions: In particular, despite a second home quota of over 20%, construction permits may be granted if the respective object is a qualified second home managed in a qualified touristic manner and (a) it is offered in the context of structured forms of accommodation (apartment hotel concept) or (b) the owner is living in the same house and the second home is not fitted out individually. The term *managed in a qualified touristic manner* means that homes are offered permanently at customary market conditions, in particular during the peak seasons (no specific minimum occupancy rate is required). The criterion of *structured forms of accommodation* is met, when the homes are not individualized but make part of a hotel-like business concept (incl. basic infrastructure such as a reception) with a sufficient business size. In case of a concept of *structured forms of accommodations*, the use of the apartment by the owner is limited to three weeks during peak seasons.

This exception to the prohibition to grant permits for second homes and its defining key terms need, however, to be clarified in further detail by the practice of the authorities and the courts.

5. Conversion of Existing Second Homes

The text of the ordinance provides that homes which have existed on 11 March 2012 or a legally valid construction permit for such home has been duly granted on that date may be used as first or second homes or converted from a first home to a second home and sold. However, a conversion of existing homes for unlawful purposes (e.g. sale of first homes as second homes, if this causes the construction of a new building in order to replace living area) is prohibited. In case a conversion of a building to second homes leads to an increase of apartments in comparison to the initial situation, such conversion will be treated like a construction of new second homes and may only be per-

mitted in exceptional cases as outlined above. Further, it should be taken into account that this regulation at ordinance level may be modified and tightened in connection with the adoption of the respective implementation legislation at statutory level. The effect of the possibility to convert a first home, already existing on 11 March 2012, into a second home as well as the exceptions mentioned above in item 4 are vehemently rejected by the persons originally responsible for the second home initiative, in a manner that a strong lobbying in the context of the parliamentary discussions on the adoption of the implementing law must be feared.

6. Intertemporal Law

The ordinance provides that applications filed prior to 11 March 2012 shall be considered pursuant to the law applicable prior to the acceptance of the second home initiative. Applications for the construction of second homes filed between 1 January 2013 and the date of the entry into force of the statutory regulation shall be null and void. Building permits granted for an unlimited term or for a limited term until 2021 are deemed "questionable" pursuant to the explanatory report of the Federal Office of Spatial Development; therefore, it is unclear how these permits will be treated. The ordinance adopted by the Federal Council and its explanations remain silent on whether applications filed after 11 March 2012, but before 31 December 2012, will be treated in accordance with the new regulation (which has most likely to be assumed based on the wording of the constitutional text). Each municipality applies this rule differently, what has caused various appeal proceedings. This question remains unsolved until the Federal Supreme Court has taken its first decisions in this respect.

In case you have any further questions in this regards, please do not hesitate to contact us.

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