The Real Estate Law Review

Fourth Edition

Editor
David Waterfield

Law Business Research

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This article was first published in The Real Estate Law Review - Edition 4
(published in February 2015 – editor David Waterfield).

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-39-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AIDAR SBZ ADVOGADOS

AL TAMIMI & COMPANY

BALCIOĞLU SELÇUK AKMAN KEKİ

BONELLI EREDE PAPPALARDO

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VIEIRA DE ALMEIDA & ASSOCIADOS, RL

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ZÁRECKÝ ZEMAN ĎURIŠOVÁ

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EDITOR'S PREFACE

The fourth edition of *The Real Estate Law Review* is testament to the book's success and the significance of real estate as a global asset class. A great deal has happened since the first edition appeared in 2012, and this fourth edition coincides with renewed confidence in the real estate market. The real estate market is often described as cyclical, and there is no doubt that we are now seeing positive investor sentiment in a market enjoying upward momentum.

The fourth edition of *The Real Estate Law Review* features 35 jurisdictions, and we are delighted to welcome a number of new notable practitioners who have helped bolster the strength and depth of this invaluable publication. Each chapter of *The Real Estate Law Review* has been updated to focus on key developments in that jurisdiction and their impact on the relevant domestic and wider global real estate market. *The Real Estate Law Review* offers real estate practitioners and their clients an immediate and accessible summary of the position in the many countries covered, as well as the global real estate market as a whole. The globalisation of the real estate market continues apace, and it is fundamentally important to develop an understanding of the legal and commercial opportunities and challenges pertinent to each country, and how each local market forms an integral part of the global picture.

This fourth edition seeks to provide an overview of the state of the global real estate investment market. Although there is without question significantly more good news around, the financial and economic turmoil of recent years serves as a reminder of how fragile markets can be, and a number of obstacles remain on what may prove to be a bumpy road to global recovery. Sustainable growth across the eurozone remains illusory, Japan continues to flirt with recession, the fear of a hard landing in China and other developing economies remains, there is continuing instability in Ukraine and the Middle East, and the Ebola outbreak in West Africa is a global concern.

Once again, I wish to express my deep and sincere thanks to all my distinguished colleagues who have contributed to this edition and the success of *The Real Estate Law Review*. I would also like to thank Gideon Roberton and his publishing team for their tireless work in coordinating the contributions and compiling this fourth edition.

David Waterfield
Slaughter and May
London
February 2015

Chapter 31

SWITZERLAND

Cécile Berger Meyer and Andreas Rötheli[1]

I INTRODUCTION TO THE LEGAL FRAMEWORK

Swiss real estate law is regulated by the Swiss Civil Code, dated 10 December 1907 (CC). The relevant provisions are to a very large extent those that entered into force with the CC in 1907; Swiss property law has not undergone any major revision since then – a testament to the system's clarity and efficiency in practice.

Real estate ownership can take any of three main forms in Switzerland: land ownership, ground lease ownership or condominium-principled ownership.

Land ownership is the most standard form of ownership, and encompasses ownership of the land and its integral parts (i.e., mainly the constructions erected on the relevant plot) in accordance with the accession principle prevailing under Swiss property law.

Ground lease ownership is a form of ownership that enables the owner of a plot to dissociate ownership of the ground from ownership of the constructions erected on the plot. Technically, a ground lease is a long-term easement recorded in the land registry that entitles its beneficiary to erect and own constructions on the base plot encumbered by such easement. A ground lease may only be registered as a separate entry in the land registry if it has been granted for a minimum duration of 30 years. In such case, it can be sold as a plot to a third party (subject to the consent of the owner of the base plot), and can benefit from and be encumbered by all the various types of easements and other property restrictions permitted under Swiss property law. The most interesting feature of the ground lease is the fact that it is possible for it to be encumbered, as can be done with a standard plot by way of a mortgage, thus permitting its owner to benefit from its enforcement value.

The ground lease is a form of ownership frequently used for strategic development zones, such as industrial zones in Switzerland's main cities. The canton of Geneva, for

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example, has made extensive use of this form of ownership by creating six industrial zones composed of 277 ground leases and regulated by special regulations enacted by the state of Geneva in light of the specificities of each such zone. A public foundation, the Foundation for Industrial Lands in Geneva, supervises these ground leases and, more generally, the compliance with applicable zoning regulations of the various tenants, owners and occupants of these zones.

Condominium-principled ownership is a form of land ownership by which one right of ownership is owned by a community of owners (as opposed to one owner in the standard land ownership or the ground lease ownership). Condominium-principled ownership is typically used for residential buildings or mixed commercial and residential buildings. It is particularly used in real estate development projects, since it enables the developer to sell the constructed building flat by flat or unit by unit. Condominium-principled ownership is also used in Geneva to split ground leases into various condominium ownership rights, thus allowing small and medium-sized enterprises to settle down and own their commercial premises.

In rem rights on real estate are validly created only upon their registration in the land registry, except in situations when such rights are necessary for technical or financial reasons (pipe easements, etc.), in which case they are binding on good faith acquirers even in the absence of a registration in the land registry. Other than in such exceptional circumstances, *in rem* rights do not exist in the absence of a registration. Accordingly, the land registry provides for exhaustive information on title, easements, mortgages, annotations (pre-emption rights, selling restrictions, artisan legal mortgages) and mentions (restrictions of ownership). Public law restrictions are, however, not registered in the land registry, and so must be part of a separate due diligence process to be performed at the federal, cantonal and communal levels (zoning restrictions, restrictions related to asbestos and polluted sites, construction law restrictions, etc.).

Swiss law does not provide for a state guarantee of title. That said, a buyer is in practice fully protected by law if it has acquired a real estate asset in good faith relying on the information provided by the land registry. A recently certified land registry extract is, therefore, always requested by a buyer before the completion of a real estate transaction to ensure that, at the time of the execution of a sales deed, the plot's situation has not changed (i.e., no additional mortgages or easements have been registered, and the seller still owns the plot); however, if a buyer knows – or should have known – that an entry in the land registry is incorrect, it is not protected by its reliance on the incorrect information or registration. Land registry excerpts are, in some cantons, no longer fully reliable, because some land registries face important delays (from one or two days up to one or two weeks) in the registration of transactions with the land registry. Indeed, any real estate transaction taking the form of an asset deal in Switzerland must be recorded officially in the land registry through a two-step registration process. The first step simply records the entry in the land register, by mentioning on the relevant plot that a matter is pending, attributing at the same time the order of precedence to the entry. The second step relates to the validation, on the merits, of the first entry. Delays were, until 2012, only encountered at the second stage. Since 2012, however, some cantons, such as Geneva and Vaud, are no longer up-to-date with the first stage, meaning that a potential buyer, when ordering a land registry excerpt, needs to obtain an additional confirmation

from the land registry that, as of the date of the transaction, no pending matters are yet to be registered on the plot at stake.

Transactions involving real estate are, by default, governed by the law of the place where the property is located; however, a choice of law provision is possible, except in the case that formal requirements are imposed by the law of the place where the property is found. In practice, real estate transactions that take the form of asset deals for Swiss properties are governed by Swiss law, and real estate transactions completed as share deals are subject to the law of either of the parties or to the law of the place of incorporation of the target. Representations and warranties regarding the underlying real estate asset in share deals remain in any event tightly linked to Swiss law, as applicable property and territory allocation regulations are, by their nature, those of the place where the property is located.

II OVERVIEW OF REAL ESTATE ACTIVITY

Switzerland's economy held up well in 2014, despite the bad economic situation prevailing in the eurozone. The Swiss real estate market has followed this general trend: although real estate transactions took place at a slower pace during 2011 and 2012 (in particular in mountain areas), these were considered to being exceptional years, and 2014 has qualified as a good year for real estate actors.

On 15 January 2015, the Swiss National Bank (SNB) decided, unexpectedly and abruptly, to suspend its actions, maintaining the Swiss franc to euro exchange rate at 1.20. On the same day, the Swiss Market Index lost close to 10 per cent, while the Swiss franc to euro rate dropped to close to 1.

Swiss export industries fear that negative consequences will result from the SNB's decision. However, the SNB justified its decision on the impossibility, in the long term, of sustaining the above-mentioned 1.20 rate, and analysts consider that the SNB's decision was the only possible decision in light of measures to be announced by the European Central Bank to re-launch consumption within the eurozone.

Swiss real estate actors do not anticipate major negative consequences on the Swiss real estate market as a result of the above decision. Rather, some consider that this decision will, to the contrary, lead investors to invest in Swiss real estate, as the country remains a stable country with a solid economy.

The high real estate prices in Switzerland continued to persuade some companies to enter into sale and lease-back transactions for their premises. Major properties were acquired not only by foreign investors considering Switzerland's real estate as stable assets suitable for investment without high risk, but also by Swiss institutional investors considering real estate to be a safe alternative investment to listed securities. Real estate has become an evident investment trend for both institutional (insurance companies, pension funds, etc.) and private investors seeking stable returns in an environment generally characterised by economic turmoil. Switzerland has consolidated its position in this respect, being regarded more than ever as a country with a stable economic and political situation. Recent major real estate transactions in Switzerland involved mainly Swiss or foreign institutional investors, or both.

In touristic regions, the legal uncertainties resulting from the acceptance of the Weber Initiative in March 2012 have now had proven effects, and we have witnessed a reduction in real estate transactions, and in particular in mountain regions (see Section VIII, *infra*).

i New minimum standards for mortgage loans

The Swiss Banker's Association enacted new minimum standards applying to real estate financings granted by banks in Switzerland in June 2012. These new standards, which entered into force on 1 July 2012, provide for minimum requirements in terms of equity and amortisation to be applied to all real estate financing granted by banks in Switzerland for Swiss real estate to ensure that an increase in interest rates does not lead to a major economic crisis resulting from defaults under Swiss mortgage financings. The standards of 1 July 2012 have been replaced and slightly modified by new standards in force since 1 September 2014.

The new standards oblige borrowers to pay, in cash and from their own funds (the notion of 'own cash funds' has been further specified in the 2014 standards), a minimum of 10 per cent of the value of the property, thus implying that the practice allowed until 1 July 2012, whereby residents seeking to buy their own home could – to meet the 20/80 debt-to-equity ratio prevailing in Switzerland – pledge their pension fund (called pillar 2 assets in the Swiss pension fund regime) as replacement for their 20 per cent equity down payment. This is now no longer possible, and all persons (or companies) seeking mortgage financings over Swiss real estate from a bank practising in Switzerland must, since 1 July 2012, make a 10 per cent minimum down payment in cash. Cash payments are also mandatory for the difference between the mortgage bank's valuation of the real estate asset to be financed and the sales price in situations where such valuation is below the sales price. The new standards further require borrowers to amortise their mortgage financings down to two-thirds of the value of the financed property within 15 years from the day of financing (the 2012 standards provided for 20 years). The amortisation must start at a maximum 12 months after the payment.

In addition to these new minimum standards, the Swiss Federal Council, at the request of the SNB, partially activated the countercyclical capital buffer (CCB), taking effect on 30 September 2013 and strengthened on 22 January 2014.

Based on the Ordinance on Capital Adequacy and Risk Diversification for Banks and Securities Traders, the SNB may request the Swiss Federal Council to require banks to hold, in the form of hardcore capital, a capital buffer of up to 2.5 per cent of their Swiss risk-weighted assets.

The activation of the CCB by the SNB resulted from the SNB's assessment that the growth in mortgage loans and real estate prices over the past few years has been so strong that it may affect the stability of the overall Swiss banking sector, and hence the Swiss economy more generally. The SNB intends, in that context, to counter a potential instability in the Swiss economy resulting from an increase in interest rates in the future.

As a result of the above, the Swiss Federal Council resolved on 13 February 2013 to activate the CCB, currently amounting to 1 per cent of the risk-weighted, direct or indirect mortgage-backed positions secured by residential property located in Switzerland. It was estimated that mortgage loans of 600 to 650 billion Swiss francs were involved,

thus meaning that additional equity capital of approximately 3 billion Swiss francs is necessary to meet the new requirements.

Real estate market players do not expect the CCB to have a major influence on real estate prices or on the real estate market in general, but it may lead certain banks to refrain from granting additional mortgage loan financings given the additional capital equity to be issued by the bank as a result of the CCB. The CCB has been heavily criticised in the real estate sector, as it is considered to be an inadequate measure to fight against a non-existent threat to the Swiss economy.

On 22 January 2014, the Federal Council decided to increase the 1 per cent rate up to 2 per cent of the risk-weighted, direct or indirect mortgage-backed positions secured by residential property located in Switzerland. Further increases remain possible as the CCB allows for a rate of up to 2.5 of the risk-weighted assets.

III FOREIGN INVESTMENT

Overseas investors are mainly restricted in real estate ownership as a result of the federal statute on the acquisition of real estate by foreigners (Lex Koller).

As a matter of principle, the Lex Koller restricts the acquisition of residential real estate in Switzerland. Despite its liberalisation in 1997 and 2002, the Lex Koller remains fully applicable today. Politicians launched an initiative to abolish it between 2005 and 2006; its abrogation was, however, refused by Parliament in 2008, and the Swiss Federal Council issued a release on 13 November 2013 in which it recommends that the Parliament renounce the abrogation of the Lex Koller. It should finally be noted that the Lex Koller has recently been amended to adapt it to real estate funds (and investment funds and unit trusts) (see Section VIII, *infra*).

The 1997 and 2002 Lex Koller revisions considerably opened up Switzerland's commercial real estate market to foreign investors. The residential real estate market, however, remains heavily restricted.

Determining whether the Lex Koller applies to a property is, therefore, important, as commercial properties can be acquired with no (or few) restrictions, while residential properties can only be acquired if an authorisation is issued. In practice, authorisations to acquire residential properties are granted on very limited grounds. Restrictions affecting real estate assets used for commercial purposes concern commercial premises that are empty, that contain residential parts or areas, or that are acquired in anticipation of a company's expansion in the short or medium term (but with no concrete plans to build at the time of the acquisition).

In practice, holding companies often face a situation in which a company owns, as part of its assets, one or two residential buildings. Some cantons allow a company whose purpose is an operational one (e.g., to run an industrial plant or a hotel) to own, among its assets, up to 30 per cent of non-commercial (residential) real estate assets. The reference value for calculating this 30 per cent threshold is the market value of the real estate asset. Applied to holding companies, the 30 per cent threshold is calculated on a consolidated basis, that is, on all real estate assets owned by the holding company's subsidiaries. Since cantons are entrusted with the responsibility and power to apply and ensure compliance with the Lex Koller, the local practice must be checked prior to every transaction.

The Lex Koller also limits mortgage financings granted by foreign investors or banks. Foreign mortgage financings are usually limited to 80 per cent of the value of the underlying residential real estate assets; however, the financing of commercial real estate assets is not limited as, since 2002, this type of real estate is no longer encompassed by the Lex Koller restrictions. The foreign mortgage financings limit varies from canton to canton, with some cantons applying a threshold of two-thirds of the value instead. Local practice must, therefore, be checked prior to any foreign mortgage financing transaction.

IV STRUCTURING THE INVESTMENT

i Investment vehicles and structures

Real estate investments are mainly made via collective investment funds or standard special purpose vehicles (SPVs). The acquisition of main or secondary residences for own use, as opposed to the acquisition of real estate for investment purposes (i.e., rented commercial or residential premises), is usually done in the name of the future owner, particularly given that the Lex Koller restrictions do not allow foreigners to acquire their main or secondary residence through an SPV.

Collective investment funds are becoming extremely popular in Switzerland, whether in the form of traditional investment funds or unit trusts (SICAVs).

Swiss real estate investment funds or SICAVs are usually listed on the Swiss stock exchange, allowing them to benefit from certain simplifications for Lex Koller purposes. They most often acquire their properties by way of asset deals, as opposed to acquiring shares of real estate companies (each owning a single or a few properties).

Foreign investment funds may only acquire commercial real estate, so they usually acquire Swiss properties via Swiss or foreign SPVs. Tax considerations usually determine the structure of foreign investment funds, depending on which double taxation treaty with Switzerland applies.

Local investors usually acquire real estate directly in their own name, or in a business capacity via SPVs commonly known as real estate companies. The choice between acquiring property through a share deal or an asset deal largely depends on the type of property and the projects contemplated for the property.

ii Tax aspects

Real estate transactions trigger taxes payable by both seller and buyer, and authorities have a legal lien on the property for the amount of these (unpaid) taxes. Such a legal lien, provided it relates to tax periods after 1 January 2012, must be registered in the land registry within two years to be valid and enforceable against a new owner of the plot. Taxes dating back to tax periods before 1 January 2012 are, however, subject to the old regime: they are protected by a legal lien that does not have to be registered in the land registry to be valid and enforceable. Taxes so triggered determine the structuring of the real estate transaction.

At the federal income tax level, gains realised by the disposal of real estate property that was a business asset are taxable. Gains realised on the disposal of real estate belonging to an individual who held the real estate as a private asset are exempt from income tax; however, gains of professional real estate dealers are subject to federal income tax.

At the cantonal income or capital gains tax level, the disposal of real estate is subject to income or capital gains tax. It is, in principle, levied on the difference between the base cost and the purchase price, that is, the gain from the sale of the real estate, and is payable by the seller. The tax rate depends on cantonal legislation, the gain and the period of ownership. Capital gains tax might be deferred if an owner-occupied property is sold and the revenue from the sale is reinvested within an adequate period for the purchase or building of a replacement property.

The acquisition and disposal of real estate is exempt from VAT. The seller may, however, under certain conditions, opt to pay VAT on the transfer of business premises to a buyer who is also subject to VAT. If it is payable on a particular transfer of real estate, it is paid by the seller (unless the obligation can be notified to the authorities by a notification procedure). The current standard rate is 8 per cent of the purchase price of the real estate less the value of the land.

A VAT option allows the owner of the plot to recoup VAT paid on construction costs and is, therefore, often chosen for newly constructed or recently refurbished buildings. The owner must, as a result, submit all its leases and rent payments for VAT to avoid any VAT self-assessment procedure.

V REAL ESTATE OWNERSHIP

i Planning

Planning control is governed by the federal law on planning, which is implemented by each canton and commune according to the same general principles.

Each canton adopts its general allocation plan, which is then further implemented by each commune through communal allocation plans.

Communes may further impose additional planning requirements for construction in excess of certain areas or located in certain zones. Geneva regulations, for instance, provide for the requirement to have a local plan adopted for any important constructions located in a development zone. Some communes further impose a requirement to adopt a local allocation plan, completing the communal allocation plan for areas with particular characteristics (e.g., lakeside plots).

Change of use is becoming heavily regulated and subject to increasing restrictions because of the small size of the Swiss territory. Switzerland's most dynamic regions face an increasing lack of housing accommodation, and have consequently enacted laws restricting changes of use and communal allocation plans to ensure that housing accommodation is included in any new construction.

Geneva, therefore, prohibits any change of use of residential premises into commercial premises unless such change of use is compensated for by a simultaneous creation of new residential premises (same type, surface and quality) in the same neighbourhood. Geneva further enacted a ground-use plan that entered into force in 2010 that provides that any newly built area must contain a minimum of 50 per cent and a maximum of 80 per cent of housing accommodation.

Some cantons also restrict the use of industrial zones by prohibiting administrative use of premises in favour of small to medium-sized industrial companies and craft industries. Geneva faces major restrictions in this respect and, given the tight market, new

companies requiring important administrative premises encounter increasing difficulties in finding premises to meet current and future (expansion) needs.

ii Environment

Contaminated land is dealt with in the Swiss environmental statute and its implementing ordinances. Contaminated sites must as a matter of principle be cleaned up if they cause significant harm to the environment or if there is a concrete danger that such harm may appear.

The law distinguishes between the performance of the measures relating to the cleanup and the bearing of the costs. Investigations, as well as monitoring and cleanup measures, must be carried out by the holder of the site, who must provide advance payment for such measures. The final bearing of the costs is then determined by an allocation-of-costs proceeding, which aims to identify which person or entity caused the contamination through its behaviour (troublemaker by behaviour). In situations where more than one person or entity appear as troublemakers by behaviour, each will be held liable in proportion to its respective liability. The holder of the site (troublemaker by situation) will in such instance only have a residual liability.

Concerned parties may also come to an agreement as to how liability should be allocated between themselves. Private law arrangements, however, may not supersede any decision on allocation of environmental costs issued by a competent authority. As a result, such agreements only have an impact on the parties' internal relationships.

iii Tax

Most cantons (and municipalities) levy a real estate transfer tax payable upon each transfer of ownership.

The respective real estate transfer tax rates vary by canton, and are usually between 1 and 4 per cent of the purchase price or the taxable value of the real estate. There are exemptions from, or reductions of, transfer tax for specific real estate transfers in cases such as reorganisations, expropriations, compulsory auctions and transfers between relatives or investment funds (subject to advanced tax rulings).

In principle, the buyer is liable for the transfer tax; however, in some cantons, transfer taxes are split between the buyer and the seller.

There is no transfer tax triggered in a share deal of a company owning real estate if the legal owner who is registered in the land registry remains the same, unless the company qualifies as a real estate company. Most cantons qualify a company as a real estate company if most of its assets are real estate or if its profits are mainly made from real estate transactions.

In addition to such taxes, notary fees and land registry fees are due in asset deals. Who pays such fees mainly depends on local practice and the contract between the parties. In some cantons (e.g., Geneva), the buyer usually bears all the fees. In others, the buyer and seller share the fees equally.

iv Finance and security

Real estate financing is usually subject to the assignment of mortgage certificates for security purposes and to the assignment of rental income claims for security purposes.

Security interests by way of transfer of ownership on mortgage certificates for security purposes are extremely frequent in practice. In Switzerland, however, issuance of mortgage certificates is costly, since in most cantons, transfer tax is levied on their creation at a rate of 1 to 2 per cent of the face value of the certificate. The security interest is perfected by execution of a written deed of assignment and delivery of the mortgage certificate. Using dematerialised mortgage certificates, the delivery of the securities is replaced by a registration of the new secured creditor with the land registry.

Assignment of rental claims, insurance claims and bank account claims usually completes the assignment of mortgages for security purposes. Security agreements typically provide that insurance companies and banks may be notified immediately of the assignment, while tenants may only be notified of the assignment upon the occurrence of an event of default.

VI LEASES OF BUSINESS PREMISES

Switzerland's lease agreements are governed by specific rules in the Swiss Code of Obligations, which are highly favourable to tenants and for which no derogations are permitted. Negotiations on lease agreements are therefore limited to non-mandatory provisions of the Code of Obligations. Lease disputes are treated by specific courts, which exclusively decide on lease matters and are composed of three judges, among which one will defend the interests of tenants and another the interests of landlords.

Leases for commercial premises are usually entered into for five-year periods, to allow the landlord to adapt the agreed rent to the consumer price index. Indexation can only be done under Swiss law for leases of a minimum duration of five years. Rent increases can only be effected at the end of the agreed term unless specific provisions allowing for intermediary increases have been agreed. Parties may, for instance, agree to a staggered rent, or to increase the rent should the landlord carry out added-value works in the rented premises during the course of the lease.

Various types of options may then be agreed between the parties. Real options are often requested by the tenant, while landlords prefer having unreal options, as such options allow them to break the lease at the end of a five-year period and rent the premises at the new market price.

Swiss lease law provides tenants with an array of protective measures. Tenants may, for example, challenge their initial rent within 30 days from the date on which they moved into the premises. Tenants may further challenge any additional rent increase in the future as well as the termination of their rental agreement. These rights of challenge trigger many court precedents in practice, and give a Swiss lease a very strict and formal framework that strongly limits a landlord's rights.

Swiss law does not have a security of tenure right. Nonetheless, tenants of commercial properties may seek an extension of their lease by a maximum of six years (in one or two extensions) in situations where the termination of their lease would cause them to suffer hardship.

VII DEVELOPMENTS IN PRACTICE

i Implementation of the Weber Initiative protecting the Swiss landscape

Since 11 March 2012, the Swiss real estate sector has mainly been involved in the implementation of the successful initiative launched by Franz Weber entitled 'Stop the Boundless Construction of Second Homes' (Weber Initiative).

The Weber Initiative added two new provisions to the Constitution. The first restricts the construction of second homes to 20 per cent of the homes and the gross floor area of each Swiss commune. The second provides that construction permits for second homes shall automatically be null and void if they are issued between 1 January 2013 and the date of entry into force of the implementing federal statute. The potential impact of the Weber Initiative in practice is important, particularly in touristic areas of the country where the 20 per cent threshold has already been exceeded (i.e., mainly in Switzerland's famous Alpine ski resorts), as no new second homes should be allowed in the future in communes where the 20 per cent threshold has been exceeded. The provisions raise numerous legal questions that will be extremely difficult to solve in the future.

Between 11 March 2012 and 31 December 2012, communes issued numerous construction permits, making the best of the time gap existing between 11 March 2012 and the 1 January 2013 Weber Initiative deadline. The Weber Initiative's committee strongly criticised the delivery of these new construction permits during this time frame, and filed numerous appeals against such permits. The Swiss Supreme Court issued three key decisions on 22 May 2013, and ruled in favour of the Weber Initiative's committee: it decided that the new constitutional provisions had already entered into force on 11 March 2012, and accordingly cancelled all the construction permits issued between 11 March 2012 and 31 December 2012 in communes where the 20 per cent threshold of second homes is considered as already exceeded, and for which an appeal had been filed by the Weber Initiative's committee. Construction permits for which no appeal was filed have, however, entered in force, and we have not yet heard of any court decision considering that using these permits constitutes an abuse of right or is illegal.

Given the complexity of the matter, and in anticipation of the adoption of the implementing federal statute regulating the legal situation in greater detail, a temporary ordinance entered into force on 1 January 2013 that aims to clarify the legal situation until the enactment of the formal implementing statute of the Weber Initiative.

In summary, the temporary implementing ordinance provides that in municipalities with a second-home quota of over 20 per cent, construction permits for new second homes shall no longer be granted as of 1 January 2013 until the implementing statute has been passed, when the provisions of the implementing statute will exclusively govern the matter. The ordinance provides, however, for certain exceptions. In particular, despite a second-home quota exceeding 20 per cent, construction permits may be granted if the respective object is considered as a 'qualified second home' managed in a 'qualified touristic manner', and it is offered in the context of structured forms of accommodation (e.g., apartment-hotels, which the owner may not use personally for more than three weeks in peak seasons), or its owner is living in the same house and the second home is not fitted out individually.

The first draft of the implementing federal statute (along with its ordinance) was made available for consultation on 26 June 2013. All interested parties had the opportunity to review and comment on this draft version until 20 October 2013.

The implementing federal statute provides that in municipalities with a second-home quota of over 20 per cent, construction permits for new second homes shall no longer be granted. In line with the temporary ordinance, the federal statute also provides for certain exceptions. It especially indicates that construction permits may be granted despite a second-home quota exceeding 20 per cent as long as the new homes are allocated for touristic accommodations (implying an obligation to offer such homes for rent in the market at market terms on a long-term basis for short-term stays, in particular during peak seasons) and provided at least one of the following conditions is met: its owner is living in the same house, it is offered in the context of structured forms of accommodation (e.g., hotel accommodation) or it is offered on a commercial platform intended for the international market.

In respect of housing accommodation built before 11 March 2012 (i.e., before the entry into force of the constitutional provisions related to second homes), the first draft of the implementing federal statute offers two alternatives: the first offers a great deal of flexibility, insofar as it provides that such housing accommodation may freely be used (as primary or second homes) and may be subject to minor extensions. The second, however, provides that housing accommodation created under the former applicable law may only be altered within the limits of their existing surface. It further stipulates that changes of allocation (from main residence to second home) are only permitted for restrictive causes (death, change in marital status, etc.). On one hand, the Weber Initiative's committee strongly communicated its displeasure regarding the first draft of the implementing federal statute: it believes that the essence of the initiative has not been complied with, as the federal statute offers too many opportunities to bypass the 20 per cent second-home threshold. On the other, many economic circles – as well as real estate owners in touristic areas – welcomed especially the first alternative due to its flexibility.

However, in our view it is unfortunate that the first draft of the implementing federal statute has not yet been coordinated with the Lex Koller, thus implying the existence of two separate parallel procedures before two different authorities; and that the issue regarding the change of allocation of commercial premises into housing accommodation has not been properly dealt with, such that – for example – one may currently not say whether the change of allocation of a restaurant into housing accommodation will result in the possible creation of a main residence only, or potentially also a new second home. Notwithstanding the above, we believe that the new opportunity to create new homes, provided they are offered on a commercial platform for the international market, is extremely positive, especially for the development of various Swiss touristic areas.

In September 2014, both drafts were debated by the Council of States, and both the flexible and strict versions have been firmly defended. However, some elements seem to have emerged despite strenuous discussions. In particular, hotels older than 25 years old are not allowed to be transformed into second homes if the municipality exceeds the 20 per cent threshold. Construction of new second homes could be allowed if the owner offers them for rent on a 'commercial platform'. An extension of a second home could be allowed, subject to some limitations (a maximum extension of 30 per cent of the existing surface, but not more than 30 square metres). These debates have not fixed

a clear direction, and the project is now being reviewed by the National Council. New evolutions are expected in 2015, before the federal statute enters into force.

VIII OUTLOOK AND CONCLUSIONS

The territory allocation regulations in Switzerland underwent some important changes in 2013 and 2014, and other major changes are expected in the future as a consequence of Switzerland's small size and its pace of growth during the past decade.

Given the continuous economic growth of the country, the Swiss territory and its management, in the short and long term, is still a priority of the main political parties, who aim to protect the landscape and ensure that Switzerland's economy is given the right tools to pursue growth.

In two respects, 2013 and 2014 were important years in the area of law: first, the initial draft of the federal statute implementing the Weber Initiative was issued and hotly debated by many interested circles: the final version of the implementing federal statute is awaited with great interest in 2015.

Secondly, on 3 March 2013, by a large majority (62.9 per cent) the Swiss accepted the new provisions in the federal statute on territory allocation enacted by Parliament on 15 June 2012.

To implement the above-mentioned new provisions, which entered into force on 1 May 2014, the ordinance on territory allocation will be amended. The implementing revised ordinance, together with the technical guidelines on building zones and the complement to the master planning guide, have thus been made available for consultation. These documents have been highly criticised by various interested circles due to the stringent restrictions on the autonomy of the communes and cantons in relation to territory allocation. The analysis and interpretation of the submitted comments and criticisms are ongoing, and we believe they will tend towards a partial reinstatement of the autonomy of the communes and cantons.

The new provisions especially seek to limit land available for development in Switzerland to the equivalent needed for each canton and commune for the next 15 years (implying an obligation in non-development areas to rezone or de-zone undeveloped plots considered to be unnecessary for development purposes within the next 15 years) to ensure that, to the extent possible, poorly located building zones are moved to areas where they are needed, and to reduce oversized building zones.

The cantons are required to adapt their master plans within five years of the entry into force of the new provisions in the federal statute. The new provisions further provide that, until a canton's amended master plan is approved by the Swiss Federal Council, the surface of the building zone in the relevant canton should not be increased. The ordinance, however, authorises cantons with oversized building zones to create new building zones, provided such surface is compensated by a similar surface of (poorly located) existing building zone.

This recent evolution should lead landowners of land not yet built upon to shortly determine whether development projects may be undertaken to safeguard their existing building rights on plots and to enhance their position in the context of a future rezoning

or de-zoning. As a result, we anticipate that many landowners will develop their land in the next few years to limit the risk of it being rezoned as a non-development area.

On 1 May 2014, modifications to the territory allocation federal statute and its ordinance incurred by a vote of 3 March 2013 entered into force. The cantonal directing plans now have greater impact than they used to. The communes have lost a great deal of their independence to choose where to implement building zones and non-building zones. Within five years of 1 May 2014, the cantons must align their directing plans with the new federal regulations, and must comply with limiting the surfaces of building zones for the following 15 years, according to a complicated calculation formula. In addition, building zones will have to be 're-centered' and densified to ensure that future construction will not endanger agricultural zones and green landscapes.

A system of indemnification for the owners of the de-zoned surfaces has been put in place, as well as a tax system for the owners of old non-building surfaces that could become building surfaces.

The authorities will have the possibility under certain conditions to oblige owners of non-built building zones to commence building in order to avoid the loss of such unused building zones.

These new regulations, and especially the calculation formula to be used for allocating the authorised building surface per canton, have been strongly criticised, and are deemed to be too complicated and to trigger excessive administrative obstacles. The considerable curtailment of the historical autonomy of the communes and cantons has also been heavily criticised.

Geneva is the canton that has made the greatest progress in ensuring that its territorial planning complies with the new regulations; it has already put in place its next cantonal allocation plan, which is currently being examined by the Confederation. Particularly high-quality agricultural zones will most probably be re-allocated according to the canton's new building needs and federal obligations. Indeed, the protection of green and agricultural zones greatly contradicts the urgent need for more housing in Geneva.

Appendix 1

ABOUT THE AUTHORS

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Cécile Berger Meyer is head of real estate at Lenz & Staehelin in Geneva, where she has been a partner since 2013. She regularly advises both private and institutional clients in the field in respect of both civil matters (purchases, sales, structuring and financing) and administrative law matters (planning, construction licences, restrictions on acquisitions).

Ms Berger Meyer attended the University of Fribourg (*lic iur*), gained an LLM from the University of Chicago Law School, and in 2010 undertook a certified specialist SBA in construction and real estate law qualifying her as a certified SBA real estate and construction law specialist. She is admitted to the Geneva Bar and sits as landlord judge in the Geneva lease court.

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Andreas Rötheli is an expert in corporate and M&A in Switzerland. He regularly advises on international and domestic transactions, including private equity buy-outs and transactional real estate matters. He leads the corporate and M&A practice group of Lenz & Staehelin in Geneva and is consistently recommended by many rating agencies in his practice areas.

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