

Newsletter - TerraLex Connections

The Weber Initiative: The End To Chalets In The Swiss Alps?

by **Sandrine Giroud and Cédric Lenoir***

Introduction

The Swiss Alps have always been a favoured vacation destination and Swiss chalets are secondary residences to many happy owners. However, the construction boom of the past decades has led to an over-development of certain alpine regions with the resulting growth of “cold beds”, i.e. beds used only occasionally during holiday seasons but left empty the rest of the year. It has been suggested that in 2012 there were over 500,000 properties used as second or holiday homes in Switzerland, raising concerns about the impact of this situation on villages, Swiss Alps resorts, as well as the environment. It is against this background that the environmentalist Franz Weber launched a constitutional initiative to limit the number of secondary residences in Switzerland (the so-called “*Weber Initiative*”). On 11 March 2012, Swiss people voted in favour of limiting secondary residences in Switzerland to a maximum quota of 20% of residential zones and of the total surface of habitable space of each commune.¹

With the adoption of the *Weber Initiative*, a new article was added to the Swiss Constitution imposing a 20% limit on secondary residences for each commune. The Swiss authorities must now develop the implementing legislation. However, while the objective of the Initiative is clear, its implementation raises numerous questions particularly regarding the future construction of secondary residences and the fate of the existing secondary residences. In this context, the Swiss government has decided to rapidly issue an Ordinance to regulate the notion of “secondary residence” and provide a transitional regime until the entry into force of the required implementing legislation.

This article provides an overview of the current situation as well as some guidance to navigate through this evolving legal and regulatory environment.

I. Statutory Text

The new constitutional article provides that secondary residences may not exceed 20% of residential zones and of the total habitable surface area of each commune. To this end, communes are required to publish statistics each year regarding the number of primary residences and develop a plan to regulate construction of new residences going forward. The article further provides that construction permits issued between 1 January of the year that will follow the acceptance of the Initiative (i.e. as from 1 January 2013) and the entry into force of the execution provisions shall be null. Finally, this article authorises the Swiss government to enact implementing regulations by way of an Ordinance in case the Parliament fails to enact

implementing legislation within two years after acceptance of the Initiative (i.e. before 14 March 2014).

While the article specifically limits the proportion of secondary residences, it leaves open a number of questions such as the definition of secondary residences, the formula for calculating the quota of secondary residences available in each commune, or the legal regime applicable to the possible transfer of existing buildings (sale, inheritance, gift).

II. The Ordinance on Secondary Residences

A. Governmental Working Group

The aftermath of the *Weber* Initiative's adoption has given rise to heated debates and dissenting voices regarding its implementation. To answer the many legal issues left unresolved by the text of the Initiative, the Swiss government has rapidly set up a working group in order to implement a transitional regime.

The task of the working group has been a rather difficult balancing act between the will of the initiators, the constraints of the legal framework currently applicable to construction of secondary residences – in particular fundamental rights, such as the right to property and territorial planning, and the different economic interests at stake, in particular those of the Alpine regions.

On 30 May 2012, the working group published a first draft Ordinance on Secondary Residences aimed to remedy some of the uncertainties caused by the Initiative. This first draft has been followed by an amended version further to a hearing conference that was held on the 18 June 2012 during which the persons having an interest had the opportunity to give their opinion about the first draft of the Ordinance.

On 22 August 2012, the Swiss government published the final wording of the Ordinance on Secondary Residences which will enter into force on 1 January 2013. The Ordinance sets the base for the solutions that will ultimately be adopted in the future implementing legislation to be prepared by the Swiss parliament before March 2014.

B. Definition of Secondary Residences Under the Ordinance

The Ordinance defines “*secondary residence*” as a “*dwelling which is not occupied the whole year by (a) a person domiciled in the commune, (b) for professional or study purposes.*”

The notion of domicile refers to the domicile as defined by civil law, i.e. the place where an individual resides with the intention to stay in the long run, lives and pays taxes. In principle, this is the place where one sleeps, spends free time and keeps personal belongings. The advantage is that this concept has been legally tested and is the subject of abundant case law.

The Ordinance further specifies that dwellings placed by companies at the disposal of their employees to reside during business days should not be considered as secondary residences. Nor should be considered as secondary residences any dwelling used for study purposes.

C. Calculation of Quotas Under the Ordinance

The text of the Initiative retains as calculation criteria the “*residential area*” and the “*total surface area of the habitable space*”. The second criterion is, however, not uniformly defined at the federal level. The Swiss government has therefore decided not to retain it for purposes of the Ordinance and to focus exclusively on “*dwelling units*”, a term which corresponds to all the rooms constituting a construction unit and having autonomous access from the outside or from a common space inside the building.

The Swiss government has further issued a list of communes which are deemed to have exceeded the 20% quota (e.g. Gstaad, Verbier, Zermatt, or St Moritz) but this presumption can be rebutted by the communes concerned.

D. Existing Dwellings Under the Ordinance

The situation of existing dwellings is the most sensitive point. The Swiss government has however stressed that restrictions to dwellings already constructed or dwellings for which a definitive construction permit has been granted would go against the guarantee of property. As a result, the Ordinance guarantees that existing dwellings can be transformed without restriction into secondary, as far as the usual construction law rules in force are respected. Moreover, the Ordinance specifically prohibits abusive transformations, in particular if any such transformation results in the construction of an additional primary residence. Cantons and communes must take the necessary measures to prevent such abuses.

In the event of inheritance of a primary residence, the Ordinance safeguards the right to preserve or sell the inherited property as a secondary residence and the possibility to transform an inherited dwelling used as a primary residence into a secondary one in case of a change of domicile. This provision meets the expectation of property owners who were concerned about the possible prohibition to sell their properties as primary or secondary homes after the entry into force of the

Weber Initiative. Indeed, restrictions in this direction may have resulted in substantial reduction of the value of such properties.

Furthermore, the Ordinance authorises the conversion of old and non-profitable hotels into secondary homes provided the hotel considered has been run as such during at least 25 years and independent expert advice has confirmed the hotel is no longer profitable. This provision aims to maintain the value of such buildings on the real estate market so that the hotel business can be financed through the sale of old hotels and the construction of new ones.

E. Building of New Secondary Residences Under the Ordinance

The Ordinance sets out two main exceptions to the general prohibition to the construction of new secondary residences in the communes where the ceiling of 20% has already been reached. Residences which are not personalised and made available throughout the year at market price for short term lease are allowed provided they are (1) made available in the framework of an organised housing structure or (2) if the residence owner lives in the same building.

The first exception authorises secondary residences put on the market within an organised housing structure such as hotels strictly speaking and “aparthotels” other than condominiums. The underlying idea is to authorise the construction of “hot bedding” by contrast to “cold beds”. These types of dwellings should be used for tourism purposes, thus excluding long-term and annual lease. Also, the actual use of the property by its owner or his family should be limited to three weeks during high season in order to guarantee the attractiveness for tourists.

The second exception authorises the construction of secondary residences when individuals who build their primary residence wish to include therein accommodations meant for short term lease to tourists. This means, however, that the owner should reside under the same roof in a way to avoid potential abuses.

Apart from these two exceptions, it will be otherwise impossible to build new secondary residences in communes that have exceeded the quota, which is the case of most touristic areas. It will therefore become more difficult for investors, whether Swiss or foreign, to realise large scale real estate projects mixing secondary residences and non-hotel accommodations, insofar as such projects are often financed via the sale of a first group of secondary residences generating a significant profit margin and the necessary liquidity to build hotel complexes. The *Weber* Initiative is likely to set new standards in the way tourism is being developed in the regions concerned through the prohibition to build new secondary residences.

F. Effective Date of Entry Into Force of the New Regime

Pursuant to the Ordinance, the entry into force of the new regime should be as follows:

- The new constitutional article should be effective the day of its adoption by popular vote and is therefore directly effective and applicable as of 11 March 2012;
- Construction permits issued before 11 March 2012 remain valid. However, the Ordinance does not address the issue of whether pending requests as of 11 March 2012 should be treated pursuant to the law in force at the time of the filing;
- It is unclear what legal regime is applicable to construction permits issued between 11 March 2012 and 31 December 2012. There is an ongoing legal debate between the cantons² most concerned by the *Weber* Initiative and the Swiss government. For the time being the working group has stressed that during this period, construction permits should not be granted without reservation under the prior regime as this would be contrary to the purpose of the new constitutional article. In case of doubt as to the conformity of the construction permit with the new constitutional article, request for construction permits should be suspended until the entry into force of the implementing legislation;
- The new constitutional article explicitly provides that after 1 January 2013, no further construction permits will be issued to communes with more than 20% secondary residences.

III. The *Weber* Initiative's Interaction with Swiss Rules of Territorial Planning

The *Weber* Initiative interacts with the recent amendment of Swiss rules regarding territorial planning which are governed by the Federal act on the territorial planning (FATP). The revised Article 8 FATP entered into force the 1 of July 2011. This new provision obliges the cantons and communes to take the necessary measures to maintain a well-balanced proportion between main homes and secondary residences. This provision further defines the three main objectives that have to be reached by the cantons and the communes in this respect. First, the proportion of secondary residences should be restrained. Second, local authorities must promote the hotel industry and the building of main homes at a reasonable price. Third and finally, local authorities must take all the necessary measures to improve the occupation rate of main residences.

The new constitutional article resulting from the *Weber* Initiative is seen as the concretisation of the objectives defined by the revised Article 8 FATP, with the *Weber* Initiative in fact complementing the revised FATP.

IV. The *Weber* Initiative's Impact on the Acquisition of Property by Foreigners

The limitation of secondary residences makes it even harder for foreigners to acquire property in Switzerland who are already subject to acquisition restrictions pursuant to the Law regarding the acquisition of real estate by persons abroad (the so-called "*Lex Koller*").

The *Lex Koller* restricts the acquisition of real estate in Switzerland by foreigners, by foreign-based companies or by Swiss-based companies controlled by foreigners. As a rule, these categories of persons need an authorisation from the competent cantonal authority. It is irrelevant

whether the real estate is already in foreign hands or not. Additionally the legal cause of the transfer (e.g. purchase, exchange, donation) has no bearing on the application of the law. By contrast, real estate used for professional, commercial or industrial activities (with the exception of real estate acquired for the building, sale or rental of housing) may be acquired without authorisation.

The interplay between the *Weber* Initiative and the *Lex Koller* creates important and almost insurmountable obstacles to the acquisition of real property by foreigners for holiday purposes. This could well end the dream of a Swiss chalet for many foreigners unless they decide to become Swiss residents. From a legal point of view, these obstacles can be overcome if the purpose of acquisition is commercial. However, and as mentioned, this could still be problematic in practice since most of the touristic real estate projects use the sale of secondary residences to finance the rest of the project dedicated to renting, hotel or “aparthotel” thus creating an investment issue.

V. Conclusion

If the Ordinance on Secondary Residences issued by the Swiss government provides welcome guidance regarding the transitional regime applicable to existing and future secondary residences, fundamental legal uncertainties still remain such as the fate of pending requests for construction permits until the 1 of January 2013 and the transformation of existing primary residences into secondary residences.

For the time being, the *Weber* Initiative creates a legal vacuum which may heavily affect current owners or potential investors. Moreover, the interplay between this Initiative and the *Lex Koller* could well end the dream of a Swiss chalet for many foreigners unless they decide to become Swiss residents. Consequently, prudence and legal advice are required before the entry into force of the Ordinance on 1 January 2013.

¹ The commune is the lowest level of administrative division in Switzerland.

² Cantons are the member states of Switzerland.

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