

APRIL 2016

# Newsletter

**Authors:**

Yves Jeanrenaud  
Josef Caleff

SWISS LAW FIRM  
OF THE YEAR 2015  
Who's Who Legal



REAL ESTATE

## Federal Act on Secondary Homes

With the acceptance of the secondary homes initiative in 2012, the construction of secondary homes in Switzerland was limited by constitutional rule. The federal act and the ordinance implementing said constitutional rule entered into force as of 1 January 2016.

### 1 INTRODUCTION

On 11 March 2012, the Swiss people voted in favor of the initiative to "Stop the Endless Construction of Secondary Homes" ["**Secondary Homes Initiative**"]. The new constitutional provision essentially prevents the **construction of new holiday homes in tourist regions which already have a twenty percent or greater share of holiday homes**. It states: "No more than 20 percent of the total number of residential units and the gross residential floor area within any municipality may be used as secondary homes. The law shall require the municipalities to publish their primary home percentage plan and a detailed report on its implementation each year". The Federal Council adopted an implementing ordinance in 2012 which entered into force on 1 January 2013 (**ZWV 2012**). This implementing ordinance was replaced by the Federal Act on Secondary

Homes (Secondary Homes Act, **ZWG**) and the related ordinary secondary homes ordinance (**ZWV**) as of 1 January 2016. **ZWG** and **ZWV** allow for a few more exceptions for the construction of secondary homes than **ZWV 2012** and clarify certain legal uncertainties.

### 2 REGULATORY MATTER

**ZWG** and **ZWV** only regulate the construction of secondary homes. Changes without constructional measures or buildings not intended to serve for residential purposes are not subject to **ZWG** and **ZWV**. The Secondary Homes Act does not define the term "secondary home" affirmatively, but states negatively that a "home" is considered to be a "secondary home" if it does not qualify as a "primary home". **ZWG** only regulates positively what is considered as "primary home".

A primary home is essentially a home that is used by at least one person domiciled in the relevant municipality. In principle equal to primary homes are homes that (i) are used by persons only residing in such homes at workdays for work or educational purposes (but do not have their domicile at such homes) ; (ii) are vacant for less than two years and are advertised for sale or a permanent tenancy; or (iii) are company housing, in particular for persons working in hotels and restaurants, hospitals and in retirement or nursing homes.

### 3 PREVIOUS CANTONAL REGULATIONS AND FURTHER MEASURES

Previous municipal and cantonal restrictions regarding the construction of secondary homes remain in force if not explicitly annulled. For example, a home that already existed prior to 11 March 2012 and that was qualified as a primary home by municipal and cantonal provisions cannot be used as a secondary home despite being otherwise admissible under ZWG. However, a primary home can be used as secondary home if the municipal or the cantonal provisions are annulled (see section 6.4 below).

"No new secondary homes may be permitted in municipalities with a secondary homes share greater than 20 percent."

The cantons may implement measures to foster a better utilization of secondary homes as well as to foster the hospitality industry and reasonably priced primary homes. They may also establish provisions that restrict the construction and utilization of homes beyond the provisions of ZWG.

### 4 INVENTORY OF HOMES

**All municipalities** are obliged to establish a yearly **home inventory**. It shall include the overall number of homes as well as the number of primary homes (i.e. primary homes in the narrow sense and homes equal to primary homes). It is remarkable that ZWG does not refer in this context to the gross floor area, which is also relevant pursuant to the constitutional provision. The federal government determines on the basis of the home inventory the share of secondary homes for each municipality in relation to the overall number of homes. If a municipality does not produce the home inventory in time, a share of secondary homes greater than 20 percent will be assumed for such municipality. Annex 1 to the ZWV is a list of municipalities with an assumed secondary homes share greater than 20 percent (e.g., Grindelwald, Saanen, St. Moritz, Davos, Leysin, Ollon, Montana, Zermatt).

### 5 PRINCIPLE: PROHIBITION OF SECONDARY HOMES

No new secondary homes may be permitted in municipalities with a secondary homes share **greater than 20 percent**.

If the construction of a home is permitted in these municipalities, the restriction of utilization shall be annotated in the land register (primary home, touristic

homes pursuant to section 6.1). Moreover, if the secondary homes share of a municipality decreases to less than 20 percent, the authority competent for construction permits shall annul possibly existing restrictions of use upon request of the home owner.

### 6 EXCEPTIONS

In the following cases the construction of homes that are not primary homes or homes equal to primary homes, i.e. of secondary homes, **is allowed**:

- > touristic homes;
- > homes relating to a structured form of tourist accommodation;
- > homes in protected buildings or landmark buildings;
- > modification or extension up to 30 percent of the existing area; and
- > if, on 11 March 2012, a legally binding project-related special land use plan existed that defined the essential elements of the construction authorization regarding location, position, size and design of the buildings and the facilities as well as their usage type and extent ("Andermatt Exception").

Furthermore, under certain circumstances a temporary annulment of the usage restriction is admissible.

#### 6.1 TOURISTIC HOMES

A home qualifies as a touristic home if it is permanently offered exclusively for the short-term usage to guests at normal local market conditions and if it

- > is located in the same building as the owner has its main place of residence (guest apartment); or
- > if the home is not tailored to the personal needs of the owner and part of a structured form of tourist accommodation (see section 6.2).

#### 6.2 STRUCTURED FORMS OF TOURIST ACCOMMODATION

A structured form of tourist accommodation requires services and an infrastructure similar to a hotel, typically to be used by the majority of the guests. This would comprise for example a reception area, room service, facilities like a pool, sports facilities, restaurants, gaming rooms, cleaning and laundry services. It is also possible that some services or parts of the infrastructure may be provided by local cooperation partners. The tourist accommodations must show an operating concept similar to a hotel (professional short-term guest accommodation). Moreover, common management must be ensured. The rooms or apartments must be offered permanently (especially during the main season) to local market conditions in a way that they are actually demanded on the market. **The owner itself may occupy the home for a maximum of three weeks during the main season** (especially relevant for touristic homes in "aparthotels" pursuant to section 6.1). In general, hotels and residences operated as hotels qualify as structured forms of tourist accommodation (hereinafter referred to as hotels).

## "Structured forms of tourist accommodation may build new secondary homes."

Structured forms of tourist accommodation may build new secondary homes if:

- > the hotel can only continue to run economically with the revenue resulting from the construction of such homes;
- > the revenue of these homes is invested into the building or the operation of the hotel;
- > the main usable floor area of these homes does not exceed 20 percent of the total usable floor area of all the rooms and apartments (if the homes remain permanently property of the hotel a percentage of 33 percent is permitted);
- > these homes form a constructional and functional unity with the hotel; and
- > no predominant opposing public interests exist.

If the hotel already existed on 11 March 2012 and was operated for 25 years at that time, it is possible to convert up to 50 percent of the floor area into secondary homes (but not to construct additional floor areas) under certain circumstances.

An independent expert opinion has to be submitted with the application for the construction permit, confirming that the above requirements are met.

### 6.3 PROTECTED OR LANDMARK BUILDINGS

**Secondary homes are admissible in protected buildings or landmark buildings** if (i) the historic value of the building is not reduced, in particular the outer appearance and the architectural structure of the building remain substantially unchanged; (ii) a permanent preservation of the building cannot be ensured in another way; (iii) and no predominant opposing public interests exist. Buildings are considered to be protected buildings or landmark buildings, if by their location and design there is a significant contribution to the quality of the village character and to the village identity. In this case secondary homes are also allowed in so called **"Rustici" or "Maiensässe" (historic rural functional buildings) outside the building zone**. The (stricter) requirements in order to use such buildings for residential usage pursuant to the Swiss Spatial Planning Act are applicable.

### 6.4 MODIFICATIONS AND EXTENSIONS

Old homes, that lawfully existed on 31 December 2012 or that have been authorized in a legally binding way until that date, may be used at full discretion as primary or secondary home. The same applies to homes authorized with legally binding effect as secondary homes between 1 January 2013 and 31 December 2015. Excluded are homes subject to prior municipal or cantonal provisions or restrictions. Old homes **may be refurbished, renovated, demolished and reconstructed**. Furthermore, the separation of the floor area into several smaller homes is allowed if the overall

amount of floor area does not increase. Finally, even an extension of 30 percent is admissible, but only of the floor area already existing on 11 March 2012 and only if no additional homes are created.

### 6.5 TEMPORARY RELIEF

The usage restrictions of a primary home or of a touristic home may temporarily be cancelled, i.e. the home may temporarily be used as a secondary home, if:

- > it is not possible to comply with the usage restrictions as a result of special circumstances such as death, change of domicile, change of marital status; or
- > the owner can demonstrate to have publicly advertised the home and to have searched unsuccessfully for persons that would lawfully use the home in exchange for reasonable consideration. The landlord must in any case prove that (i) advertisements were regularly published according to common market customs; (ii) the home was advertised at local market conditions; and (iii) the home was ready for occupation at any time with regard to a tenant or purchaser.

Temporary relief may be extended if the landlord can prove that the prerequisites are still met. Relief may in any event only be granted only up to two years each time.

### 7 CONSEQUENCES OF NON-COMPLIANCE

If a home is not used lawfully as a primary home (including vacancies for more than two years) or for touristic purposes as described above, the competent authority shall request the owner to comply with the lawful usage (usage as primary home or touristic home). If the landlord does not remedy the unlawful state in time, the authority prohibits the usage and orders the sealing of the respective home. Moreover, the authority will implement any measures necessary to restore the lawful state. **The authority is especially entitled to let the home in question as a primary home**. In case of a substantial infringement of the usage restriction (i.e. the usage as a secondary home), the authority furthermore has the power to order imprisonment or a fine.

### 8 CONCLUSIONS

If planning to purchase of a holiday home in Switzerland, a purchaser is well advised to check whether the land register **contains a usage restriction**. In doing so, attention must also be paid to municipal or cantonal restrictions dating back to before the entry into force of ZWG. If a refurbishment or extension of a property in Switzerland is planned, it has to be considered that a separation into several apartments is no longer admissible if at the same time an extension of the floor area is envisaged. Extension of the floor area not exceeding 30 percent of the floor area that existed on 11 March 2012 is admissible, provided the number of apartments is not increased.

Today, as a consequence of the new law, the acquisition of new holiday homes in the many favoured tourist areas in Switzerland is de facto only possible in the form of **touristic homes, homes relating to structured form of tourist accommodation (hotels) and protected buildings or landmark buildings**. Especially for hotels or accommodations similar to hotels, there is a substantial potential regarding the construction of secondary homes.

Finally, a certain alleviation of the rather strict new rules may exist in view of the possibility to grant temporary relief from the usage restrictions. Especially if one takes into account that the demand for primary homes in the relevant areas is limited.

## Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

### In Zurich:



**Josef Caleff**

Partner  
josef.caleff@swlegal.ch

### In Geneva:



**Yves Jeanrenaud**

Partner  
yves.jeanrenaud@swlegal.ch



**Martin Weber**

Partner  
martin.weber@swlegal.ch



**Amanda Burnand Sulmoni**

Senior Associate  
amanda.burnand@swlegal.ch

**SHELLENBERG WITTMER LTD / Attorneys at Law**

**ZURICH** / Löwenstrasse 19 / P.O. Box 2201 / 8021 Zurich / Switzerland / T+41 44 215 5252

**GENEVA** / 15bis, rue des Alpes / P.O. Box 2088 / 1211 Geneva 1 / Switzerland / T+41 22 707 8000

**SINGAPORE** / Schellenberg Wittmer Pte Ltd / 6 Battery Road, #37-02 / Singapore 049909 / [www.swlegal.sg](http://www.swlegal.sg)

[www.swlegal.ch](http://www.swlegal.ch)

This Newsletter is available on our website [www.swlegal.ch](http://www.swlegal.ch) in English, German and French.