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The return of the property question in the development of Alpine tourist resorts in Switzerland

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The return of the property question in the development of Alpine tourist resorts in Switzerland

1 For some thirty years the urbanisation and development of tourist resorts have historically been carried out in Switzerland within an institutional framework through a recurring tension between, on the one hand, a very strong level of protection afforded to property and, on the other hand, a very decentralised spatial planning policy, mainly directed towards coordination tasks relating to public policy and its ability to intervene through the use of instruments for managing land ownership and property (hereinafter referred to as property instruments) consists primarily of zoning, owing to the relinquishing of the main restricting property instruments following the public's rejection in 1976 of the first Federal law on spatial development. This situation, which has (had) an important effect – often problematic – on the development processes and the dynamics of spatial development of the resorts (e.g. excessively large and badly located building zones, the spreading out of a fabric of secondary residences that eat up space and a disproportionate amount of urban service costs), resulted from the turbulent birth of the spatial development policy that had to be built against the very powerful institution of property ownership (Nahrath, 2003; 2008).

2 It is however interesting to note that the problematic effects resulting from the inconsistency of Swiss spatial development has been leading for some time to a change in the evolution of the spatial development policy through the putting in place of instruments more directly geared towards the regulation of land ownership and property, a change in which the tourist resorts are the preferred areas both as a source and for experimentation.

3 In a first part (1st part) we will briefly describe the birth of the Federal spatial development policy, before presenting some of its effects on tourist communes (2nd part). In a last part (3th part) we describe and discuss the changes in the spatial development policy in the tourist communes and cantons in the form of the increase in the use of property instruments.

The birth of the spatial development policy in Switzerland: the choice of zoning rather than property instruments

4 Swiss property law is characterised by the very strong protection provided to property owners against the restrictions on use arising from public law. Thus, Article 26 of the Federal Constitution[1] sets out that (Art. 26):

1. The property is guaranteed.
2. Expropriation and restrictions of ownership **equivalent to expropriation** are fully compensated[2].

5 This extension of the concept of expropriation – expressed in terms of a *de facto* expropriation (Moor, 2002) – in order to describe in legal terms the significant restrictions placed on the rights of use of property owners through public policy and spatial development in particular without there being any *formal* expropriation on the part of the State, is a creation of the Federal judges. Thus, the case law developed from the 1960s[3], following the appearance before the courts of the first cases concerning the limitation of rights of property owners as a result of the introduction of the first cantonal laws regarding spatial development[4], has contributed to putting the communal authorities under very heavy pressure. As the latter are responsible for the legally restricting planning with regard to the allocation of land, they also found themselves financially liable in the event that a situation of a de facto expropriation was recognised by the courts.In effect, the central principle, which would be however appreciably watered down by the evolution of Federal case law from the 1980s (Moor, 2002), is that any restrictions

placed on or suppression of building rights implies that the property owner is to be "fully and entirely" compensated.

6 It is within this context that the Federal authorities drafted at the beginning of the 1970s the first Federal law regarding spatial development (LAT). This first draft is characterised by a certain ambition regarding the centralisation of certain planning competences as well as with regard to property instruments. In particular, the law provides for the principle of a systematic tax on the increase in value of the property resulting from the zoning procedures[5], in order to reduce in particular the unequal treatment of the winners and losers from these procedures and, more particularly, to finance the compensation for the de facto expropriation.This law was vehemently opposed by property owners, property developers and federalists[6] and was to be rejected by public vote in 1976 following the holding of a public referendum organised by these same circles.

7 The version finally adopted in 1979 represents a version that had been significantly amended and watered down from the first draft[7].It is particularly characterised by strong decentralisation as well as by a significant weakening of the property instruments available to the authorities.Spatial development is thus defined as a competence of the cantons (Federal states), with the Confederation being limited to defining the basic planning principles.This situation thus creates plenty of room to manoeuvre both for the cantons in drawing up their planning guidelines as well as for the communes in defining their land allocation plan (the only legal binding restrictions for property owners).

8 Seen from the point of view of the development of the tourist areas, this implies that there is no central planning (neither at the Federal level nor at the cantonal level) regarding the development of resorts and the tourist infrastructure and that the development processes result mainly from local dynamics (communal), indeed from a cantonal regulation for some aspects.In this way the cantons and communes can develop in particular specific zoning categories for tourist areas and resorts.Furthermore, the abolition of the systematic and compulsory nature of the tax on the increase in value of a property following the failure of the first law[8] has contributed to the weakening to a very significant degree in the ability to regulate allocations through zoning inasmuch as the communes find themselves clearly deprived of the instrument that is supposed to enable them to finance the compensation payable in the event of not only a formal, but particularly a de facto expropriation.

9 It is thus the spatial development system, within the framework of which the tourist resorts have been developed for about thirty years, that is experiencing a strong imbalance in favour of land and property owners, the latter seeing their property guaranteed against the restrictions arising under public law as a result of the implementation of public policies, even if they have no obligation for most of the time regarding the returning to the community of a part of the increase in the property value in the event that their land is classified as a building zone by the public authorities.

10 This situation (corresponding *de facto* to the State protection of income arising from property) combined, on the one hand, with a blurred definition of the size criteria for the building zone[9] and on the other hand, the existence of a decentralised fiscal system that gives the communes great autonomy, encourages the latter to develop competing strategies in order to attract developers, entrepreneurs and other investors (property, tourist, etc.) by offering them in particular land to build on at affordable prices.This explains to a large extent the race to extend the building zones in numerous communes, especially tourist communes.

11 Conscious of the risks resulting from the structural weakness of the spatial development policy that is confronted with the strong protection provided to property ownership, the Federal Court judges responsible for defining case law regarding de facto expropriation took remedial action from the 1970s onwards by tightening the conditions under which compensation is granted for a de facto appropriation. This tightening mainly consisted of adding additional conditions regarding the obtaining of compensation, the conditions themselves based on the objectives and criteria of the LAT[10].

The effects of the spatial development policy on tourist communes

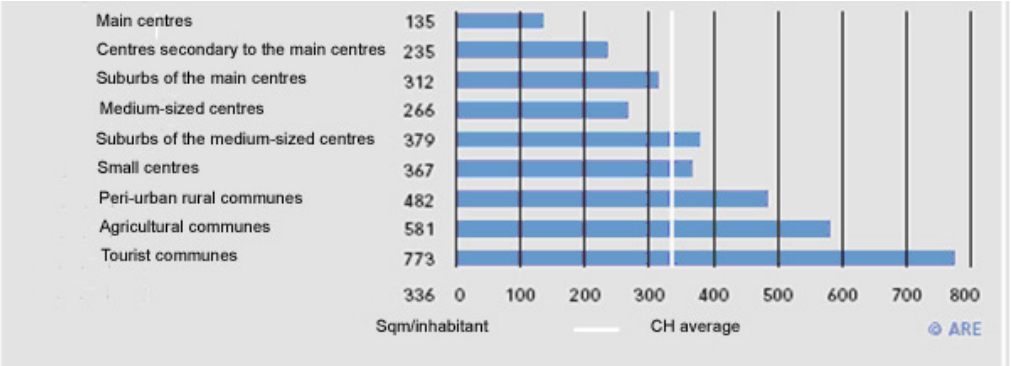
Excessively large building zones

12 Despite this "rescue" attempt made by the Federal judges with regard to the spatial development policy, the implementation of the LAT has not been able to prevent the following *phenomena* and *problems* from occurring in the tourist communes in general and the Alpine tourist resorts in particular:

implementation of the spatial development policy that very often differentiates between the cantons and communes, with each developing specific zoning categories (for example the tourist zone) and distinct, and even competing, strategies for land development.

building zones that are chronically and systematically too large, in particular in the tourist communes, the latter having available according to statistics published by the Federal Office for Spatial Development (ARE, 2008) the largest reserves of undeveloped building zones in the country relative to their area and the number of inhabitants (Diagram 1), a situation under which a resultant significant risk of the dispersal of construction sites and of an urban sprawl in the countryside is incurred.

Diagram 1. Building zone area by inhabitant, by type of commune



Source: ARE (2008: 29)

A very great difficulty experienced by the communes in reducing *a posteriori* the size of their excessively large building zones due to the definition of these zones within the communal allocation plans, henceforth in accordance with LAT, and the ensuing obligation of the communes to equip the plots of land, contribute to increasing the accounting processes required for this building land with the conditions for the obtaining of compensation for de facto expropriation, despite the tightening of case law in this respect.

A massive growth in the supply of residential property (particularly secondary residences) due to the high availability of building land.

13 It is evident that the tourist communes are among the areas in which the inconsistency of the current system of spatial planning has had the most problematic effect in terms of land development.The scale of the development of the tourist property sector in general and that of secondary residences in particular, which has more or less a significant effect on the majority of the tourist communes, is explained by the convergence of several interdependent factors whose introduction into the process is not unlike the phenomena of "growth coalitions" in the sense of J. Logan and H. Molotch (1987). In fact, the strong presence of property owners and property professionals within the decision-making processes regarding spatial planning and tourist development as well as, to a larger extent, within the structures of the local authorities, whose political legitimacy is based on tourist developments, has often led to the implementation of a spatial planning policy geared firstly towards the objective of making available large building zones enabling a development model to be put in place within which the exchange value (i.e. the construction and sale of secondary residences) has a tendency to take precedence over the value-in-use (i.e. income producing property such as the hotel business or "para-hotellerie" schemes). The continuing use of this model has been made possible by the decentralisation of the spatial planning policy in particular as well as by the difficulty experienced by the

communes in reducing their excessively large building zones following the latent threat of compensation demands for de facto expropriation.

The boom in secondary residences and its effects

14 Historically, the hotel was virtually the only form of accommodation available up until the 1950s. Things began to rapidly change with the "invention" of the secondary residence (apartments in buildings or individual chalets, rented out or not): the interest shown by customers for this type of accommodation was high and the construction of secondary residences increased in the Swiss Alps. In the 1960s and 1970s the number of beds in secondary residences overtook that of hotel beds in most of the tourist resorts.This trend has hardly been reversed since, although it was more or less slowed down by the periods of economic crisis that reduced the number of persons with the financial means to buy a secondary residence. In the same way, if the 1990s represented a period of relative calm, a genuine "rush" has been experienced since the start of the Millennium with the emphasis being placed moreover on the creation of luxury secondary residences.

15 Although there are no precise statistics regarding the number of secondary residences in Switzerland, it is estimated that the proportion of the latter to total housing is around 12%.This percentage varies greatly from one canton to another and exceeds 35% in Grisons and Valais (Table 1).It is still higher in the tourist communes where it is often in a range of between 50% and 80% (Mühlinghaus, 2006).

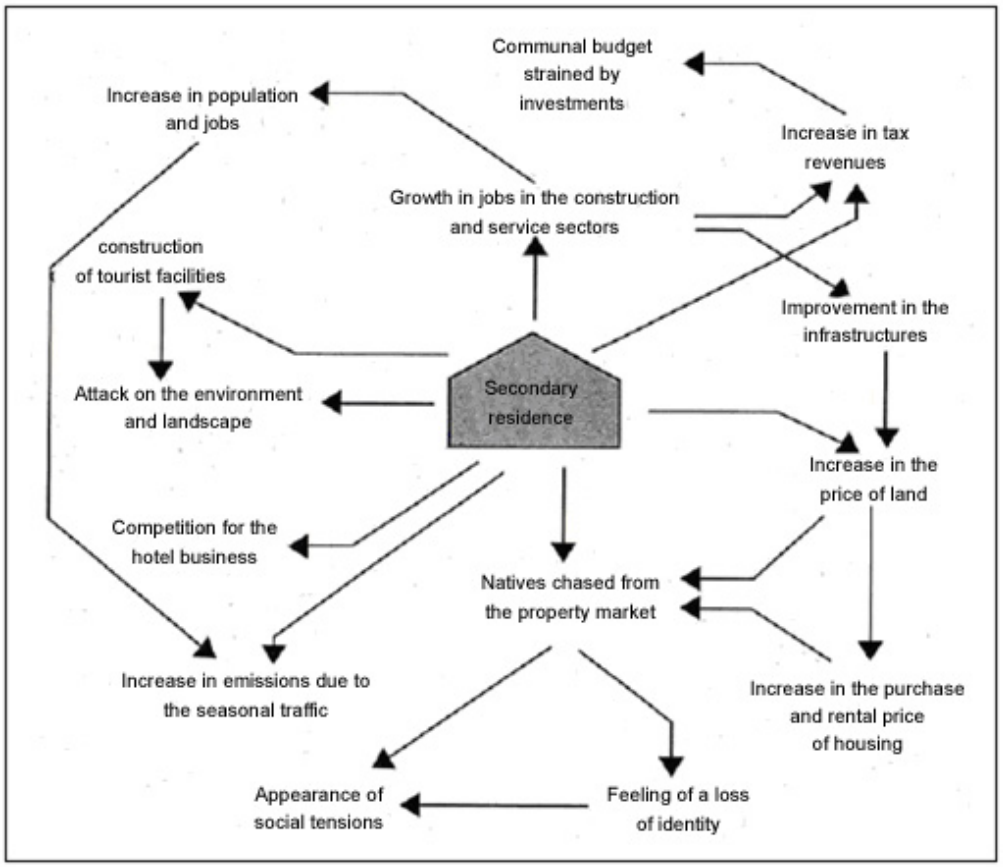
Table 1. Change in the percentage of secondary residences in relation to the total housing stock in urban, tourist and rural areas of the cantons of Grisons and Valais

	1970			1980			2000		
	Housing	Secondary residences	As % of housing stock	Housing	Secondary residences	As % of housing stock	Housing	Secondary residences	As % of housing stock
Grisons	**62 038**	**15 106**	**24.3 %**	**91 107**	**33 862**	**36.9 %**	**129 338**	**47 902**	**37.0 %**
Towns	25 002	1800	7.2 %	32 309	3273	10.1 %	46 379	5374	11.6 %
Tourist zones	24 087	9866	41.0 %	42 942	24 582	57.2 %	61 650	34 643	56.2 %
Rural zones	12 949	3440	26.6 %	16 456	6007	36.5 %	21 309	7885	37.0 %
Valais	**84 588**	**22 589**	**26.7 %**	**124 746**	**48 421**	**38.8 %**	**172 705**	**70 835**	**41.0 %**
Towns	26 334	1905	7.2 %	36 110	4513	12.5 %	52 894	8472	16.0 %
Tourist zones	25 221	12 877	51.1 %	45 538	25 673	56.4 %	66 490	38 552	58.0 %
Rural zones	33 033	7807	23.6 %	43 098	18 235	42.3 %	53 321	32 811	44.7 %

Source: Arpagaus & Spörri (2008: 52)

16 Diagram 2 below provides an overall picture of the main economic, social and environmental effects, both positive and negative, of the development model based on secondary residences. As can be seen, if the private, often very significant, economic gains and their variable knock-on effects on local society are excluded, the economic, social and environmental costs are relatively significant for local societies (Krippendorf, 1977; FST, 1985).

Diagram 2. The consequences arising from the construction of secondary residences



Source: ASPAN (1993: 15)

The return of property instruments for the purposes of regulating the tourist property sector and the land development of resorts

17 Faced with the inconsistencies in the spatial planning system (cf. 1st part above) and its particularly problematic effect on the accommodation structure in tourist resorts (cf. 2nd part above), some initial measures for restricting the rights of disposal of property owners and property developers were put in place at the Federal level at the start of the 1980s. Thus, the Federal law on the acquisition of buildings by foreigners (LFAIE)[11] is aimed at combating the overheating of the property market in the tourist regions by placing limits on the acquisition of buildings by persons domiciled abroad.In concrete terms these provisions introduce an annual quota on the sale of property to persons domiciled outside the national territory.This quota (for example 1,500 units in 2009) is then distributed between the cantons (for example 330 units for the canton of Valais).*De facto*, despite some perverse effects and problems relating to its implementation (Linder, 1987) this legislation, known today as *Lex Koller*, restricts the construction of secondary residences, in particular when foreign demand is significant and the total quota has been used up (which is very often the case). However, this does not affect persons domiciled in Switzerland who constitute the majority of the owners of secondary residences (Arpagaus & Spörri, 2008). In 2007, the wish of the Federal Council (the Swiss government) to repeal Lex Koller, given in particular the discriminatory nature of this law with regard to persons domiciled abroad, was voted down by the Swiss parliament which refused to abolish it, and some spatial planning measures regarding the regulation of secondary residences were also not adopted at the national level.

18 In the absence of an unconditional and restricting public regulation regarding secondary residences, it was most often the communes, at times with the support of the canton[12], that started to introduce restrictive measures through using (new) instruments – statutory or as

an incentive – that intervened directly in the areas of land and property ownership for some people.The main such instruments implemented in the communes over the past years are as follows:

The *principal residence quota* requires for any new construction a minimum proportion of living space (generally between 35% and 60%) to be allocated to some principal residence.Hotel housing or space used by the trade industry can be taken into account in the calculation as if they were principal residences.A possible variant is to allow the owner to release himself from the obligation to create principle residences on the condition that a replacement tax is paid that can be used to finance the construction of principal residences elsewhere.However, this variant did not bring the hoped for results regarding the reduction in secondary residences: in the regions where demand is high, the replacement tax did not have any effect as the amount was simply included the sale price (ARE, 2009: 22).

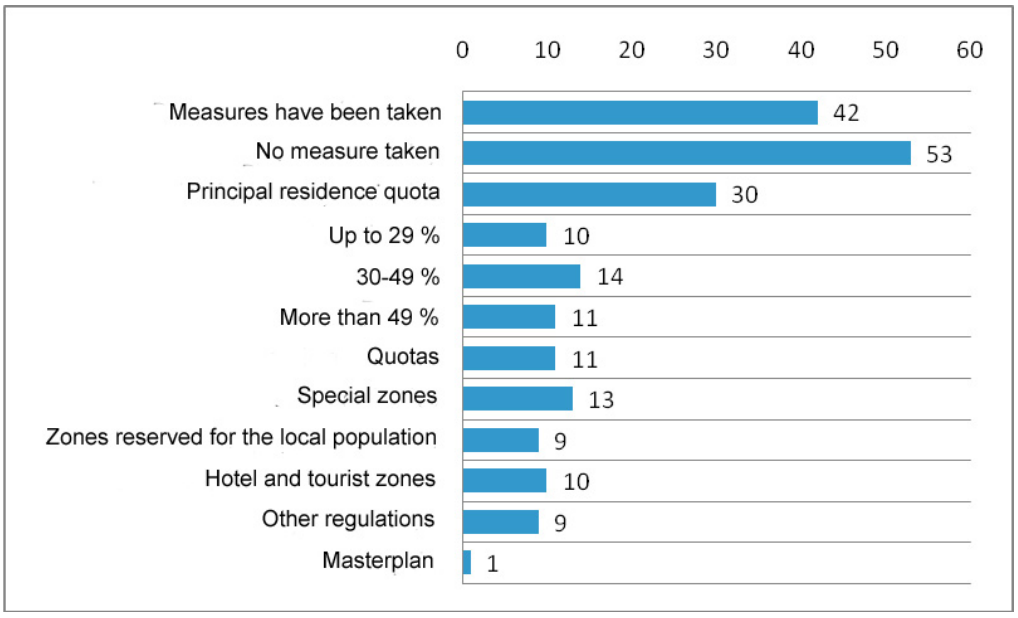
The creation of *special zones* reverts to the inclusion in the local development plan of zones reserved for certain types of allocation that exclude the construction of secondary residences.Under this certain resorts created hotel zones or zones reserved for permanent inhabitants.However, it should be noted that such a zoning instrument does not permit the number of secondary residences within a tourist resort to be limited in an absolute manner.

Finally, the *quota*, which has already been discussed with regard to Lex Koller, consists of placing an annual limit on the amount of land that can be used for the construction of secondary residences.The communes of Crans-Montana (8,000 sqm), those in the region of St-Moritz (12,000 sqm), Saas-Fee (1,500 sqm) or even Zermatt (850 sqm) have introduced such an instrument.

19 In addition to these measures, some Swiss communes or cantons have used a *moratorium* which allows the issuing of building permits for secondary residences to be frozen for a specific period of time (generally between 1 and 2 years), while taking advantage of the length of the moratorium to establish a communal regulation containing one or several of the above-described property instruments.

20 But these measures are far from being implemented in all tourist communes.In 2007, a comparative study conducted on 95 tourist communes [13] showed that 56% of them had not taken any action regarding the management of secondary residences (cf. Diagram 3).Those who have taken action particularly preferred the instrument of the principal residence quota and, to a lesser extent, the creation of special zones or the quota.

Diagram 3. Spatial planning measures affecting the construction of secondary residences implemented in 95 Swiss tourist communes (status 2007) (n = number of communes)



Source: Switzerland Tourism (2007: 19)

21 While the majority of communes in German-speaking Switzerland and Tessin have taken action, this is not the case in French-speaking Switzerland where not a single commune had implemented any measures in 2007. This is explained by the fact that problems linked to accommodation in the resorts had been raised too late in French-speaking Switzerland (since a decade at the most), have focussed in particular on the loss of revenue linked to empty beds in secondary residences and culminated above all in considering incentives for renting.In German-speaking Switzerland these problems had been raised earlier (in the 1980s), were concerned more with the question of knowing how to guarantee access to housing for the local population and had been dealt with by putting in place restrictions on the construction of secondary residences (Switzerland Tourism, 2007: 21-22).

Property instruments currently under discussion in Switzerland

22 In addition to the measures mentioned above other measures that intervene directly on the rights of landowners and property owners are under discussion, even if, up until now, they have only been used a little or not at all by the communes.Although it is not possible here to review all of them or describe them in detail[14], a brief mention can be given to the following regulatory and incentive measures that currently are the most debated in Switzerland:

Delimitation of a maximum proportion of secondary residences by commune: the Swiss population should shortly reach a decision on an initiative called “End to the unrestricted construction of secondary residences”, under which a ceiling of 20% (linear) is required to be imposed on the number of secondary residences by commune.

*Increase in the coefficient of use and/or occupation of land for property projects aimed at the creation of paid beds (hotels, holiday complexes, etc.).*Under this measure permission is granted to the owner to construct more floor space on his plot of land.It is frequently used within the urban planning process due to its very practical nature inasmuch as it enables land and property values to be created by the State for “free” that can then be used for compensation transactions, for limiting or restricting the rights of owners as a result of spatial planning actions.

Limitation of the rights of use of the property:under this a property owner is obligated to guarantee that his building is to be used for commercial purposes in order to prevent an increase in unpaid beds.

*Tax incentives:*these can take different forms such as a single tax on the purchase of a secondary residence, the introduction of a tax on secondary residences or connection fees (drinking water, waste water, energy).However, the room to manoeuvre of the communes is relatively limited as the amount of these taxes should not in principle discriminate against owners of secondary residences.

Masterplan: implemented in the resort of Engelberg, this instrument is more precise than the normal zoning process as a visual idea of the construction when completed can be obtained. Under this the construction can be integrated into the countryside in a more harmonious way and a higher architectural standard is achieved.

Purchase and exchange of land: the communes can follow an active property policy and prefer to set up projects for paying guest accommodation or the creation of State infrastructures. However, this measure is difficult to implement when the state of the public finances is bad and the price of property is high. Furthermore, its effects will only be felt in the long-term, whereas the problem of secondary residences calls for a quick approach.

23 It is interesting to note that the instruments implemented as well as those currently under discussion are tailored in such a way as to avoid the pitfall of de facto expropriation.

Conclusion

24 Faced with the current limits imposed by the Swiss spatial planning system based mainly on the zoning instrument and characterised by the quasi absence of property instruments, the public players the most directly confronted by the ensuing negative effects (generally the communes and some cantons), have started to develop new planning and spatial development regulations for tourist resorts through using property instruments as an addition to the classical

instruments of spatial planning. Everything is thus happening as if we were witnessing a return of the property question and especially of regulatory property instruments that are not only used for intervening on the spatial definition of land allocations, but more directly on the land and property markets. Furthermore it is interesting to note that this return of property instruments, initially excluded from the mechanisms available under the spatial planning policy, is occurring according to a dynamic that conforms to the principle of subsidiarity, inasmuch as they are emerging firstly at the communal level, even at the cantonal level in some cases.However, this *bottom-up* dynamic, while it has the advantage of enabling the specificity of local property policies to be taken into account and therefore to increase the ability of these instruments to regulate, has two disadvantages, the effects of which are starting to be felt.
(1) The putting in place of such instruments, which results from a local decision-making process, depends on the cooperation, respectively the weakening in the position, of property owners and the players in the property sector within the local space planning policy (and therefore implies the destabilisation or at a minimum the restructuring of the growth coalition) ;
(2) As these relationships of cooperation and conflict between the different players, constituent parts of the structure of the local authorities, vary greatly between the different communes, one can thus observe large differences between resorts (including within the same canton) with regard to the use (the ability to use) of these instruments and therefore the ability to regulate problems relating to the proliferation of secondary residences and the urban sprawl of the resorts.

25 Everything seems to indicate that a scattered and non-coordinated interventionist policy only in place at the communal level is not sufficient:on the one hand, the risk of seeing lucrative property transactions being shifted from one restrictive commune (resort) to another less so is significant; on the other hand the level of expertise of the responsible local politicians regarding the management of problem areas regarding land and property is relatively limited.

26 Under these conditions the necessity to change the scale of public action (Faure *et al*., 2007) is clearly felt. The redeployment of these land and property regulations on an inter-communal, regional or cantonal level, indeed on a national scale as proposed in the “End to the unrestricted construction of secondary residences”, as well as the implementation of a strategy to systematically reduce excessively large building zones in tourist communes, will constitute the central, and at the same time very conflicting, challenges – given de facto expropriation – of the Swiss tourist policy over the next years (Clivaz, 2007). However, it is not certain that these questions can be mastered without a significant change to the rules in force under Swiss property law.

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Notes

1 Federal constitution of the Swiss Confederation dated 18 April, 1999, RS 101. This principle of a Federal guarantee on property dates from 1969 (*Land ownership law - Bodenrechtsartikels*), but has been anchored in the cantonal constitutions for a much longer period of time.

2 Underligned by us.

3 The first definition of the concept of a de facto expropriation in Federal case law dates from 1966 (Barret ruling, ATF 91 I 329-339 and JT, 1966 I : 205-209).

4 It should be noted that, while the Federal law on spatial development dates from 1979, legislation regarding this began to develop from the 1930s—1940s in the towns and from the 1960s at the cantonal level.

5 This mechanism comprises a tax on the property owner of a variable percentage (but generally fluctuating between 20% and 30%) on the appreciation in the financial value of his plot of land following its classification as a building zone within the framework of a communal allocation plan.

6 Contrary to the American meaning of the word, the Swiss federalists are supporters of a conception as decentralised from the State as possible that guarantees the cantons (Federal states) the greatest degree of autonomy as possible in the greatest number of areas of public policy as possible, and in particular with regard to spatial development.

7 This second version of the LAT of 1979 is still in force today (RS 700).

8 There are currently only two cantons, Bâle-ville and Neuchâtel, subject to the systematic implementation of this instrument.

9 Article 15 of the LAT provides that: "the building zones comprise land suitable for construction which: a). have already been built on to a large extent, or b). will probably be required for building within the next fifteen years and will be appropriately equipped within this period of time".

10 The conditions progressively added into case law from the 1980s onwards are in particular:the high degree of probability that the construction project will be completed, the degree to which the plot of land is appropriately equipped, the features of the immediate environment (proximity to other construction sites), the battle against the dispersal of construction sites, the general direction of local planning, the regulations for policing the construction and the infrastructure (communal or cantonal).

11 Federal law on the acquisition of buildings by foreigners (LFAIE), dated December 1983, RS 211.412.41.

12 The cantons of Grisons and Tessin have thus enacted some directives in order to help their communes put into place administrative measures for secondary residences.Furthermore, the Confederation has issued a consultative guideline "Secondary residences" for the benefit of the cantons (ARE, 2009).

13 These are Swiss communes who have more than 25,000 hotel nights per year and where the proportion of secondary residences exceeds 20%.

14 Please refer to the following studies for a more detailed presentation on the conceivable measures: ARE, 2009; Plaz & Hauser, 2006; Switzerland Tourism, 2007.

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Résumés

This contribution demonstrates how the issues and current problems regarding real estate management in Swiss Alpine tourist resorts emerge, for an important part, from the inconsistencies of the Federal land management system set in place at the end of the 1970s, system based on zoning scheme and excluding virtually any estate instrument, including the capital-gain levy. In these very favourable conditions for landowners, who also see land ownership strengthened by its introduction in the Federal Constitution at the end of the 1960s, the "growth coalitions" structuring the local power in many tourist towns usually planned oversized building areas (and often badly located) which have facilitated the development of second homes industry to the detriment of productive estate home industry. Faced with the failure of planning and zoning to limit these trends whose negative effects on the development of tourism seriously begin to be felt in the 1990s, we encounter, now in recent years, the post-eradication of the real estate question in discussions concerning the development of tourist resorts particularly in implementing real estate instruments, such as quota systems, moratoriums or taxes, intervening so much more directly than only zoning on land and real estate owners, contingency arrangements initially excluded from spatial planning policy.

Cette contribution montre dans quelle mesure les enjeux et les problèmes actuels en matière de gestion foncière et immobilière dans les stations touristiques des Alpes suisses découlent pour une part importante des incohérences du régime fédéral de l'aménagement du territoire mis en place à la fin des années 1970, régime fondé sur le zonage et excluant quasiment tout instrument foncier, notamment le prélèvement de la plus-value. Dans ces conditions très favorables aux propriétaires fonciers, qui voient par ailleurs la garantie de la propriété foncière encore renforcée par son inscription dans la Constitution fédérale à la fin des années 1960, les « coalitions de croissances » structurant le pouvoir local dans de nombreuses communes touristiques ont généralement produit des zones à bâtir surdimensionnées (et souvent mal situées) qui ont favorisé le développement de l'industrie de la résidence secondaire au détriment de l'immobilier de rente. Face à l'impuissance de la planification et du zonage à limiter ces tendances dont les effets négatifs pour le développement touristique commencent sérieusement à se faire sentir à partir des années 1990, l'on assiste depuis quelques années à la réémergence de la question foncière dans les discussions concernant l'aménagement des stations touristiques, notamment au travers de la mise en œuvre d'instruments fonciers et

immobiliers, tels que quotas, contingentements, moratoires ou taxes, intervenant de manière beaucoup plus directe que le seul zonage sur les propriétaires fonciers et immobiliers, modalités d'intervention initialement écartées de la politique d'aménagement du territoire.

Entrées d'index

Mots clés : aménagement du territoire, immobilier, propriété foncière, stations, Suisse, tourisme
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