

Mexican Senate to vote on a Constitutional Reform to Allow Foreigners to Own Direct Title to Coastal Property

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By the end of 2013, the Mexican Senate will vote on a bill already approved by the Mexican House of Representatives (*Cámara de Diputados*) that would allow foreigners to own direct, fee simple title to real property near Mexico's beaches and borders.

Today, Article 27, Section I of the Mexican Constitution, reads:

*"Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and that appurtenant thereto, or to obtain concessions for the exploitation of mines or of waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and to agree not to invoke the protection of their home governments in matters relating thereto; under penalty, in case of noncompliance, of forfeiture to the Nation of the property acquired.¹ **Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers of the border and of fifty kilometers of the sea shores of the country.**"*

Currently, foreigners who have purchased real property - including residential lots, second homes and condominiums - in the Restricted Zone are using banks as trustees that hold title in trust for the benefit of the foreigner; that is, the bank holds legal title to the land, but the foreigner holds beneficial title, including use, enjoyment and conveyance rights.

This trust (in Spanish, *fideicomiso*)² structure has made the process to acquire land by foreigners in the "restricted zone" slow (as the bank must review, approve and execute the trust as well as approve any amendments, encumbrances or conveyance) and expensive, as the trustee charges fees and adds an additional layer of bureaucracy to the closing process.

The thrust of the constitutional amendment is to allow foreigners to purchase **direct title** to real property in the Restricted Zone, provided, however, that it is solely for residential purposes. Under the amendment, foreigners who currently own land through a trust would be able to terminate their current trust and transfer title to themselves directly.

¹ Commonly found in Latin American countries, this constitutional provision is referred to as the "Calvo Clause".

² The trust is a three-party contract through which the seller (fideicomitente/trustor) irrevocably transfers title to real property to a Mexican bank (fiduciario/trustee) so that the foreign citizen (fideicomisario/ beneficiary) can use and enjoy the property and dispose of it if and when desired.

However, foreigners who purchase land with a commercial, business, industrial, agricultural or any type of direct or indirect economical purpose would be required to take title the old way; that is, through a Mexican trust, or by incorporating a wholly owned Mexican subsidiary.³

If the bill passes the Senate and is then approved by a majority of Mexican state legislatures, it is foreseen that each bank will determine the cost and process for terminating the trusts so that title may be transferred to the individual. Of course, many owners will likely elect to keep their property in the trust for the time being, as the systems are put in place or in the event that they plan on selling soon anyway. And some may even elect to keep their trust indefinitely, inasmuch as (a) it does afford estate planning benefits (no Mexican will is required to pass property to heirs because the trust does it for you) and (b) makes it more difficult for creditors to attach the property.

It is important to note that the proposed reform, although seen by the Mexican government as an incentive for foreign investment, is also a way to prevent the practice in which foreigners acquire land intended for residential purposes, but then use it for economic gain. Once the amendment is passed, Congress and the Executive will establish the secondary laws and regulations, respectively, which will shed further light on the process and restrictions, including a provision that will likely stipulate that if a foreigner acquires direct title to property for residential purposes but then uses it for commercial purposes (e.g., a hotel or restaurant), then it could be subject to forfeiture to the Mexican government.

The current Mexican Senate ordinary session ends on December 15, 2013, so it is likely that this reform will be voted before this date. If the bill is passes, it will then be submitted to Mexico's state legislatures probably in January 2014. If approved, this reform would be in effect by the end of Q1 2014, after which the secondary law and regulations would be formulated, voted on and promulgated.

At Rosen Law, we specialize in real estate transactions and would be able to assist you in any type of questions regarding this important reform and its future effects.

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³ The Mexican subsidiary/corporation may be 100% owned and managed by foreigners.