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Regulatory amendments address commercial real estate industry concerns regarding federal foreign buyer ban

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The Minister of Housing and Diversity and Inclusion has announced a series of regulatory amendments with respect to the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the Act) which alleviate many of the concerns the commercial real estate industry has voiced regarding the legislation.

The Act prohibits "non-Canadians" from purchasing any "residential property" directly or indirectly for a two-year period until the end of 2024. While the legislation was originally created to assist with housing affordability in major urban centres, the release of the accompanying regulations (the Regulations) on December 21, 2022, revealed the ban's significant and seemingly unintended consequences for commercial real estate transactions.

Other than receiving general feedback from various industry stakeholders, the Ministry did not provide a public opportunity to comment on the proposed amendments to the Regulations. The amendments [PDF], which came into force on Monday, March 27, 2023, appear to have responded to this feedback. However, the amended Regulations do not entirely dispose of the issues industry experts have raised regarding the Act. Care will still need to be taken in assessing the application of the law to transactions involving properties that have existing residential uses, on a case-by-case basis.

Issues addressed in the amendments

The amendments respond to concerns raised regarding the Act in the following manner:

1. Increasing the foreign ownership threshold of 'control'

Issue

In the Regulations, an entity was originally deemed to be "non-Canadian" if shares or ownership interests of the entity representing 3% or more of the value of the equity in it, or carrying 3% or more of its voting rights, were directly or indirectly owned by a foreign person or entity. As a result, the Act's prohibition captured a broad class of commercial real estate industry participants — including partnerships, private corporations, and private investment funds — with foreign investors contributing 3% or more to their equity/capital stack.

Response

The amendments have revised the definition of "control" by increasing the foreign ownership threshold to 10%, which is less than the 20% threshold the commercial real estate industry had been seeking. This change is likely to be of some assistance to many investment funds with foreign investors. This benefit is further bolstered by the narrowed definition of "residential property" and the "development" exclusion, discussed further below.

2. Expanding an existing exemption to include all publicly traded entities

Issue

The original Regulations provided an exemption from the definition of "non Canadian" for publicly traded corporations, but did not similarly exempt other publicly traded entities, such as REITs.

Response

Under the amended regulations, publicly traded Canadian *entities* (not merely corporations) listed on a Canadian stock exchange are now excluded from the definition of "non-Canadian". This would include REITs, and likely also the affiliates or subsidiaries of the REIT. However, in relation to such affiliates or subsidiaries, we recommend consulting further with legal counsel if the 10% foreign ownership threshold is or may be exceeded at the REIT level.

3. Narrowing the definition of 'residential property'

Issue

In the original Regulations, the definition of "residential property" extended beyond single-family homes to include land that did not contain a "habitable dwelling", but was zoned for either residential or mixed use. As a result, transactions involving commercial properties which were zoned to permit residential uses (although such residential uses did not and could not exist on site) were potentially prohibited by the Act.

Response

The amendments have repealed the portion of the definition of "residential property" referring to "land that does not contain any habitable dwelling, that is zoned for residential use or mixed use". While the commercial properties listed in the bullets below are not expressly exempted from the legislation by virtue of the deletion, all that now remains within the definition of "residential property" in the Act are those properties that contain three or fewer residential units (or similar properties).

In our view, it follows that:

- existing commercial properties (such as office towers, shopping centres, warehouses, etc.) that have *no residential uses,* irrespective of whether zoning permits residential or mixed uses, are not "residential property" under the Act.

- any existing commercial property that has one to three residential units (i.e., street front urban retail with one to three upper floor residential units) is still a “residential property” to which the prohibition applies (unless it can be demonstrated that the purpose of the acquisition is for development).
- properties with more than three residential units (i.e., apartment buildings) are still excluded from the definition of “residential property”.
- vacant lands, irrespective of whether zoning permits residential or mixed uses, are not within the definition of “residential property”.
- the acquisition of a single-family home in an urban area remains within the definition of “residential property” and subject to the prohibition, but — in light of the new exemption discussed below — the acquisition of such property by a non-Canadian would be *exempt* where it was for “the purposes of development”.

4. Exempting acquisitions for the purposes of development

Issue

The original Regulations created uncertainty for the commercial real estate development industry due to the absence of language clarifying which development projects and transactions were permitted under the Act. For example, the Act and Regulations, as originally drafted, appeared to prohibit non-Canadians from developing or redeveloping residential and mixed-use lands as part of a land assembly process of smaller adjoining residential properties.

Response

The Regulatory amendments seek to clarify this ambiguity by introducing a new subsection that exempts non-Canadians acquiring residential property "for the purposes of development” from the prohibition under the Act.

There is no definition of “development” or further guidance regarding this exemption included in the amendments. However, the amendments are accompanied by new Frequently Asked Questions on the CMHC website that offer insight as to how the Ministry may interpret this “development exemption” (it being acknowledged that the CMHC FAQs are not legally binding).

Some items of note from the FAQs include the following:

- Development includes evaluating, planning and making alterations or improvements to a residential property, or the land on which the property is located. There need not be a complete redevelopment; adding a new building while retaining the existing structure and use is considered development.
- Major alterations and modifications, including those that engage re-zoning or site plan approval processes, might meet the “development” threshold. A contextual analysis will

need to be applied on a case-by-case basis.

- Where an expansion or remodel is so extensive that one is essentially constructing a new building or effecting a change of use, this would qualify as development.
- An alteration or improvement does not have to result in the property being used for its highest and best use in order to constitute "development".
- However, repairs, remodeling, or other similar minor modifications will generally *not* meet the threshold of "development".
- A non-Canadian with good faith intentions to develop a residential property who buys the property while relying on the development exemption, but later fails to develop it for good faith reasons, has not committed an offence under the Act. The non-Canadian should be prepared to show (a) a good faith intention to develop the property; and (b) a change leading to a good faith decision not to develop the property.
- In most cases, "land banking" for potential redevelopment in the non-immediate future while the property continues to be rented for residential purposes likely would not qualify as an acquisition "for the purposes of development" and, as such, would not benefit from the new exemption.
- A non-Canadian cannot purchase residential property in reliance upon the development exemption simply for the purpose of leasing, renting out, or otherwise managing it as a rental property as part of its portfolio.