

CUBAN REAL ESTATE FRAMEWORK LAWS

Rolando Anillo

Foreign investment in real estate has been the engine of growth for many under-developed countries and has served as a vehicle to bolster other economic sectors, particularly tourism. The Cuban government has recognized the need to attract foreign capital as a supplement to the national investment efforts. The Cuban government is looking for sources of medium- and long-term financing for the construction of real estate projects as well as for working capital for their operations and for the generation of new employment.

With 11.2 million people, Cuba is also facing intense demand for housing, a demand aggravated by several hurricanes that have torn through the island since 2005. These hurricanes have damaged over half a million homes and have caused over 10 billion dollars in damages. Cuban President Raúl Castro authorized Cubans to “build your homes with whatever you can.” Cuba’s Housing Institute has started granting “self-effort” building permits. The permits are to build new homes, or expand or repair existing homes.

Another significant step to liberalize the Cuban real estate sector is Cubans’ new ability to buy and sell homes, rather than to swap dwellings of supposedly equal value. Not only does the move cut down on under-the-table dealings, but it could also allow Cubans to free up significant capital and unleash a wave of home building, renovation and other entrepreneurial activity.

The purpose of this paper is to identify key components of the Cuban legal framework that is being created to develop the real estate sector in the island. The paper also seeks to provide information regard-

ing the latest modifications to the Cuban Civil Code to accommodate new forms of property ownership as well as to relax historical limitations regarding the transfer of real estate properties.

FOREIGN INVESTMENT LEGISLATION

The substantive and procedural laws of Cuba are based on Spanish Civil laws, altered by the concept of socialist legality as defined in the Cuban Socialist Constitution of 1976. Opening Cuba to real estate investments with foreign capital required additional guarantees to the foreign investors. As a result, in 1992 Cuba’s National Assembly of People’s Power (ANPP) amended the 1976 Socialist Constitution of Cuba and in 1995 enacted the Cuban Foreign Investment Act (Law No. 77).

As the demand for Cuban real estate investments exceeded the initial expectations, additional changes to the legislation were enacted. The Cuban Council of State approved several laws dealing with real estate issues during the period 1998–2007, including: Decree-Law No. 185/98 (Cuban Property Registry Law), Decree-Law No. 214/2000 (Structuring of Mortgages), and Decree-Law No. 233/03 (Modified Cuban Housing Law). As a complementary regulation, the Cuban Ministry of Justice (MINJUS) issued Resolution No. 114/07 (Procedures of the Cuban Property Registry), which together with the Constitution, Civil Code, the Spanish Mortgage Law of 1893 and Law No. 77 have created the current legal framework by which the Cuban real estate market is regulated.

The 1976 Socialist Constitution only contemplated the possibility of doing business with the Cuban

State. As observed by the still-in-force Cuban Civil Code (Law No. 59/87), “the real estate and facilities belonging to the Cuban State may not be transferred to natural or juridical persons.” In 1992, modifications were introduced to the 1976 Constitution that essentially derogated such principles in it and in the Civil Code. For example, Article 15 of the Constitution, as amended, in its last paragraph expresses: “Property ownership may not be transferred to natural or juridical persons, save for exceptional cases in which the partial or total transfer of an economic objective is carried out for the development of the country and does not affect the political, social and economic foundations of the State, prior to approval by the Council of Ministers or its Executive Committee.” Article 15 goes on to state: “The transfer of other property rights to state enterprises and other entities authorized to fulfill this objective will be prescribed by law.” Furthermore, Article 23, as amended, states: “The State recognizes the right to legal ownership of joint ventures, domestic companies and economic associations which are created as prescribed by law” and “the use, enjoyment and disposal of the assets belonging to the former mentioned entities are ruled by what the Law and treaties establish, as well as by their statutes and regulations.”

The above-mentioned Articles in the Constitution, as amended, created the conditions to open up the Cuban real estate sector to foreign investments. Law No. 77 of 1995, in its Article 10, stated that “foreign investments may be authorized in all sectors, excluding health and education for the population and the armed forces institutions, with the exception of the latter’s commercial system.” Meanwhile, Chapter 6 of Law No. 77 deals specifically with real estate investments. Articles 16, 17 and 18 define the scope of real estate investments, including ownership and other property rights. Thus, pursuant to Law No. 77, foreign investors may purchase houses and other structures destined for private residence or tourism activities; housing or offices of foreign companies; and develop real estate projects in the area tourism. Chapter II (Glossary) sets forth that the authorization for real estate investments would take the form of a “document issued by the Executive Committee of the Council of Ministers (CECM) or a govern-

ment commission.” Article 21(f) of Law No. 77 states that the CECM has the exclusive power to authorize “investments that include the transfer of state-owned property or of other state-owned property rights.” Law No. 77 also considers real estate as a contribution to a joint venture investment. Article 19(d) of Law No. 77 lists as contribution to a joint venture investment: “property rights over personal property and over real estate property, as well as other property rights over those assets, including usufruct and surface rights.” As such, the Cuban party in a joint venture may include land, buildings, usufruct rights and surface rights as part of its contribution to the joint venture.

According to Cuban law, the right of usufruct gives the right to the free enjoyment of the property of another, with the obligation to preserve its form and substance, unless the title constituting it or the law provides otherwise. The rights and obligations of the usufruct holder (usufructuary) are determined by the title document of usufruct. The usufructuary is obligated to use the property that is object of the usufruct in accordance with its purpose, and may make such improvements, facilities or installations necessary for its adequate maintenance, conservation and enjoyment. Usufruct in favor of individuals may not exceed their lifetime; usufruct granted in favor of corporations (including joint ventures) may not exceed 25 years, which may be extended by an equal term at the request of the usufructuary made prior to its expiration date. Article 210 of the Cuban Civil Code states that “the right of usufruct is nontransferable and may be encumbered, unless the title provides otherwise.” Article 211 of the Code prescribes that “the State may grant in usufruct state-owned property to individuals or corporations in the cases and with the formalities provided under applicable law. When granting the right of usufruct, the State may establish conditions different from those indicated in the Cuban Civil Code as long as they do not contravene the nature of the usufruct as an institution.” As established in the mentioned Articles 15 and 23 of the Cuban Constitution, the Cuban State may authorize Cuban entities to contribute with the right of usufruct to a joint venture as long as the contribution meets the economic objective of the State.

According to Article 218 of the Cuban Civil Code, the State may grant to natural or legal persons surface rights over state-owned lands for the construction of housing or to carry out other constructions. Surface rights may also be granted in order to use the land for other specifically determined activities. Surface rights may not be granted over lands considered personal property such as residences and vacant land. Surface rights may be granted by onerous or gratuitous title. It is worth noting that the holder of a surface right becomes the owner of whatever is built on the land. However, Article 225 of such Code indicates that when the surface right is extinguished (ended), the improvements or facilities built on the land would revert in favor of the State, who is the owner of the land. The surface rights given to the Cuban partner, that is to say, the Cuban party in a joint venture, may also represent a capital contribution, but if the surface right is given directly to the joint venture, the joint venture will have to pay the value of the surface right to the Cuban State.

Decree-Law No. 273 of 2010 modified Articles 221 and 222 of the Cuban Civil Code, which contain the terms and conditions under which the State may grant surface rights to foreign developers. The objective of the amendment is described in its preamble: “to expand and facilitate the process by which foreign investors can participate in international tourism” and “provide great legal certainty and guarantees to foreign investors in the Cuban real estate transactions.” Pursuant to these modifications, the State could now grant surface rights for a period of up to 99 years, and if the rights were granted for a shorter period of time, the period could be extended to 99 years at the request of the holder of the right. In addition, the State may grant perpetual surface rights over State-owned land, prior payment of the value or price of the right, to Cuban companies or Cuban societies for the construction of tourism homes or apartments. Previously, surface rights could only be granted for a term not exceeding 50 years and could be extended for half of its original term, at the request of the holder of the surface rights made before the date of the expiration. Surface rights are transferable, except when the law or the title document provides otherwise.

CUBAN PROPERTY REGISTRY

There was an evident stagnation of the property recording process in Cuba since the 1960s, which caused the loss of the chain of titles. Only authenticated or certified documents can be recorded in the Registry. The recording of the documents in the Registry guarantees the property rights over the real estate.

During the last two decades, MINJUS has been creating the legal formalities to reorganize the real estate market in Cuba. Such legal formalities have been divided into four stages:

1. Legalization of real estate properties in favor of the Cuban State.
2. Registration of all properties owned by the State in the Cuban Property Registry.
3. Registration of property rights granted in favor of Cuban entities
4. Registration of property rights granted in favor of joint ventures (including foreign investors).

Decree-Law No. 185 of 1998 modified Law No. 65 of 1988 and designated the MINJUS as the state organ in charge of implementing the regulations of the Cuban Property Registry. Under this authority, the MINJUS issued Resolution No. 114 of 2007, which provides the rules and procedures of the Cuban Property Registry (the Registry). The Registry is a government agency with the unique function of keeping records of legal documents affecting property rights. The Registrar is a public officer in charge of the Registry.

The Registry provides transparency to the real estate investment process by keeping a record of all real estate transactions. The Registry also provides additional guarantees to foreign investors as well as to U.S. and Cuban nationals whose properties have been affected by expropriations or confiscations. Currently, interested parties may be able to search in the Registry for the following documents: declarations of expropriation and confiscation of properties in favor of the Cuban State and transfers of state owned-properties to Cuban companies, joint ventures or individuals (foreign or nationals); rights of usufruct, surface rights, leasing agreements or other real estate contracts; warranty deeds; notary docu-

ments; judicial decisions affecting a real estate property; recorded mortgages or other recorded encumbrances, assessments and declarations.

According to MINJUS Resolution No. 114 of 2007, the following documents shall be recorded: new transfers of title or property rights; prior transfers of property or titles to recognize the rights of the current title holder; new construction; real estate properties that constitute capital contributions to joint ventures. The Registry shall be made public by way of: the issuance of informative notes; the issuance of certifications; the direct search of the recording documents in the Registry.

The real estate recording process starts with a request to the Registrar. The Registrar examines the documents to determine if the request includes the documents contemplated in Article 4 of Resolution No. 114 of 2007 or titles or other legal documents enumerated in Article 5. According to Article 3 of the Spanish Mortgage Law of 1893, only notarial deeds, authenticated private documents or titles issued by a judicial authority, the State or its agencies are recordable with the formalities prescribed by applicable laws. The Registrar may inquire about additional documents to support the request. According to Articles 14.1 and 25 of Resolution 114 of 2007, the Registrar shall examine the documents for error or omissions. The Registrar may suspend the recording of the documents until the errors have been corrected. The Registrar may also deny the recording when there is an illegality or the title contains defects. As such, the Registrar acts as a title examiner.

Decree-Law No. 114 of 2007 also contemplates an administrative procedure to challenge the Registrar's decisions before the Director of the Provincial Justice (a government agency). There is also a subsequent right to appeal an adverse decision of the Director through an administrative process pursuant the Cuban Civil Procedure Law (Ley de Procedimiento Civil, Administrativo, Laboral y Económico, LPCALE, Law No. 7 of 1977).

CUBAN MORTGAGE LEGISLATION

The laws promulgated after the Cuban Revolution of 1959 limited and almost eliminated the figure of

mortgage from Cuban legislation. As a result, the Cuban Civil Code of 1987 only recognizes mortgages with respect to ships and aircraft. The Spanish Mortgage Law of 1893, which is the only existing mortgage law in Cuba, was practically a dead letter until the approval of Decree-Law No. 214 of 2000 which created the possibility of filing mortgages in Cuba. Specifically, Article 2 of Decree-Law No. 214 of 2000 prescribes that the legal regime of mortgages in Cuba is based on the still-in-force Mortgage Law of 1893 and its complementary regulations. The "old" Spanish Mortgage Law gained currency with the Cuban foreign investment strategy.

After the promulgation of Law No. 77, foreign investors demanded more flexibility in the real estate investment process. At the same time, real estate lenders demanded more guarantees and security to finance real estate projects. It is worth noting that one of the purposes of the Decree-Law No. 214/2000 was to allow foreign financial institutions to finance real estate investments in Cuba. The latter recognizes the mortgage as a guaranty to the fulfillment of the contractual obligations and the payment of obligations and debts. Regulations of financial institutions in Cuba are established by Decree-Law No. 173 of 1997, which defines financial institutions as "legal entities established pursuant to Cuban or foreign laws with the purpose of providing financial intermediation. This activity may be carried out by banks or other non-banking financial institutions."

Cuba limited the capacity to mortgage real estate properties to corporations or other economic entities registered in Cuba. According to Law No. 77, all the companies created under that law are considered Cuban corporations regardless of the nationality of its shareholders. It is worth noting that only Cuban corporations (domestic or jointly) properly registered and established for the purpose of conducting real estate activities are allowed to mortgage their properties as a guaranty of repayment. The registration process of corporations in Cuba is set out in Decree-Law 226 of 2001.

Special provisions of Law-Decree No. 214–2000 further define aspects of mortgages in Cuba:

- The first special provision establishes that any filling of a mortgage in Cuba requires prior and express authorization of the CECM.
- The second special provision establishes that the Cuban State has preferential right to acquire mortgage titles by paying their value in the event the mortgage holder (lender or intermediary) decides to sell, assign or transfer the mortgages. As a result, the Cuban State reserves the right of first refusal and option to purchase mortgages. If the Cuban law provides that the State has a preferential acquisition right, it is understood that such right includes both the *right of preemption* and the *right of retraction*. According to the Cuban Civil Code, the *right of preemption* or *right of first refusal* confers upon a person designated by law the right to acquire an asset for an agreed price or the legal price, as the case may be, in preference to another acquirer, whenever the owner wishes to dispose of same. The *right of retraction* or *right of redemption* confers upon a person designated by law the right to acquire an asset sold, in subrogation of the purchaser, by reimbursing the purchase price, contractual expenses and any other expenses, including those made in the asset itself. Pursuant to Cuban law, where the transfer of a property requires the prior authorization of the State, it is understood that the Cuban State has both the right of preemption and the right of retraction.
- The third special provision establishes that the solution of disputes derived from the registration or execution of any mortgage in Cuba is determined in accordance with the Cuban Civil Procedure Law. The Economic Division of Cuban Provincial Courts have jurisdiction over any mortgage dispute related to foreign investment companies as prescribed in Decree-Law 223 of 2001 (Jurisdiction of the Economic Division of the Provincial Courts of Popular Power).

SALE AND PURCHASE OF DWELLINGS

Decree-Law No. 288 of 2011 eliminated the restrictions regarding the transfer of dwellings between individuals. A fundamental limitation remains in that a person can only be the proprietor of one dwelling as

a permanent residence, and one other, as a vacation home. Decree-Law No. 288 modified Chapter V of the General Housing Act, which refers to the transfer of ownership of dwellings through sales, donation, swapping and adjudication, the latter referring to instances in which the owner dies or definitively leaves the country and in the event of an uncontested divorce.

Among other objectives, Decree-Law No. 288 was designed to ensure that proprietors who want to dispose of a dwelling can do so as they wish, without the need for any authorization from the Municipal Housing Authority, as had been the case prior to the new law. This is relevant because the State does not have the rights of preemption and retraction regarding the sales of dwellings in Cuba.

Decree-Law No. 288 seems to set out that property transfer transactions are to take place in the presence of a notary public thus eliminating a body of administrative authorizations and legal requirements that, over the last several years, have led to corruption. The requirement of paying the Transfer of Property and Inheritances Tax is maintained, while a Personal Income Tax specifically for income based on the sale of a dwelling has been incorporated into the law. Both taxes represent 4% of the value of the dwelling. The following are highlights regarding the application of Decree-Law No. 288:

- **Requirements to transfer ownership of a dwelling:** (1) For a person to transfer ownership of a dwelling, he or she must be the rightful owner of the dwelling and reside in Cuba; (2) the property must be registered in the Registry of the municipality where it is located; and (3) the property title must be up to date, including the tax assessment.
- **Government Authorization:** Prior authorization from the Municipal Housing Authority is no longer required, as we have already mentioned, and in the concept of disproportional value of the dwellings exchanged, given their differing value or characteristics, is also eliminated. If the parties involved so decide, they may declare a monetary compensation to accompany the swap, which will be recognized by law, and

must be established in Cuban Pesos (CUP), in the presence of a notary public, in order to guarantee legal protection in the event of future problems. Again, with the purpose of offering greater security, as in the case of a sale, a cashier's check issued by a local bank will be used. In the case of a swap transaction, each party must pay taxes on the Transfer of Property and Inheritances based on the value of their new homes. If one of the parties receives compensation, this amount will be added to the value of the dwelling acquired for the purpose of calculating the tax.

- **Price of the Property:** It is not required that the price of the dwelling necessarily coincide with the value indicated in the tax assessment. The price is agreed upon by the parties involved in the sale and is set by them. The value reflected in the tax assessment is used to calculate the taxes to be paid, if the price declared by the buyer and seller is less than this amount.
- **Indebtedness:** When a sale is completed, the seller is expected to show that all debts related to the purchase of the home have been paid in full.
- **Closing:** The buyer is obliged to inform the notary that he or she is not the proprietor of another dwelling as a permanent residence. The form of payment required to complete the transfer of funds is established by the buyer and seller. The buyer is obliged to deposit the amount of money agreed upon in a local bank, in exchange for a cashier's check, which is then delivered to the buyer in the presence of a notary public, to formalize the sale. The notary, in turn, records the number, the date and name that appear on the check. The purpose of using a cashier's check is to provide parties with legal protection and to eliminate the need to handle large sums of money.
- **Taxation:** Both the buyer and the seller have to pay a 4% tax on the amount agreed upon as the

price for the dwelling. The former pays the tax in the form of a Transfer of Property and Inheritances Tax, while the latter pays Personal Income Tax. In the case of donations, the transaction is also taxed accordingly.

With these new legal provisions coming into effect, individual citizens will have more flexibility in making decisions about the sale and purchase of dwellings, but they will also have more responsibility for them. State institutions, for their part, are charged with ensuring that the regulations are fully respected and that real estate transfer activities outside of the law are ended.

CONCLUSIONS

The Cuban government has introduced a number of economic and legal reforms in the last few years and is expected to implement additional legislation to create a more favorable and transparent environment to develop the real estate sector in the island.

The need to attract external financing to the development of the real estate market in Cuba brought about the resurgence of the property registry and of the legal figure of the mortgage as additional guarantees to foreign investors in Cuba. However, the mortgage instrument has a very limited scope due to the restrictions of applying mortgage laws within a socialist property system. The impossibility of the Cuban nationals to use the mortgage as a mean of improving their housing and living conditions requires additional laws and modifications to existing laws, including the Cuban Constitution.

Recent modifications to the Cuban Civil Code are in line with the Guidelines approved by the VI Communist Party Congress, which are part of updating of the country's economic model. They seek to develop a coherent policy to simplify real estate transactions and limit existing irrational prohibitions that over the years have been conducive to violations.