

# THE IMPACT OF CUBA'S NEW REAL ESTATE LAWS ON THE ISLAND AND THE DIASPORA

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## RESIDENTIAL REAL ESTATE

Cuba's current economic reforms are limited and moving forward slowly, but they are moving. As Rolando Anillo said about the reforms in his presentation, "sin prisa pero sin pausa." The range of the topics covered by the reforms is quite extensive. They include agriculture, small businesses, foreign investment, tax policy, reducing government spending, removing excessive business restrictions, credits for businesses and home improvements, buying and selling automobiles, and buying and selling residential real estate.<sup>1</sup> The one area where the reforms are having a strong impact, which is already quite noticeable, is residential real estate.

In November 2011 a new law (Decree-Law No. 288) went into effect allowing Cubans to buy and sell their homes without authorization from the government.<sup>2</sup> The sale price is determined by the parties to the sale. This is a radical change from the "permuta" model that existed in Cuba for many years, which is somewhat similar to the concept of "light kind exchange" in U.S. law. The new law even allows Cubans to sell their homes before leaving the country and keep the proceeds of the sale. The government has also established new procedures to register and transfer titles. The new law has created a residential real estate market similar to what is in existence in

many countries. The one big limitation is that under current Cuban law, you can only own a principal residence and a beach or country second home. Another important limitation is that the owner cannot mortgage the principal residence.

Even with these limitations, the legalization of residential real estate sales will have a very significant impact on Cuban society. Family net worth will go up substantially with this transformation of the housing model. Even the national net worth will go up, as the value of residential real estate increases. According to official reports, Cuba has approximately 3,700,000 residential properties, including houses and condominiums. Yet less than ten percent of the residential properties had title of ownership filed in the official registry of properties when Decree-Law No. 288 was passed last year.<sup>3</sup> One of Cuba's principal law firms reported that during the first half of 2012, seventy-five percent of their work involved real estate recordings and sales.<sup>4</sup>

- Cuba has several characteristics that suggest that the new real estate law will have a substantial impact on Cuban society and economy.
- Cuba has more than 3 million homes. Approximately 90 per cent of these homes are owned by

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1. Philip Peters, *A Viewer's Guide to Cuba's Economic Reform*. Arlington, Virginia: Lexington Institute, May 2012.

2. "Decreto Ley No. 288," *Gaceta Oficial*, 2 de diciembre 2011, No. 35, p. 359.

3. *El Nuevo Herald*, December 21, 2011, p. 9.

4. Author's conversation with several attorneys of the firm in May 2012.

the occupants.<sup>5</sup> This is one of the highest home ownership ratios in the world.

- Cubans under current law are allowed to have a country home or a beach house. Therefore, there is the possibility of more than 3 million second homes being incorporated to the new housing market.
- Cuba has a populous and relatively wealthy Diaspora close by in the United States. The U.S.-based Diaspora is now sending more than two billion dollars per year to Cuba in cash and goods. The U.S. Diaspora is also visiting Cuba at the rate of some 300,000 individuals per year.
- For the Cuban Diaspora, retirement in Cuba is relatively easy. You have to be at least 62 years of age, have a place to reside in Cuba and sufficient income in hard currency to support yourself.
- There is the possibility of expanding the primary residence. For example, adding rooms, building a second story, selling air rights, developing a business like a "Paladar" or a bed and breakfast, renting part of the house, and so on.
- Finally, Cuba has a very low population density compared to other Latin American and Caribbean countries. Therefore, there is a lot of room for different forms of real estate development in the island.

In Cuba there has been for many years an industry of illegal private construction. Private construction companies are now legal and they can have up to 12 employees. Involved in this growing industry are members of the Cuban Diaspora with their relatives in Cuba. However, also involved in private construction companies are also investors and entrepreneurs with family connections in Cuba from Spain, Italy, Canada and other countries.

### **RESORT DEVELOPMENTS WITH GOLF AND MARINAS**

The Foreign Investment Code, Law No. 77 of September 1995, opened Cuba to foreign investment in

real estate. Hotels and condominiums were popular with foreign developers, investors and buyers in the 1990s. Many hotels were built all over the island while condominiums were built and sold mostly in Havana. The hotels were built based on a 25 to 50 year lease between the Cuban government and the joint venture company doing the development. Condominiums were sold as fee simple, based on the Condominium Law of 1952. For a variety of reasons, the sale of condominiums was basically terminated in 2000.

Discussions regarding golf and marina residential development started almost ten years ago as a way of improving tourism. The successful example of the Dominican Republic was cited by those promoting this form of development. Because of the investment of capital required for development of such projects, a better land deal was needed. After considerable analysis and discussion a new law was approved in August 2010 extending the lease term to 99 years for golf and marina developments.<sup>6</sup> The new law also created the possibility of a lease in perpetuity with the joint venture company.

At present there are more than fifteen resort development projects under consideration.<sup>7</sup> They will have more than twenty thousand residential units for sale, some twenty five golf courses, six or seven marinas and about twenty hotels. One project is already under construction, Marina Gaviota, at the eastern tip of the Varadero Peninsula. This project will have about 1,000 condominiums, a hotel, a large marina, a repair yard for boats and perhaps a golf course. The developer is Gaviota, a company associated with the Cuban military.

Two other projects are close to approval. The first is Carbonera, just west of Varadero, very near Varadero's International Airport. Carbonera will have about 1,000 residential units, a golf course and a hotel/club house. The second is Loma Linda in Guardalavaca beach in Holguin province. It will have 1,200 resi-

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5. Timothy Ashby, "Cuban Real Property: Current Laws and Future Prospects," *Real Estate Law Journal*, Fall 2004, pp. 128-131.

6. "Decreto Ley No. 273," *Gaceta Oficial*, 13 de agosto 2010, No. 33, p. 942.

7. *CubaNews*, No. 20, February 2012, pp. 8-9.

dences, two hotels and two golf courses. The developers of Carbonera are British and those of Loma Linda are Canadians. The Cuban partner in the joint venture to develop both of these two projects is a company called Palmares. There are other projects in the process of approval, for example La Altura, west of Bahia Honda in Pinar del Rio, and Bacunayagua, in Matanzas. The ultimate success of these residential resort projects is partially based on buyers and investors from the United States.

In the United States there is substantial interest in Cuba as a real estate development opportunity. Cuban-Americans under present rules can live and retire in Cuba as long as they have relatives in the Island. They can send to their relatives in Cuba as much money as they want and stay in the Island as long as they want. However, there is a limit on daily expenditures, a situation may change in the future.

Americans can invest indirectly in real estate development in Cuba under the 49/49 rule.<sup>8</sup> This means that the investment must be non-controlling, in a third country company, not U.S. or Cuba, and the company has to generate most of its income from outside of Cuba. In the case of the golf and marina residential projects, income from Cuba will not be generated for several years.

Another motivator for U.S. investors is the example of Vietnam. Cuba and Vietnam share some important similarities. Both are socialist countries with a one-party government; both have had long periods of antagonism with the United States; both have substantial Diasporas in the United States; both have gone through revolutions and both have started economic opening efforts after the collapse of the Soviet Union. One big difference between Cuba and Vietnam is that Vietnam did not decelerate the economic opening of the 1990s as Cuba did. Vietnam has done very well with real estate development projects. Sales of real estate residential units have had a strong demand by foreigners and the Vietnamese Diaspora in Europe and the United States. There is actually a

Vietnamese company, HUD Holdings with two real estate development projects in the process of approval in Cuba.

### **PROPERTY CLAIMS BY U.S.-BORN CITIZENS AND CUBAN-AMERICAN CITIZENS OF THE UNITED STATES**

There are four types of Cuban property claims. First, claims by U.S.-born persons. Second, claims by Cubans that have become American citizens. Third, claims by Cubans in the Diaspora. And fourth, claims by Cubans in Cuba. The last two groups will not be considered in this presentation because United States and International laws do not apply to them. Their claims must be decided under Cuban laws and courts.<sup>9</sup> The claims of U.S. nationals are governed by international law. The compensation for the expropriation of foreign investor properties is based on an agreement between the nations involved. Normally, the property is not returned. An agency under the U.S. Department of State, called the Foreign Claims Settlement Commission (FCSC), was created to handle claims by U.S. citizens against foreign governments for expropriation of properties. In the case of Cuba, the FCSC has verified and certified more than 7,000 claims for a total value of more than six billion dollars (including interest).

Once the claims were certified in the late 1960s, the United States and Cuba were supposed to start negotiations for the resolution and payment of the claims. This has not taken place, apparently because the United States has not moved forward with the negotiations. This is somewhat strange because Cuba has settled the property claims issue with all countries that had foreign investment in Cuba. Included among these countries are Spain, Canada, Italy, France, and England. What the United States did do was to allow its citizens to take income tax credits for the losses of property in Cuba.

The claims resolution process between the United States and Cuba has not moved forward basically because of political reasons. It appears that the United

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8. Paolo Spadoni, *Failed Sanctions*. Gainesville: University Press of Florida, 2010.

9. *Report on the Resolution of Outstanding Property Claims Between Cuba and the United States*. Creighton University, 2007.

States has made a political decision to deal with the property claims issue under laws enacted by Congress like the Helms-Burton Act of 1996. The Cubans want to deal with the property issue but including claims for damages supposedly caused to Cuba by actions of the United States, such as the economic embargo and Operation Mongoose.

The issue of real estate property claims between the United States and Cuba should be resolved for the benefit of both sides. Claimants should receive some compensation and Cuba should clear the claims issue for the benefit of future real estate development. The issue of residential property claims should relatively easy to resolve. First, the doctrine of adverse possession or *usucapion* as it is known under the Civil Law, clearly favors current occupants.<sup>10</sup> Second, according to several polls, most former owners of residential properties do not want their properties back. Third, many U.S. claimants have already received some compensation for their losses on their tax returns. Cuba could do something similar with members of the Diaspora returning to Cuba to retire or to live on the Island.

The issue of commercial properties is a lot more complicated. First, commercial properties are generally more valuable than residential properties. Second, many of the commercial properties are now being used for some business purpose, while others may be used in the future for commercial and other types of development. This creates a problem for the foreign investors with Helms-Burton Title III. However, Helms-Burton Title III probably will never be applied because of the opposition of the European Union and close allies of the United States, like Canada, Mexico and Brazil. The application of Title III

of Helms-Burton has been suspended by President Clinton, President Bush and President Obama. However, the future relations of the United States and Cuba are partially dependent on what happens with Helms-Burton Title I and Title II.<sup>11</sup>

Hopefully, the issue of commercial properties will be resolved perhaps by different initiatives. The Cuban government could pay some compensation for the expropriation of commercial properties. Foreign investors could also pay some compensation, as it was done by the Italian company Telecom to the American company ITT. There should be more private deals like the one between Telecom and ITT. Former owners/claimants could also deal directly with the Cuban government. Both types of solutions have been subject of conversations in the past and there could be more conversations in the future. When individual Americans have tried to negotiate with a foreign government, usually the Logan Act is cited as a deterrent. The Logan Act has two paragraphs. In the first paragraph it says "any citizen of the United States...without the authority of the United States, directly or indirectly...carries on any correspondence or intercourse with any foreign government...in relation to any disputes or controversies with the United States...shall be fined under this Title or imprisoned not more than three years or both." However, the second paragraph states "this section shall not abridge the right of a citizen to apply himself...to any foreign government...for redress of any injury which he may have sustained from such government."<sup>12</sup> This paragraph seems to allow U.S. citizens with property claims against Cuba to negotiate directly with the Cuban government the issue of compensation for the expropriation of their property.

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10. Agustín de Goytisolo and José M. Hernández, "Debating Cuban Property Law," *CubaNews*, No. 2, October 1993, p 6.

11. Dianne E. Renmack and Mark P. Sullivan, *U.S.-Cuban Relations: An Analytic Compendium of U.S. Policies, Laws and Regulations*. Washington: The Atlantic Council of the United States, March 2005.

12. 18 U.S.C. §953(2004).