

LITIGATION | AUGUST 23, 2023

# Florida Law on Foreign Ownership of Real Property Survives For Now – Compliance Still an Issue

Joseph M. Hernandez, Mamie Joeveer & Kevin M. Koushel

On August 17, 2023, Judge Allen Winsor of the U.S. District Court of the Northern District of Florida denied the Plaintiffs' motion for temporary injunction in *Shen v. Simpson*, Case No. 4:23-cv-208-AW-MAF, the pending challenge to SB 264 (Chapter No. 2023-33, Laws of Florida). As previously [summarized](#), SB 264 is the new law that restricts certain individuals and entities associated with China, Russia, Iran, North Korea, Cuba, Venezuela, and Syria from owning real property in Florida.

In his 51-page Order, Judge Winsor held that the Plaintiffs did not show a substantial likelihood of prevailing on the merits and disagreed that the law violates the U.S. Constitution and the Fair Housing Act. When brushing aside the Plaintiffs' Equal Protection argument, Judge Winsor cited a series of 100-year old U.S. Supreme Court cases that held states could deny aliens ownership interests in land within their respective borders absent an arbitrary or unreasonable basis: *Terrace v. Thompson*, 263 U.S. 197, 216-22 (1923); *Porterfield v. Webb*, 263 U.S. 225, 232-33 (1923); *Webb v. O'Brien*, 263 U.S. 313, 324-26 (1923); *Frick v. Webb*, 263 U.S. 326, 332-34 (1923). Despite the Plaintiffs' argument that the foregoing precedent was impliedly superseded by more recent cases, Judge Winsor's position was that he was bound because the older cases were not expressly overruled.

## ***The Fight Continues***

On August 21, 2023, four days after the Court's ruling, the Plaintiffs filed an appeal to the U.S. Court of Appeals for the Eleventh Circuit, and they moved to enjoin enforcement of the Order pending the outcome of the appeal. However, since the Plaintiffs were essentially required to show the same factors as their initial motion, Judge Winsor denied the Plaintiffs' second attempt for an injunction, as expected.

The Plaintiffs' appeal will likely continue to argue that the law is not facially neutral on national origin discrimination, and even though the Court declined to apply strict scrutiny review, it still fails on a rational basis review. Their second motion asserted: "The State has provided no justification for prohibiting Plaintiffs and similarly situated individuals who live in Florida from purchasing homes—let alone a justification for treating these Florida residents more severely than people domiciled in other "countries of concern." The Plaintiffs also drilled the Court's ruling of the interpretation of "domicile." They argued that the State's own confusion of the term was evidence that the law is unconstitutionally vague. Lastly, the Plaintiff argued that SB 264 is preempted by the Committee on Foreign Investment in the United States, the federal law that addresses foreign ownership of real estate. Regardless, SB 264 remains enforceable pending the appeal.

### ***Other Ambiguities in the Law***

Aside from the arguments being raised in *Shen v. Simpson*, practitioners have other concerns with SB 264, as many of the tools necessary to avoid civil and criminal liability are still unavailable. For example, the law requires foreign principals to register their applicable properties with the Department of Commerce (formerly known as the Department of Economic Opportunity) or the Department of Agriculture and Consumer Services. To date, however, neither State agency has established their registration system. Additionally, the Florida Real Estate Commission was tasked with creating a form buyer's affidavit to be used in all future real estate transactions. But like the registration systems, the form is still not available.

Despite the foregoing dilemmas, the Department of Commerce and the Department of Business and Professional Regulation ("DBPR") recently issued rulemaking notices. The Department of Commerce will create a rule that "prohibits the purchase of real property on or around military installations or critical infrastructure facilities by foreign principals." The plaintiffs in *Shen v. Simpson* challenged the terms "critical infrastructure facility" and "military installation" as unconstitutionally vague, but the Court disagreed and held that the law "gives fair notice of the specific facility types that qualify" and is sufficiently detailed enough to understand what facilities will be included. But in reality, only time will tell if there is enough detail in the statute to prevent unnecessary litigation.

This [map of South Florida](#) illustrates the difficult task ahead for practitioners without clearly defined exclusion zones.

Similarly, the DPBR will create a rule providing a form buyer's affidavit relating to the ownership restrictions in SB 264. Since the law is currently in effect, however, practitioners have begun drafting their own form affidavits in an attempt to avoid liability. Additionally, practitioners are updating their real estate agreements to add representation and warranty language that tracks both federal and State requirements with respect to foreign ownership of real estate. Hopefully the rulemaking process will lead to clarity on many of the issues since public comment is a part of the process.

### ***The Unintended Impact on Business***

Another area of concern not addressed in *Shen v. Simpson* is the impact SB 264 will have on institutional buyers and investors. The new law contains a narrow exemption allowing foreign principals to own a "de minimus indirect interest" in restricted properties, but there is no consensus on how the pertinent language should be interpreted. And without a clear indication of how the State is going to enforce the law, many investors may choose to avoid the potential risks altogether.

Prominent business leaders have voiced concerns that SB 264 may stifle investment in Florida. For example, Associated Industries of Florida President and CEO Brewster Bevis notified the DBPR on July 31, 2023, that the law is much broader in scope than the publicly stated intent, which could limit the freedom of Florida's future growth.<sup>1</sup> Citadel's Ken Griffin also questioned the law and recently provided the following statements to Bloomberg: "Florida is defined by its promise of freedom and economic opportunity, and our State government must continue to reflect and uphold these ideals. We support the freedom of individuals who are lawfully working in the US to purchase homes and we will continue to advocate for those rights."<sup>2</sup>

While the law remains entangled in litigation, the next few months will be pivotal for real estate practitioners not only in Florida, but also those out of state who advise clients doing business here.

[1] [Industry Group Raises Alarm Anti-Chinese Investment Law Could Curb Florida Growth](#)

[2] [Ken Griffin Reshaped Law Banning Chinese Real Estate Purchases](#)

## Related People



**Joseph M. Hernandez**  
**Partner, Real Estate**



**Mamie Joeveer**  
**Of Counsel, Real Estate**



**Kevin M. Koushel**  
**Of Counsel, Real Estate**