

Enter the Fray: Florida Restricts Certain Foreign Ownership of Real Property

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Lawsuit Against Florida Law Restricting Certain Foreign Ownership of Real Property Set for Hearing This Week, DOJ Supports but 12 States Oppose

On July 1, 2023, SB 264 (Chapter No. 2023-33, Laws of Florida) took effect. The controversial law, among other things, restricts certain individuals and entities associated with China, Russia, Iran, North Korea, Cuba, Venezuela, and Syria from owning real property in Florida. SB 264 labels these individuals and entities as "foreign principals" and the countries as "foreign countries of concern."

Except for those associated with China, all foreign principals are prohibited from acquiring agricultural land and any interest in real property within 10 miles of any military installation or critical infrastructure. Foreign principals associated with China, on the other hand, are completely prohibited from purchasing or acquiring any interest in real property in Florida. The law provides limited exceptions for natural persons from foreign countries of concern, including China, to purchase one residential property (i.e., two acres or less) if it is more than five miles from any military installation.

Aside from the obvious issues raised above, SB 264 is also a potential liability minefield. First, the Florida Real Estate Commission ("FREC") was tasked with preparing a form affidavit so real estate purchasers can certify that (i) they are not a foreign principal, or (ii) the transaction will otherwise comply with the law. However, as of the date of this article, FREC has not prepared the form affidavit. Second, foreign principals are required to register their properties with the Department of Economic Opportunity ("DEO"), including restricted properties acquired prior to July 1, 2023 (i.e., that are grandfathered in), and permitted properties acquired on or after July 1, 2023. But similar to FREC, the DEO's registration system is not currently up and running. Lastly, violations of

SB 264 can lead to civil and criminal liability for those on all sides of the transaction, as well as forfeiture of the property to the State.

To say the least, SB 264 is a questionable piece of legislation not only from a practitioner's standpoint, but also from a legal one. For example, restricting the ownership of real property based on one's alienage, national origin, race, and ethnicity may violate the Equal Protection Clause of the U.S. Constitution, as well as the federal Fair Housing Act. There are also Due Process concerns because SB 264 is arguably too vague as to which properties and individuals are actually restricted. And finally, legislation related to national security is specifically reserved for the federal government — not a state that disagrees, or is impatient, with the handling of certain issues on a national scale.

Regardless if one agrees or disagrees with these restrictions, these are the underlying arguments challenging SB 264 in the federal lawsuit currently pending in the Northern District of Florida.

Shen v. Simpson

On May 22, 2023, two weeks after SB 264 was signed into law, four Chinese citizens and a Florida real estate brokerage filed a lawsuit against the State of Florida seeking (i) an order enjoining the State from enforcing the new law, and (ii) a declaratory judgment that the new law is unconstitutional *Shen v. Simpson*, 4:23-cv-00208 (N.D. Fla.). The challenge is a coordinated effort with the American Civil Liberties Union, the ACLU of Florida, DeHeng Law Offices PC, the Asian American Legal Defense and Education Fund, and the Chinese American Legal Defense Alliance.

In addition, the U.S. Department of Justice ("DOJ") filed an amicus brief in support of the plaintiffs. The DOJ also alleged that SB 264 violates the U.S. Constitution and Fair Housing Act, and it argued that the new law is in direct contrast with existing federal regulations that address real property issues involving national security.

Although the potential impacts of SB 264 will likely vary, the plaintiffs in *Shen v. Simpson* are alleging significant damages. A few of them, for example, may lose tens of thousands of dollars in deposits for restricted properties currently

under contract; one may have to cancel plans to purchase an investment property because he already owns a residence elsewhere in Florida; and the real estate brokerage estimates it will lose 25% of its business. These are some of the reasons why the plaintiffs are also seeking an emergency motion for preliminary injunction.

The State's response, however, paints a different picture. First, it argues that the plaintiffs lack standing because the individuals are not subject to SB 264 and the real estate brokerage's purported injuries are speculative. Second, it claims the statutory mechanisms for identifying the restricted properties are clear, and "the mere fact that close cases can be envisioned" does not make the law unconstitutional. Third, it asserts SB 264's restrictions on land ownership do not violate the Equal Protection Clause. Fourth, the plaintiffs cannot invoke the private cause of action or show discrimination under the Fair Housing Act. And finally, it contends that the existing federal regulations restricting foreign ownership of land do not conflict or preempt SB 264.

Like the DOJ's support of the plaintiffs, twelve other states have stepped up to defend Florida. In their jointly filed amicus brief, the attorneys general of Idaho, Arkansas, Georgia, Indiana, Mississippi, Missouri, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, and Utah all argue that the plaintiffs' claims fail under existing Supreme Court precedent; SB 264 does not discriminate on alienage, race, or national origin; federal law does not impliedly preempt SB 264; and SB 264 lawfully addresses important issues of state policy.

Regardless, SB 264 is now in effect, and the hearing on the plaintiffs' motion is not scheduled until July 18, 2023. This means those who violate SB 264 between now and the court's ruling could be held accountable. And, this is also why industry professionals need to prepare themselves as if the preliminary injunction will not be granted and the underlying challenge to SB 264 will fail. So, what is necessary to avoid liability in these scenarios?

The Affidavit and Registration

In an effort to assist current and prospective purchasers, various organizations such as title companies, have released their own affidavits until FREC's form is

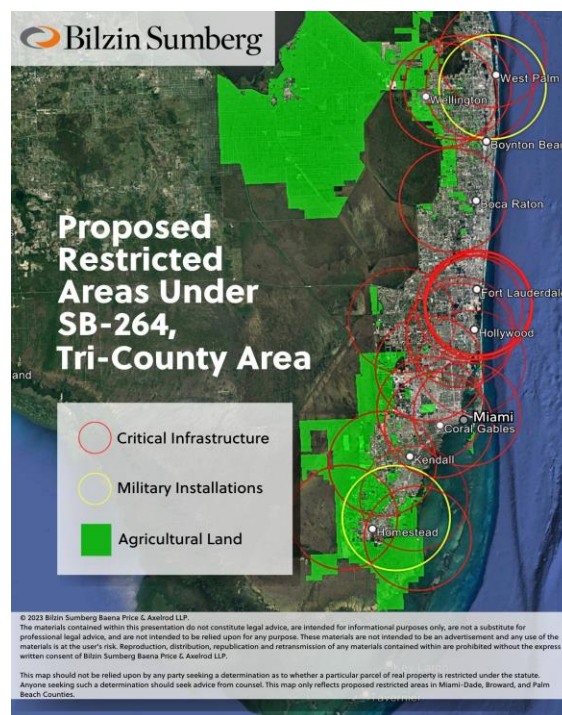
available. It is unknown if these “gap filler” affidavits, created out of an abundance of caution, will be substantially similar to the FREC one — or even rise to the level of compliance with the law. Either way, the general consensus is that purchasers in all real estate transactions (i.e., not only “foreign principals”) will need to provide the affidavit as an additional closing document. Florida Realtors, for example, are also advising industry professionals that they should not attempt to make any determination as to whether an individual or entity is a “foreign principal.” Instead, industry professionals are being advised to use the affidavits in every transaction to avoid potential Fair Housing claims. Many form affidavits are available on the various organizations’ websites.

The other express requirement under SB 264 is registration. Specifically, foreign principals that acquired properties prior to July 1, 2023, which are now restricted under SB 264, have until December 31, 2023 to register their properties with the DEO. The registration must include: (1) the name of the owner of the real property, or the owner of the interest in such real property; (2) the address of the real property, the property appraiser’s parcel identification number, and the property’s legal description; and (3) in the case of agricultural land, the total number of acres. Foreign principals that acquire unrestricted properties on or after July 1, 2023, however, must register their properties with the DEO within 30 days of closing. But, as mentioned above, the DEO registration system is not currently available. This means the only option for foreign principals is to regularly monitor the DEO website until the earlier of: the registration system up and running or a favorable ruling in *Shen v. Simpson*.

Mapping Out Restricted Properties

SB 264 has serious consequences for those who knowingly purchase restricted properties. However, by expressly prohibiting the purchase of agricultural land, as well as including distance requirements from military installations and critical infrastructure, violating SB 264 is essentially a strict liability crime. In other words, not having basic mapping skills or being savvy enough with technology to scan the areas in question, is probably not going to be a valid defense for violating SB 264.

Along those same lines, there is currently no standard in place for measurement. Does the five- or 10-mile radius from the military installation or critical infrastructure begin at the center or edge of the property? Or, what if a property is only partially within a restricted radius? Without clearly defined “exclusion zones” or some type of State-run property search tool, SB 264 is only inviting error. To illustrate this point, the [map included](#) with this article took three attorneys, a former city planner, and the marketing department to put together — and there is still no guarantee that this accurately covers all the restricted property in the area shown. How can one expect ordinary persons without the same resources to certify compliance with this new law?



[\(Click here to download image\)](#)

Conclusion

The myriad of questions surrounding SB 264 demonstrates the dire need for court intervention — either to strike down the law altogether, or provide time for a “glitch bill” to correct the law’s ambiguities and questionable purpose. But again, practitioners and those that may qualify as foreign principals should be prepared in the event SB 264 remains in effect. There is little choice

when the potential consequences for noncompliance are so severe for all parties involved.

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