

Ga. Law Creates Challenges For Foreign Ownership Of Land

By **Nellie Sullivan and Lindsey Grubbs** (May 20, 2024)

Georgia is the latest in a series of states that have adopted legislation to limit the ownership and possession of land by certain foreign entities and people depending on the location and use of the land.

On April 30, Georgia Gov. Brian Kemp signed S.B. 420 into law, which, barring a challenge combined with successful injunctive relief, will take effect on July 1. The bill aims to address current concerns regarding foreign ownership of sensitive land, but the particulars associated with complying with the legislation will have a broader impact on many involved in real estate transactions and even passive ownership of land.

Buyers, sellers, lenders, attorneys, title companies, brokers and others will have to perform a number of new due diligence tasks just to ensure their transactions are not in the scope of the legislation or else risk fines, jail time, and loss of both the property and purchase funds.

Such consequences on the real estate industry are being felt in other states that have recently adopted similarly aimed legislation, but the legislation varies enough that anyone involved in real estate in Georgia will want to be aware of the particulars here.

And even where similar challenges have been created in other states, the legislation is new enough that typical real estate processes have not yet been altered sufficiently in ways to smooth the bumpy implications on real estate transactions.

Basics of the Legislation

Essentially, the bill forbids certain "nonresident aliens" from acquiring or maintaining a possessory interest in some agriculture land and land within a 10-mile radius of any military base, military installation or military airport.

It also provides requirements for disposing of such property within certain time frames if the foreign person or entity already owns or otherwise comes into ownership of such property. Real estate practitioners will quickly see the hidden implications of such legislation.

New due diligence approaches may be required in three different ways: identification of the buyer or current owner, use of the land in question and use of the surrounding land.

Further, the legislation may require due diligence not ordinarily performed on land that is already owned and not intended to be conveyed as now, such ownership could be deemed illegal based on the owner's status and the status of the land. Let's examine the complications of each of these.

Intended or Current Owner



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The first step in this analysis requires the identification of the intended or current owner. This is an exercise that requires an understanding of several terms that are newly defined within the bill.

The legislation defines "nonresident aliens" as:

(A) Any natural person who is not a United States citizen or legal resident, is an agent of a foreign government designated as a foreign adversary by the United States Secretary of Commerce pursuant to 15 C.F.R. Section 7.4, and:

(i) Has been physically absent from the United States for more than six months out of the most recent 12 months preceding the acquisition of a possessory interest described in this Code section; or

(ii) Has been physically absent from Georgia for more than two months out of the most recent 12 months preceding the acquisition of a possessory interest described in this Code section.

(B) A corporation, partnership, limited partnership, trustee, or other business entity that is:

(i) Domiciled in a country whose government is designated as a foreign adversary by the United States Secretary of Commerce pursuant to 15 C.F.R. Section 7.4; or

(ii) Domiciled within the United States, but the ownership of at least 25 percent of which is composed of any corporation, partnership, limited partnership, trustee, or other business entity that is domiciled in a country whose government is designated as a foreign adversary by the United States Secretary of Commerce pursuant to 15 C.F.R. Section 7.4; or

(C) A foreign government designated as a foreign adversary by the United States Secretary of Commerce pursuant to 15 C.F.R. Section 7.4.

The definition of "agent of a foreign government" is also quite broad and would require deeper analysis, particularly when dealing with countries where large portions of their people are employed by government or political parties. Such definition includes the following:

(A) Any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign government or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign government, and who directly or through any other person:

(i) Engages within the United States in political activities for or in the interests of such foreign government;

(ii) Acts within the United States as a public relations counsel, publicity agent, information service employee, or political consultant for or in the interests of such foreign government;

(iii) Within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interests of such foreign

government; or

(iv) Within the United States represents the interests of such foreign government before any agency or official of the government of the United States; and

(B) Any person who agrees, consents, assumes, or purports to act as, or who is or holds himself or herself out to be, whether or not pursuant to a contractual relationship, a person described in subparagraph (A).

In its drafting, the legislators anticipated that an individual or entity's status may change, in which case the possessory interests in land may no longer be forbidden, but in its current state, the law does not provide any kind of mechanism for confirming or proving such change.

Use of the Subject Land

If it determined that the current owner falls or may fall within the definition of nonresident alien, the next step of the analysis is to determine the use of the property. If it is agricultural land, the land falls within the scope of this new legislation.

It defines "agricultural land" as "any land capable of use in the production of agricultural crops, timber, livestock or livestock products, poultry or poultry products, milk or dairy products, or fruit or other horticultural products."

It further specifies that the land must be zoned by a local government unit for a use other than and nonconforming with agricultural use. This means that if the land may be used for agricultural use, it is in the frame of the legislation. These provisions now require those involved in land matters to verify, and perhaps monitor, the use of the land.

The law does provide for some very narrow carveouts for people or entities who may fall in the definition of nonresident aliens based on the use of the land for residential purposes or certain, specific agricultural research and development.

Use of Nearby Land

The analysis does not stop there, however, as the law also covers any property within a 10-mile radius of any military base, military installation or military airport.

As real estate practitioners know, typical title work involved in most real estate transactions does not readily identify land within 10 miles of subject tracts as being military installations or not.

Hence, title work for certain transactions will require a reliable chain of title not only for the subject property, but now perhaps also for surrounding properties. Further, official land records often do not contain legally reliable designations of current use, meaning that attorneys, brokers, buyers, sellers and title companies will need to adapt their due diligence processes to ensure compliance with the legislation, in ways that may be cumbersome in both time and expense.

Additional guidance and requirements are likely imminent from title companies and underwriters operating in Georgia to provide them comfort with these new requirements. We hope the Legislature will also provide additional guidance on safe harbors and the like.

Penalties and Enforcement

The legislation imposes penalties for owners who inappropriately acquire prohibited interests and for brokers who fail to alert potential buyers. Intentional violation of the law is considered a felony, punishable by fines up to \$15,000 and imprisonment of one to two years. As a result, all transactions will now need to be thoroughly vetted to ensure that they are not in violation of the new restrictions.

Furthermore, the local jurisdiction's attorney, the attorney general or any person involved in the transaction who is not a foreign person or entity may file an action to void the conveyance and have the interest reverted to the previous owner.

If voided, the foreign person or entity is barred from making any claim against any party — which we would read to include the seller of such property — for restitution of the purchase price it paid for such property. This provision in particular has significant implications for title insurance, as it may lead to increased risk and potential claims. It also affects lenders who may rightly be concerned whether they have valid security interests in real property.

Passive Ownership Is Also Forbidden

Finally, it is worth noting that the legislation forbids passive ownership of possessory interests in the specified agricultural or near military land by certain "nonresident aliens," requiring that existing interests be divested by June 30, 2027.

The legislation makes exemption for interests acquired through debt collection — foreclosure on mortgages — and through devise or inheritance, but the exemptions are not permanent, as such properties must be disposed of by forbidden foreign persons or entities within two years or one year, respectively, of such possessory interest arising.

Conclusion

If a party having a possessory interest in real property is deemed to be a nonresident alien, significantly more work is now necessary to ensure any possessory interest they have is and remains legal.

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