
To: Environment and Transportation Committee

From: Legislative Committee of the Real Property Section Counsel

Date: March 7, 2023 [Hearing Date March 9, 2023]

Subject: **HB 842 – Agricultural Land - Foreign Property Interests - Restrictions**

Position: **Opposed**

The Real Property Section Counsel of the Maryland State Bar Association (MSBA) **opposes House Bill 842 – Agricultural Land - Foreign Property Interests - Restrictions**. The bill seeks to prohibit “foreign persons” from purchasing, leasing, or otherwise acquiring certain interests in agricultural land in the State on or after October 1, 2023 and provides that any such transfer is **void** as against public policy.

The bill has two fatal flaws. First, there is no enforcement mechanism. Assuming the foreign person buys the property in exchange for the “void” deed, it will still take possession of the property. Then what happens? This bill does nothing to address what happens next. Silence in the statute invites a judicially created remedy of “void” title or a similar remedy. But who will file such a lawsuit? Assuming the State files the action and obtains a judgment voiding the conveyance, then what happens? Does the title revert in the foreign person’s grantor or someone else?

The second fatal flaw is that by declaring the conveyance “void”, the statute would cloud the title to all agricultural land conveyed on or after October 1, 2023. Even if such conveyance did not involve a “foreign person”, there would be no way for subsequent title examiners to determine whether a prior grantor was a foreign person.

And because rights and interests in real property rely on the concept of a “chain of title,” declaring a “link” in the chain to be **void** will harm any innocent residents or businesses that obtain an interest in the same land. This is because the transfer of property rights relies on the old common-law rule of *nemo dat quod non habet*—that is, no one can convey an interest in property that he or she does not already legally own. This important rule means that remedy of “void” title would cast a serious cloud over the marketability of all land titles subject to the statute. For example:

- Any resident or business who later purchases the property from a prohibited entity will also have “void” title—ad infinitum down the “chain of title” in perpetuity.
- Any contractor or subcontractor who does work for a prohibited entity may be denied lien rights for unpaid labor or materials, since such rights frequently only attach if the work is done for the “owner” of the property, and a “void” title means that the purchaser never became an “owner.”
- Any lender who gives a mortgage loan will likewise have an invalid and unenforceable

mortgage (or deed of trust) on the property, leaving that lender unsecured under state law.

- Should the State obtain an Agricultural Easement on the land on or after October 1, 2023, such easement may be void.

As if these consequences of a “void” title were not serious enough, voiding a transfer would create a cause of action for “unjust enrichment” (or “restitution”) against the innocent resident or business seller for the sales proceeds; any mortgage lender who was paid off with the sales proceeds; and any real estate broker involved in the transaction (for a commission for a sale that legally never occurred). This means that if a prohibited sale from a resident or business had occurred, everyone involved in the transaction would be subject to a lawsuit effectively to “unwind” the transaction.

The problems associated with a “void” title can be avoided by following the example of many other states that have effectively dealt with this similar issue for decades without placing a cloud on their land titles. Examples of such workable existing statutes include prohibitions on foreign ownership of agricultural land enacted in Pennsylvania, North Dakota, Minnesota, and Missouri. See 68 PA. CONS. STAT. §§ 41 et seq.; N.D. CENT. CODE §§ 47-10.1-01 et seq.; MINN. STAT. §§ 500.221 et seq.; MO. REV. STAT. §§ 442.560 et seq.

These states’ enforcement mechanisms effectively move the “chain of title” forward rather than push it backward by voiding a transfer that has taken place. They do this by imposing either a **forced divestiture** or **forfeiture** (or escheat) of the land to the state.

These existing state statutes vest the state attorney general or other appropriate executive authority with investigative and enforcement powers to carry their provisions into effect. Moreover, they protect lien holders (such as mortgage lenders and mechanics’ lien claimants) and future property owners by providing their interests in the property are not affected or impaired by the divestment of the foreign owner’s interest.

Any legislation in this area should include the following principles:

1. **Avoid voiding title** – In no case should the consequences for a violation of the law result in “void,” “voidable” or “invalid” title. Likewise, the law should **not be silent** as to the remedy or enforcement mechanism.
2. **Use a proper remedy or enforcement mechanism** – The law should specify an appropriate enforcement mechanism that avoids rolling back title but rather pushes title forward to a new owner.
3. It should provide for a **forced divestiture** as the enforcement mechanism or provide that land acquired in violation of the statute is subject to **forfeiture** to the state.
4. The statute should identify the **enforcement agency** and establish investigative powers. An example of an appropriate enforcement authority is the state attorney general.
5. If a party acquires title in violation, the law should provide a **reasonable period for voluntary transfer**. If a party disputes the violation, or fails to comply with an order to divest, the law should provide a process for **court-supervised forced divestiture** (probably using an established sale process such as judicial foreclosure, receivership, or partition).
6. Any legal process should include a requirement for the **recording of a lis pendens** and any order confirming and validating a sale to a new owner.
7. The law, and any sale procedure, should ensure **protection of any lien holders and**

purchasers. Likewise, once the prohibited party is no longer in title, the title to the property should be **free from any taint.**

8. ***Protect innocent parties from potential liability*** – If a state decides to impose criminal liability and penalties for violation of the law, the statute should protect innocent third parties from complicity, aiding and abetting, conspiracy, or similar vicarious liability.

Sample Legislative Text – The American Land Title Association has developed model legislative text that incorporates the above principles. Such text could be easily harmonized with existing Maryland law. The Real Property Section would gladly participate in doing so if the legislature is considering passing a bill with respect to foreign ownership of agricultural land.

For these reasons, the Real Property Section Counsel of the MSBA **opposes HB 842** and asks for an **unfavorable report.** Thank you for your consideration.

Suggested Legislative Text for Bills Regarding Foreign Ownership of US Real Estate

State lawmakers are considering bills restricting the ability of certain foreign individuals and entities to buy property within the state. In some instances, the bills prohibit ownership of certain types of property, such as farmland, or disallow property ownership with proximity to agricultural businesses, military bases or other property deemed essential to national security.

Real estate transactions represent approximately 13% of U.S. gross domestic product. Given the importance of real estate to the U.S. economy, any law regarding foreign ownership should establish specific processes and procedures to protect valid property interests and avoid penalizing legitimate sellers, creditors, and future owners of property.

Bills should incorporate the following:

1. Clearly defined prohibitions and express remedy for enforcement

Sample legislative text: *A transfer of an interest in land in violation of this section shall be subject to divestiture as set forth in this section.*

2. Identification of the agency responsible for enforcement and clear articulation of its investigative powers

Sample legislative text: *The [attorney general or appropriate state authority], upon the request of any person or upon receipt of any information which leads the [attorney general] to believe that a violation of this section may exist, may issue subpoenas requiring the appearance of witnesses, the production of relevant records and the giving of relevant testimony.*

3. Provide for divestment of property acquired in violation of the law with appropriate due process protections (via voluntary transfer or forced divestiture following established process such as judicial foreclosure, receivership, or partition)

Sample legislative text: *On concluding, as a result of the investigation, that a violation of this section has occurred, the [attorney general] shall order the [foreign entity] to divest itself of all interests in the land within 90 days. If the [foreign entity] fails to divest itself of all interests, or if an interest holder timely objects to the order of divestiture, the [attorney general] shall commence an action in [superior] court. Except in the case of dismissal, the court shall order that the property be sold pursuant to [insert appropriate state statute for judicial foreclosure, receivership, or partition action under a power of sale].*

4. Protect previous owners, lien holders and future purchasers from loss or litigation

Sample legislative text: *Proceeds of the sale shall be disbursed to lien holders, in their order of priority, except for liens which under the terms of the sale are to remain on the property.*

No title to land shall be invalid or subject to divestiture by reason of the violation of this section by any former owner or other person holding or owning a former interest in such land.

No person not subject to this section shall be required to determine or inquire into whether another person is or may be subject to this section.

5. Safeguard the Reliability of US Property Records

Sample legislative text: *Upon commencement of an action under this section, the [attorney general] shall promptly record a notice of the pendency of the action in the [local land records]. Upon the entry of order for the sale of the property under this section, the attorney general shall promptly record a copy of such order in the [local land records].*