

Made in the USA: Attorney General's Opinion Clarifies Limits on Foreign Ownership of Land in Wisconsin

 Tom Larson |  February 05, 2015



In December, Wisconsin's then-Attorney General J.B. Van Hollen issued a formal opinion to clear up confusion regarding the ability of non-U.S. citizens to own land in Wisconsin. The confusion stemmed from what appeared to be a direct conflict between state law, which limits the amount of land a foreign citizen could own, and a federal treaty, which prohibits states from enacting or enforcing laws that treat U.S. and foreign citizens differently. Due to this apparent conflict, REALTORS[®], property owners, and others have been unclear about the rules regarding foreign ownership of land in Wisconsin.

Foreign investment in real estate is growing

Interest by foreign investors in U.S. real estate is very strong and continues to grow. Most of the real estate holdings by foreign investors consist of forest and farmland, but interest is also strong in other types of property, such as commercial, golf courses and residential properties. While activity by foreign investors historically has been higher in coastal areas, states in the Midwest and the South have also experienced greater demand by foreign investors in recent years. Consider the following:

- In 2012, the United States Department of Agriculture estimated that approximately 24.2 billion acres of farm and forest land were owned by companies with foreign investors. This represents an increase of approximately 65 percent since 2004. ¹
- In 2013, foreign investment in commercial real estate was an estimated \$40 billion. ²
- The U.S. ranks number one by foreign investors as the most stable and secure destination for real estate investment, according to a survey by the Association of Foreign Investors in Real Estate (AFIRE). ³
- Ninety percent of global investors have indicated that they plan to maintain or increase the size of their U.S. real estate portfolio in 2015, according to the survey by AFIRE. ³

Wisconsin law vs. federal treaty

While increased demand by foreign investors has helped strengthen U.S. real estate markets, such demand has also resulted in a growing interest in the laws that regulate foreign investment in real estate.

Since 1887, Wisconsin law has prohibited foreign individuals and corporations from owning more than 640 acres of Wisconsin land. The 640-acre limit applies to all land owned in Wisconsin, not just contiguous property. Thus if a foreign individual or corporation has various land holdings in Wisconsin consisting of farmland, commercial buildings and forest land that equal 640 acres, any further land purchases with or without improvements would be prohibited. Moreover, the penalty for exceeding this limit is significant given that any property acquired in excess of 640 acres is subject to forfeiture.

Wisconsin's law, however, does contain numerous exceptions. The exceptions include property owned by railroads and pipeline corporations as well as land used for mining, manufacturing, mercantile or energy-production activities. In addition, the law specifically exempts foreign governments and subjects of foreign governments whose rights are secured by treaty.

Because the U.S. entered into a number of agreements and treaties with foreign countries over the last 50 years to encourage global investment and free trade, many have questioned the enforceability of Wisconsin's 640-acre limit on foreign investment. For example, in 1995, the U.S. and over 150 countries signed the General Agreement on Trade in

Services Treaty (the "federal GATS Treaty"), which was designed specifically to remove barriers to trade and investment between countries. The federal GATS Treaty applies to over 150 countries, including China, Russia and most European countries, and prohibits countries from treating foreign citizens and corporations differently than their own citizens and corporations.

Since Wisconsin's 640-acre limit applies only to citizens and corporations of foreign countries and the federal GATS Treaty prohibits states from treating foreign citizens and corporations differently than domestic citizens and corporations, considerable confusion existed as to whether the 640-acre limit was enforceable.

AG's opinion

Based on an analysis of both Wisconsin law and the federal GATS Treaty, the recent opinion from Wisconsin's Attorney General concluded that the 640-acre limit does not apply to citizens and corporations of the 150 countries that have entered into the federal GATS Treaty agreement for all uses except agricultural and forestry uses. In other words, the federal GATS Treaty overrides Wisconsin's 640-acre limit on foreign real estate investments unless the property is being used for agriculture or forestry. Thus the 640-acre limit still applies to foreign ownership of agricultural and forestry land regardless of whether the foreign owner is a citizen or corporation from a country that has entered into the federal GATS Treaty.

In support of this conclusion, the opinion cites two different reasons:

1. Wisconsin's law specifically exempts most uses of land owned by foreign investors and corporations from the 640-acre limit, but does not exempt agriculture and forestry uses. Given that the Wisconsin statutes were amended numerous times to specifically exempt certain uses from the limit but not agriculture and forestry uses, the opinion determined that the legislature's intent was to clearly limit the amount of agricultural and forestry land that could be owned by foreign investors.
2. The federal GATS Treaty is one of the exceptions in Wisconsin's law, and the treaty applies to a long list of "service sectors" but not the agriculture or forestry service sectors. Thus, because the federal GATS Treaty does not apply to agriculture or forestry service sectors, the opinion reasons that agriculture and forestry land are not exempt from the 640-acre limit.

Conclusion

When working with foreign investors or corporations interested in purchasing land in Wisconsin, REALTORS® should be aware of both the 640-acre limit and the exceptions for certain uses provided for both under the Wisconsin statutes and the federal GATS Treaty. Because the penalty for violating Wisconsin law is forfeiture of the property, REALTORS® should strongly encourage foreign investors and corporations to seek the advice of legal counsel to ensure they are in full compliance with the law.

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