

KEY CONSTRAINTS TO REAL ESTATE DEVELOPMENT IN NIGERIA

1 Introduction

Real estate has continued to play a significant role in man's evolution. It is not a coincidence that food, shelter and clothing believed to be the three essentials that sustain mankind, also have some linkage to land. Food grows out of land while shelter is affixed to it, and man's clothing is made largely from what grows out of land. Indeed, whether in ancient times or today's modern system, land constitutes a significant index for man's wealth, and as economic activities have assumed more sophistication over time, land has continued to play a central role in their development. There is hardly any business venture that does not require to be supported by some form of real estate: from the small business that requires real estate as offices from where its business can be organized, to the major venture that needs it for its factory. Economics and management studies have long established that production is dependent on four factors, out of which land is one, along with labour, capital and machinery. It therefore simply stands to reason that to be true to his professional responsibility every commercial/business lawyer ought to have a proper grasp of real estate law. The client needs advise on this in one form or the other.

It is therefore not difficult to understand why there is a lot of demand for land. Elementary economics teaches us that where there is a lot of demand, prices are bound to go up. What has further complicated the graph is the fact that, although a natural endowment, land is not finite. It accounts for only about 20% of the whole surface of the earth. Consequently, against this backdrop major economies, through some very robust and well thought out land policies comprehensively address challenges they encounter in the real estate sector.

This is not exactly our situation here in Nigeria and the result is that there is a myriad of problems in our real estate sector. Only very recently the Minister of the Federal Capital Territory announced the withdrawal of Certificates of Occupancy in the Federal Capital Territory. Whether for good or evil, this is indicative of some of the challenges faced in the real estate sector. It is not intended here to pass judgment over this ministerial pronouncement. Rather, the aim is to draw attention to, and highlight some of the problems that encountered in our real estate sector.

In the course of this paper, the phrases "real estate" and "land" will be used interchangeably. After all, although not exactly synonymous, yet in its connotations, real estate means some connection to land.

2. Nigeria's Real Estate Sector And Government Control

As has been shown above, land is intrinsically connected to the economic development and well being of any nation, thereby necessitating some intervention by prudent governments. Such interventions vary in degrees, depending on the nation. In Nigeria our land tenure system is a mixed story. In Southern Nigeria, under customary law land was organized largely around the community or the family. The individual could rarely lay claim to any part of it as owner and therefore could not alienate it without the consent of the head.¹ This land tenure system was however whittled down following the introduction of received common law principles. In Northern Nigeria the situation was markedly different as land was held and administered for the use and common benefit of

the people who held a right of occupancy over it and such rights were subject to the control and disposition of the native authority.

State ownership of land in Nigeria can be traced to the 1861 Treaty of Cession which ceded the colony of Lagos to the British Crown, subject to the customary rights of the local people. Before 1963 land was vested in the Queen, and when Nigeria became a Republic in 1963, it was vested in the Federal Government. Thus, under customary law, land was generally vested in communities and families in the South, whereas in the North land was vested in authorities for the use and benefit of the people. All this however changed when Nigeria became colonized and land was vested in the Queen until 1963 when Nigeria became a Republic.

Consistent with the economies of industrialized nations, the colonial government in Nigeria needed land for developmental purposes, specifically for agriculture and industrialization. As land at that time was vested in the communities and families, government was forced to compulsorily acquire these lands from them and today we have a rash of acquisition statutes in Nigeria beginning with the Public Land Acquisition Act of 1917, through to the Public Land Acquisition Law Cap 105 of Western Region, 1959, to the Public Land Acquisition Act of 1976. States have their separate Public Land Acquisition Laws.

This was the position with our land tenure system up till 1978 when the Land Use Act ("the Act") was introduced. The Act was promulgated to bring about uniformity in Nigeria's land tenure system, ensure that land was available for agricultural and industrial development, and importantly address our socio-economic problems. This paper will attempt to highlight factors which in the writer's view account for the manifest stunted development in our real estate sector.

3. Problems Of Nigerian Real Estate Development

(a) Land Policies

Our recent history reveals that in nearly every facet of our society we feel government's overbearing, suffocating role. Whether in the provision of telecommunication, electricity, energy, etc, government saw it as its ordained responsibility to provide these facilities. This do-it-all, economic monopolistic philosophy was adopted from the welfarist economic philosophy which the Labour Party Government that our colonial masters, Great Britain, adopted after the second world war. It was believed that it was well suited for a developing nation that was anxious about equitable wealth distribution, and that it protected its economically weak consumers from profiteering investors. Unfortunately, government allowed itself to extend this philosophy to our land policies. It considered it its place to drive real estate development, hence section 1 of the Act that proclaims that all land is vested in government to be held "in trust and administered for the use and common benefit of all Nigerians". If our real estate sector is not thriving, in the considered view of the writer, it is traceable to the philosophy behind the Act.

As with other sectors at that time, Government believed its role was to develop the real estate sector. We would recall that the central programme of the National Party of Nigeria led Federal Government of the Second Republic was housing, which led to the development of residential houses across the country in selected cities and towns. Not only was that Government unable to sustain the

development at that time, today the houses that were built share an unenviable place in our growing list of abandoned projects in this country. And today, many years after, that philosophy largely remains. Virtually every government has either an Authority/parastatal or a property development company with the objective of developing the real estate sector. At the Federal level we have the Federal Housing Authority ("FHA"), at Federal Capital Territory level, we have the Abuja Investment and Property Development Company (AIPDC), at state level, the Lagos State Development Property Company (LSDPC) is an example. I must not be misunderstood. These companies are doing a marvelous job developing property and creating income for their governments. But inspite of these efforts real estate development remains painfully low.

If we look around us more private property development companies are engaged in property development. For instance, there are promising projects along the Epe/Lekki Expressway. Babalakin & Co. happens to be exclusive solicitors to what is perhaps the most successful private estate in Nigeria, the Victoria Garden City. There are some projects going on in Port Harcourt as well as in Abuja. But lest we be deceived, there is still so much to be done. Our real estate development is limited largely to residential and to some extent hotel, office and shopping complexes. By comparison, in developed economies the private sector is engaged in the development of stadia, airports, hospitals, roads, rail, bridges, tourist and entertainment centres, museums, theaters etc. and some of these structures are truly gigantic.

The point to be made is that the role of our government ought to be to create the enabling environment for the private sector to drive real estate development. It is regrettable that this has not been our experience in Nigeria. Although Government has since accepted the failure of the monopolistic market and is moving towards a free market economy through the introduction of some statutes², amidst so many calls for the reform of the Act, the Act is yet to be changed.

(b) **The Nigerian Urban and Regional Planning Decree**³

Apparently, Government realized that our real estate sector needed a "shot in the arm" and introduced this Decree in 1992, in expectation of positive changes. It is the writer's view that the Decree was completely misinformed and added in no small way to the private developer's hardship. The Decree defines "development" in Section 90 "as carrying out of any building, engineering, mining or other operations in, or over or under any land, or the making of any environmentally significant change in the use of any land or demolition of buildings including the felling of trees and the placing of free standing erections used for the display of advertisements on the land and the expression "develop" with its grammatical variations shall be construed accordingly". Also in the section "Commercial development" is defined as "development or use of land or any building on the land for any of the following purposes: (a) a shop; (b) an office (c) hotel, guest house, night club, restaurant and wayside stall (d) a warehouse and other similar storage facilities (e) a cinema theater, sports stadium and a building promoting recreational and leisure facilities for a charge, (f) a market and (g) any development or use of land or building on the land for any purpose incidental to any of the above purposes".

The section also defines "industrial development" as "any development or use of land or any building on land for the purpose of: (a) processing any mineral (b)

extraction or producing by whatever means other than mining one product from another product or substance, (c) repair and working any mechanical equipment," while it also defines "Institutional development" as "(a) Social welfare and community development i.e. education, health care, religion, and charity, etc (b) offices for party political organizations, trade unions, employees, associations and any other organization whose principal purpose is participating in public affairs (c) Sports and social clubs but not clubs offering overnight accommodation for a charge/or more than twenty persons (d) museums and art gardens (e) swimming pools available for use by members of the public (f) any development or use of land and for any purposes incidental to any of the above purposes."

Although well intentioned, this law has serious shortcomings for attempting to exhaust the various definitions above.

In an age where hospitals, airports, roads, bridges, rail lines, etc are now being left to the private sector in developed countries, for a law designed for urban development, this law is clearly inchoate as it obviously does not capture the above, and other forms of modern development. What is very remarkable about this Decree is what it seeks to achieve. Firstly, any person desiring to undertake some real estate development has to apply to a created Development Control Department which is set up at Federal, State and Local Government levels. This department may or may not grant such application. Let me be clear here. This has absolutely nothing to do with the consent requirement under the Act. In other words, a prospective developer is under an obligation to obtain 2 layers of approvals from government - one for the right of occupancy under the Act, the other for development purposes under the Decree.

Apart from increasing the transactional costs of the project, the process of consent under the Act as we all know is already very cumbersome. What is more, the consent under the Act or under the Decree may be withheld without reason and may or may not grant it. A private developer may therefore find itself in a situation where consent under the Act is approved, and the consent for the development is refused. It is then stuck with a wide expanse of land that it acquired at an enormous price and processed at considerable fees for the sole purpose of development. We do not need to think hard to understand why the investor is an endangered specie in Nigeria. There appears an uncanny in-built design in the regulatory framework to financially burst the private developer.

And we must not forget that under the Constitution, on an area that the State can also legislate upon, this law empowers the Federal Government to set up a Commission for the Urban development of land at local government/state level (never mind that there is a Control Department at those levels and the Commission is established by the Federal, State and Local governments), in flagrant breach of the principles of federalism. In my view, it should be the prerogative of each state how it wants to arrange and develop its real estate sector.

The Decree also materially conflicts with the Act in some ways. For instance, under S. 75(1) of the Decree a right of occupancy can be revoked when it "appears" to the Commission, Board, and Authority (created under the Decree) that it is necessary to obtain land in connection with planned urban or rural development. From the above, it is not in doubt that the Commission has the power to revoke land. In so doing, the threshold for compulsory land acquisition is reduced. As we would see in the next section, under the Act, a right of occupancy can only be revoked for public purposes spelt out in section 51. By

stating that if it "appears to the Commission" this bar is reduced, and the private developer is more vulnerable. If the developer's land is not snared up under the Act, it would be caught by the Decree. In any event, one seriously questions the Commission's powers to revoke a right of occupancy since the object of the Decree is to develop. It has no business with who occupies the land. The draftsmen might have realized this by providing in S. 75(2) that revocation under the Decree shall be in accordance with the Act. It is however not clear whether this is to be construed to mean that it is the Governor (and not the Commission) that would revoke the right of occupancy, and that such revocation would be as a result of public purpose.

There is also a contradiction in respect of S. 76 (2) of the Decree. Under the Act as we would see, compensation for land revocation is to be made promptly. The Decree on its part states that it should be made within a reasonable time. This clearly defeats the intention of the Act. Like S. 75, S. 76 (1) states that compensation shall be paid in accordance with the Act. Clearly there is some confusion here. Although this Decree was amended in 1999, the amendments do not touch the substance of the Decree. It is striking that 12 years after it came into existence, the impact of the Decree is yet to be felt for good or bad.

(c) **Compulsory Acquisition and Compensation of Land**

Nobody seriously doubts or would challenge Government's need for land in certain cases for projects to assist the overall development of the nation. In early times, as pointed out above, Government was compelled to compulsorily acquire the land of communities and families for agricultural and industrial development. The Land Acquisition Act of 1917 is the first law empowering government to compulsorily acquire land in Nigeria. Since then we have had several Public Lands Acquisition Laws of States apart from the 1976 Public Lands Regulation Decree. Unfortunately, a survey of how Government has gone about exercising this statutory power reveals that it is for reasons other than for public purpose.

Under the Act, a person's right of occupancy may be revoked by Government for overriding public interest⁴ which the Act declares⁵ as (i) alienation contrary to provisions of that Act or its regulations (ii) Federal, State or Local Government's request of land for public purpose (iii) requirement of land for mining purposes or oil pipelines. We notice from the above that even though Section 28(1) refers to overriding public interest, Section 28(2)(a) (which is revocation due to violation of the Act) cannot, properly so called be a revocation in overriding public interest, but in fact due to default. Section 28(5) therefore ought to be seen as being in furtherance of Section 28(2)(a) in that it empowers Government to revoke a right of occupancy where there is a breach of the terms of the Certificate of Occupancy.

This presents a problem. A common clause in the Certificate of Occupancy of most states and the Federal Capital Territory is a requirement that "within two years from the date of commencement of this right of occupancy to erect and complete on the said land the buildings or other works specified in detailed plans". Clearly, such clauses envisage the development of very simple structures. It is absurd that any body would expect that a stadium, an airport or any other structure that is gigantic in nature can be completed in two years. Yet, by virtue of S.28 of the Act, non-compliance with the terms of the Certificate is a statutory basis for its revocation. Such is the problem that the developer faces in Nigeria.

(d) **Definition of Public Purpose**

We have seen that under S.28 (2)(b) of the Act, there may be compulsory acquisition of land for public purpose. What public purpose is is quite vexed under Nigerian law. Unlike advanced countries where the motive for compulsory acquisition is hardly questioned, in Nigeria there is clearly a serious abuse of power in this regard. S. 51 of the Act states that “public purpose includes”

- i. exclusive Government use or general public use
- ii. use by body corporate directly established by law or under Companies and Allied Matters Act in which Government owns shares, stock, debenture
- iii. in connection with sanitary improvements of any kind
- iv. for controlling land contiguous to land that would be enhanced by the construction of railway road, or other public work or convenience about to be undertaken by Government
- v. for controlling land required for development of telecommunications, electricity or mining purposes
- vi. for controlling land required for planned urban or rural development of settlement
- vii. for controlling land for economic industrial or agricultural development
- viii. for education and other social services.

Although the above items are clear, the interpretation is nevertheless complicated because “includes” suggests that the list is not exhaustive. As such, there have been so many compulsory acquisitions attempted by governments outside the above list that would not even as much as come near the meanings in the list, applying either the ejusden genesis rule, or even common sense.

It is quite settled in our laws that in the exercise of such compulsory acquisitions, noncompliance with the acquisition laws would invalidate the revocation and that such laws, being expropriatory in nature would be very strictly construed. In this regard, there is a requirement that the nature of the public purpose for which the land is needed is to be revealed in a notice to the occupier of land. Authorities are also settled that Government cannot revoke the land of one party, and then vest it in another party for private purpose (although it can be vested in another party for genuine public purpose). What is however not certain is whether in construing public purpose, the list in S. 51 even though it employs “includes”, is exhaustive. The supreme Court in ***Osho V Foreign Finance Corp [1991] 4 NWLR PART 184***, appears to suggest this although it was not specifically an issue for consideration before that court. The court in that case stated that any revocation for public purpose “outside” the ones prescribed in the list even though ostensibly for purposes prescribed in the list is against the policy and intention of the Act.

The Court of Appeal in ***Olatunji Vs Military Governor, Oyo State (1995 5 NWLR PART 397*** categorically held that “although the section opens with the words “public purpose includes” which words convey that the definition of public purpose therein may not be exhaustive, it seems to me that other public purposes not stated under Section 51 have to take their coloration or meaning from the public purposes stated therein. Such other public purposes must be those similar to those stated in the section”.

The implication of this is that our courts have imposed a very restrictive meaning of public purpose which is very commendable. This is because the writer has personally felt the frustration, anguish and pain of very well meaning private investors who have risked their personal fortunes in an attempt to develop land in Nigeria, only for Government to turn around and improperly acquire it. The writer was personal solicitor to that notable industrialist, Chief Adeyemi Lawson, who enlisted his professional services when the Ogun State Government compulsorily acquired part of his land development project at the popular Agbara Estate, and vested it in another person. What he sought to do in the 1970's when he took off with the project is what a lot of private investors are now attempting to do all over Nigeria, although on a very small scale. He was clearly ahead of his time and had to pay dearly for this because our courts apparently had some difficulty understanding the complexities of his vision. Not unusually, he lost his suit to recover his land at the High Court and the Court of Appeal. Although the Supreme Court ruled in his favour finally in 1997⁶ by then it was a bit too late as Chief Lawson went to his grave just before the judgment was delivered.

While victory came Chief Lawson's way, although late, not many people can say this, as it was also the writer's role to represent one Chief J. H. Bassej whose land was similarly acquired by the Federal Government in the 1980's. The acquisition was clearly illegal and while we were in court challenging it, Government promulgated a decree specifically for Chief Bassej's land which it titled "J. H. Bassej Acquisition of Properties Decree". Such is the naked abuse of power by government on compulsory land acquisition in Nigeria.

(e) **Compensation**

The Act provides for prompt compensation but the issues of compensation are also not free from controversy. For one thing, compensation by Government is never prompt. What a fair compensation would be is also not clear. The Act states that there would be compensation for the value of "unexhausted improvements". Although S.29 (4)(b) of the Act prescribes for the replacement cost of acquired buildings or improvements, less depreciation, together with interest at bank rate for delayed payment, in practice, this is hardly complied with. And in the event of dispute the matter goes to a Land Use and Allocation Committee. Significantly, there is nothing in the Act to ensure that this Committee is made up of people with commercial background who would objectively appreciate the developer's losses. There is also some controversy on who to be compensated. The Act states the "holder" of land and "occupier" of land⁷.

(f) **Title Document**

It is fairly certain that there would be very few people who have not been at the receiving end of the cumbersome process of obtaining Governor's Consent in Nigeria. The Act makes it a requirement that land transfers and land mortgages require consent otherwise the transaction is void⁸. But the process of obtaining such consent is truly herculean, tortuous and laborious.⁹ And unscrupulous vendors have tried to take advantage of this by attempting to go back on land transactions they concluded. Happily our courts have seen through this and in a rare display of justice have had to prevent injustice where vendors attempted to void land transactions on ground that consent, (which under the Act, they have a duty to obtain) was not obtained, or where consent comes after the transaction¹⁰

even though a literal interpretation of the statute is that consent should precede the transaction¹¹, which is not practicable.¹² The point to be made here is that there are enough contradictions in the Act for the unscrupulous party to invoke to avoid their obligation under important land transactions.

The unvarnished truth is that the consent requirement compounds land transactions, and increases the investor's financial exposure. What, for instance, can be the possible justification for consent in respect of bank mortgages? Under common law principles, the mortgagor possesses an equity of redemption such that a mortgage transaction is not contemplated in any way as alienation. Why then is a requirement for consent necessary?

While the above problems relate to the consent requirement and its arduous process, there are more fundamental challenges that the Act presents. Before its introduction, at least in Southern Nigeria, persons were capable of absolute ownership of land, and the common instrument of transfer - Deed of Conveyance - was accepted as conferring title. Unfortunately, under the Act, as we pointed out, absolute ownership has been cancelled, and replaced with a mere right of occupancy. That is not all. It is settled today that the Certificate of Occupancy that is issued in favour of the person holding a right of occupancy does not confer title, does not create a right, but is merely evidence of title and presumes that one exists¹³.

The implications of the above are serious for commercial transactions. Most economic activities depend on two types of capital - their equity/shareholding capital, i.e. and loan capital, which is obtained from creditors. In the very early times, the banker advanced his loan based on trust, and collaterals were very much de-emphasized. Today however, apart from being a fundamental banking practice, a number of our laws impose an obligation on the banker to obtain adequate collateral. For real estate development transactions, invariably the banker looks at the subject land as collateral. The transaction is however put at risk with the myriad of problems under the Act. Consent, which really ought not be a condition because the transaction is not an outright alienation, is not readily obtainable, and where it is, it is at very heavy costs. The original title documents, here the Certificate of Occupancy, which the banker carefully collects from the developer and places safely in his vault may turn out to be worthless. Commentators are already speculating on the vulnerability of banks following the Federal Capital Territory Minister's announcement to withdraw Certificate of Occupancy, referred to above.

(g) **Real Estate Development and Foreign Investors**

Conventional wisdom holds that foreign capital is vital to the economies of developing countries. This explains why in Nigeria, we see a shift from the era when foreign investors were considerably restricted under the Nigerian Enterprises Promotion Act, (the so called indigenisation regime) to the current era when foreign investors can invest in literally any part of the Nigerian economy and own its venture 100%, following the introduction of the Nigeria Investment Promotion Commission Decree No. 15 of 1995. Here again there are contradictions. For instance, under the Acquisition of Lands by Aliens Law Cap 2, laws of Lagos State 1971 the transfer of land to Aliens must meet with the written approval of the Governor, while aliens are disallowed from holding freehold interest or a right of absolute ownership in land.¹⁴ In practical terms, this restriction has been blurred since, under the Act, Nigerian property holders can

also no longer own property absolutely, while such property cannot be transferred without the consent of Government. Nevertheless, since property development is very capital intensive, everything ought to be done to encourage foreign investors who have access to funds to invest in our real estate sector.

Conclusion

Land and economic development share a symbiotic relationship. Nigeria's land policies in the past were clearly informed by a monopolistic economic system. Following its failure, we are entering a free market regime. While reforms are going on for a legal and regulatory framework to support this, the legal framework for our land system remains unchanged and much needed activity in our real estate sector is yet to be felt. This paper has attempted to draw attention to some of these problems. Obviously because of space and time constraint, we cannot exhaust discussions on all of the problems. It is however hoped that Government would as a matter of urgency make the necessary reforms needed to support the sector's development.

1. In *Amodu Tijani V. Secretary Southern Nigeria* (1921) AC the court held that "the notion of individual ownership is quite foreign to native law. Land belongs to the community, village, or family, never to the individual owners, this is again due to introduction of English law". Smith however posits that even though land is organized around community and family, it is not correct that individuals do not own land under customary law. See I. O. Smith, *Practical Approach to the Law of Real Property in Nigeria* (Lagos, Ecovatch Publications Ltd, 1999).
2. See for instance the NEPA amendment decree; the electricity amendment decree, the electricity bill, the NCC Act, the Competition bill etc.
3. Decree No. 88, 1992.
4. See Section 28(1) Land Use Act
5. Section 28(2), (3) and (4)
6. See *Lawson V. Ajibulu* (1997) 6 NWLR Part 507
7. See I. O. Smith, *supra* who states that "and" here could both be disjunctive and conjunctive. See also *Ferguson Vs Commissioner for Lands & Planning Lagos State* (1999) 14 NWLR Part 638 pp 315 where the Court of Appeal stated that both the leashed owner and the legal owner are entitled to compensation.
8. See *Savanah Bank Vs Ajilo*(1989) NWLR PT 97
9. Please note that the Lagos State Government recently announced (July 2005) its 30-day accelerated title perfection process under which it guarantees to grant Statutory Consent within 30 days of application, provided all documents and fees are complete
10. *National Bank Vs Adedeji* (1989) 1NWLR PT 96
11. Section 22, Land Use Act.
12. *Awojugbagbe v Chinukwe* (1993) 1 NWLR PT 270
13. See *Ogunleye V. Oni* (1990) 2 NWLR PT 135.
14. The law defines an alien as a person other than a native of Nigeria, or companies not solely owned by Nigerians.

The information contained in this publication is only intended as a general review of the subject concerned and should not be treated as a substitute for specific advice concerning specific situations. If you need further information about any issue discussed above, please contact Wale Babalakin at bob@babalakinandco.com

BABALAKIN & CO.

8th-10th Floors, 24A Campbell Street, Lagos
 Phone: +234-1-2632185
 Fax: - +234-1-26237136
 http: www.babalakinandco.com
 E-mail: mails@ babalakinandco.com