



# Real Estate Investment in Nigeria

THE LEGAL PERSPECTIVE





## Introduction

The Nigerian real estate market has remained one of the key contributors to the Nigerian economy in terms of gross domestic product (GDP) over the years. In recent times, the real estate market has benefited from government policy targeted at diversifying the economy from the oil sector to the non-oil sector, which has resulted in significant infrastructure spending by the government.

The Nigerian government has also taken a strong stance on the ease of doing business and has devoted considerable resources towards making the country attractive to investors, with a committee – the Presidential Council on Ease of Doing Business – established and headed by the vice president. Real property investment is one of the avenues being streamlined by the ease of doing business committee.

The real estate sector in Nigeria has grown particularly in states of the Federation that are experiencing high rates of urbanization such as Lagos and the Federal Capital Territory, Abuja. Current trends in the market show an increased demand for high-end real estate in prime locations. The demand for high-end developments cuts across the residential and commercial real estate market, with projects such as the Eko Atlantic City, a new coastal city in Lagos State, setting the pace. The average asking rent for A-grade and prime grade commercial spaces in Lagos range from USD750–1,000/m<sup>2</sup>/annum; comparable with rates seen in more developed markets. On the residential front, luxury apartments are sold in the region of USD3,750-7,000/m<sup>2</sup>. With the completion of the world's largest single line refinery

in Lagos State, the Dangote Oil Refinery, it is anticipated that new large-scale investments will be observed in the country. Nigeria is without doubt an attractive investment destination.

While the real estate sector is primarily driven by private sector investment, government policy-making impacts the real estate market. Nigeria has a federal constitution governing the entire country and in which lands and real property rights of the state and individuals are placed under the Concurrent List. This means that the federal government can make laws that apply to the entire country; and the state government can make laws and ancillary legislations governing their respective states, which are subsidiary to federal statute.

This document aims to provide a guide to the key legislations and policies in Nigeria that impact on real estate investment. However, the guide is not exhaustive and our DLA Piper Africa member firm in Nigeria will be delighted to assist investors considering investment in the Nigerian real estate market.

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# 1. Ownership of real estate

## 1.1 Freehold ownership

With the introduction of the Land Use Act 1978, which regulates the incidence of ownership of property, freehold interest (absolute ownership) in Nigeria was abolished. The Act vests powers of control and administration of all land within a state on the governor of the state who grants interests to individuals and corporate entities to hold and use subject to the conditions of the grant. The interest is known as a right of occupancy and is typically for a term not exceeding 99 years. The Land Use Act provides that title to land may also be held by the federal government or any of its agencies.

## 1.2 Leasehold ownership

The Land Use Act vests in the governor of a state, the ownership of all land in the state, to hold in trust and administer for the use and common benefit of all Nigerians in accordance with the provisions of the Act. Therefore, the nature of interest in property which can be acquired under the Land Use Act is a statutory right of occupancy (leasehold) for a term not exceeding 99 years and this is evidenced by the issuance of a Certificate of Occupancy by the state government, and the acquirer holds a Right of Occupancy.

Private ownership of land is recognized in the form of a leasehold which is subject to the rights of the state government to a reversion of the interests, after the term granted to the owner has expired. Such leaseholds are usually granted for a term of 99 years, and are continuously renewable on expiry, subject to the fulfilment of conditions of grants and renewal imposed by the state.

The right of occupancy is granted by the state and usually subject to certain express conditions, ranging from the term of years, payment of an annual rental, payment of a premium, purpose of use, nature of development, and revocation for non-compliance. It is noteworthy that a Certificate of Occupancy typically prescribes a two-year period within which land is to be developed and restricts the transfer of interest until after the expiration of ten years from the date of issuance. The intention is to encourage land use and discourage speculation.

The governor of a state may revoke a statutory right of occupancy on the grounds of breach of any of the express or implied conditions which a Certificate of Occupancy is deemed to contain or where the land is required for public purpose or overriding public interest.

Any revocation for public purpose can only be carried out upon due notice and fair compensation paid.

Importantly, the Land Use Act prohibits alienation or transfer of any interest in land without obtaining the consent of the governor of the state where the land is located. Therefore, the governor's consent must be sought and obtained before a valid legal transfer of interest in property may be effected.

## 1.3 Restrictions on foreign investment

Under Nigerian law, foreigners are generally not allowed to directly own real estate assets. By the provisions of the Acquisition of Lands by Aliens Law of Lagos state, a non-Nigerian may acquire real estate from a Nigerian citizen only with a prior approval of the governor. However, no specific regulations are in force with regards to the enforcement of these provisions.

Notwithstanding this, the restriction does not apply to a Nigerian registered company wholly owned by foreigners. Therefore, a non-Nigerian may invest in real estate in Nigeria by the acquisition of such property through a corporate vehicle duly incorporated in Nigeria.

## 2. Acquisition of real estate

### 21. Formal requirements

The preliminary and fundamental step in any transaction for acquisition of real estate involves carrying out a proper due diligence on the title of the vendor. At this stage, engaging experienced professionals for advice and guidance is highly recommended to avoid the usual pitfalls with acquisition of real estate interests.

It is important that the scope of the due diligence clarifies issues such as the nature of the title and interests in the property, status and capacity of the vendor to sell, the land use designation and zoning purpose, existence of third-party adverse claims/interests or litigation, the unexpired term of years, survey and size of the property and confirmation as to whether or not the property is under government acquisition. Other due diligence investigations such as structural and environmental surveys may also be conducted by appropriate professionals.

### 2.2 Asset deals

Acquisition of real estate interests and registration of the interests acquired requires certain documentation. By law, transactions for the transfer of title and interests in real property for a term above three years are required to be in writing and by deed duly executed by the parties.

Where land is acquired directly from the government, a Certificate of Occupancy is issued evidencing the title. A statutory Right of Occupancy is granted in the case of land in urban areas while a customary right of occupancy is usually granted for

land in rural areas. Transactions for transfer of real estate interests between individuals or corporate entities necessarily requires the preparation of transfer of title deeds which are not limited to the following: (i) Sale and Purchase Agreement, (ii) Deed of Assignment, (iii) Lease/Sublease Agreement and (iv) Power of Attorney (optional).

The parties to the transfer transaction are also required to complete and sign the relevant application forms for consent of the governor to transfer the interests in the real property.

#### GOVERNOR'S CONSENT

Under the Land Use Act 1978, the consent of the governor of the state where a real estate asset is located must be obtained for a transfer of the interests in the real estate asset to be valid.

#### REGISTRATION

Registration of title is the process of registering the holder of interests in real estate as legal owner to the exclusion of any other person. By the provisions of the relevant states' Land Instrument Registration Law, there is a general requirement that instruments relating to transfer of interests in land must be registered. However, it is important to note that an unregistered title deed is not invalid but is inadmissible in court as proof of title. The importance of registration is that it gives priority and it is an indication that the property is encumbered.

The registration process involves submitting an application together with the transfer of title deeds and other ancillary documents at the Lands Bureau of the relevant state

for processing of governor's consent, payment of the assessed fees/taxes and obtaining governor's consent to the transfer of title transaction, and formal registration of the interest acquired in the Register of Deeds maintained at the Lands Registry Office of the relevant state.

The grant of governor's consent and final registration of a real estate title is subject to the payment of official fees and/or applicable property taxes such as consent and registration fees, capital gains tax, stamp duty and other sundry fees. The rates of assessment for the fees payable for grant of governor's consent and registration differ across the various states in Nigeria. In practice, it is after completion of the transfer transaction between the parties that governor's consent is processed together with the registration of the deed of transfer. Usually, it is the purchaser that is responsible for ensuring that all required costs and taxes for consent and registration of the interests are paid.

In Lagos state, the official fees payable for grant of consent and registration of title with respect to transactions involving individuals is 3% of the assessed fair market value of the property representing Consent fees (1.5%), registration fees (0.5%), stamp duties (0.5%) and capital gains tax (0.5%) respectively. The other applicable charges are neighborhood improvement charge, business premises charge (at nominal fees) and ground rent or land use charge.

For transactions involving corporate entities, the applicable capital gains tax and stamp duties are payable to the Federal Inland Revenue Service

(FIRS). The rate under the Capital Gains Tax Act is 10% of the gains from the sales. The FIRS stamp duty rate is 1.5% of the value of the property.

The parties to the transaction are also required to settle their respective income tax obligations to the relevant state government for completion of the process.

### 2.3 Share deals

Investment in real estate may also be effected through the acquisition of a corporate entity that owns real estate assets. In such a case the resolution of the members of the company is necessary for the sale. Further, the parties will be required to execute a Share Transfer Form and, where necessary, a Share

Sale and Purchase Agreement. Thereafter, statutory returns will be filed at the Corporate Affairs Commission and the company's register of members updated to reflect the changes in the ownership structure and shareholding of the acquired entity.

In Nigeria, the sale and purchase or transfer of shares in a company is not subject to tax, irrespective of the value of the real estate assets the company may have. The share acquisition structure is therefore an attractive option for investors. While the transfer of stocks and shares are exempt from the payment of taxes, in practice, a nominal stamp duty of NGN500 is payable as stamping costs for the share transfer agreement.

In addition to conducting due diligence investigations in respect of the underlying assets, it is advisable to conduct due diligence on the target company to ascertain the tax liabilities of the company, encumbrances on the shares or assets and other potential liabilities.

The parties are free to negotiate the terms of the Share Sale and Purchase Agreement; and agree upon matters such as warranties and liabilities for defects. Upon completion of the sale, it will be necessary to file with the Corporate Affairs Commission the necessary returns in accordance with the provisions of the law.



## 3. Other rights to property

### 3.1 Mortgages and charges

A mortgage refers to the legal or equitable conveyance of interests in property as security for a debt, upon the express or implied condition that the interests in the property will be re-conveyed to the debtor following the discharge/settlement of the debt. It does not require delivery of possession.

A legal mortgage involves an actual transfer of legal interest from a mortgagor to a mortgagee, subject only to reversionary rights in the asset where payment obligations are settled. The equitable mortgage on the other hand may take the form of an agreement to create a legal mortgage by a deposit of title deeds without an actual transfer of legal interest to the mortgagee for the period for which repayment obligations remain outstanding.

An equitable charge connotes an appropriation of interest in real property giving the chargee the rights to enforce the security without an actual transfer of legal interest in such an asset.

It is important to note that generally, a mortgage involves a transfer of interests in land which by law requires the consent of the governor and registration in accordance with the provisions of the relevant state's laws regulating registration of land instruments.

The fees payable for processing governor's consent and registration of mortgage deeds are not the same across the states in Nigeria. The applicable fees and the rates in Lagos state are consent fees at 0.25%, registration fees at 0.5% and stamp duties payable to FIRS at 0.375% respectively. There is also a requirement for registration of the mortgage transaction at the Corporate Affairs Commission.

### 3.2 Easements

The right of easement is a non-possessory right attached to land which allows the owner of that land (the dominant owner) to either use a neighboring land belonging to another (the servient owner) in a particular manner or to restrict its use by that other person. A right to easement is usually not exclusive as it does not confer a proprietary right. Any person claiming a right of easement must show that the easement had its origin either in grant or statutory provision.

An easement by grant may be acquired through the express words in the conveyance of the legal estate to the owner of the dominant land. An express grant may also be made without the conveyance of legal estate, for example where a right of way is granted in exchange for consideration. The grant of a legal easement must be by deed, otherwise the right of easement will only be equitable.

Notwithstanding, a right of easement may also be implied or presumed in certain instances, such as on the grounds of necessity where the property will be inaccessible without the easement; where it was the intention of the parties at the time of conveyance; and where the dominant owner has used the servient land over a period of time.

### 3.3 Pre-emption rights

A pre-emption right is a contractual right to acquire property before it may be offered to a third party. Under Nigerian law, parties retain the right to agree to the commercial terms of an agreement, thus a pre-emption right may be negotiated as one of the terms of a contract. Typically, the option is contained in a long lease and grants the lessee the option of first refusal to purchase the property in the event the lessor intends to sell.

In the case of direct acquisition of interests in land from the state evidenced by a Certificate of Occupancy, it is a usual term of the grant that the holder of the right of occupancy shall not transfer same within the first ten years of the grant and shall be obligated to first offer the property to the governor in the event of a sale. In Lagos state, the practice is that upon the sale of property within the ten-year period of the state grant, an additional consent fee (about 1.5 % of the value of the property) will apply at registration of the transfer.

## 4. Zoning and planning law

Zoning and planning in Nigeria is regulated by specific legislations and the various states in Nigeria have enacted their own Physical Planning Laws to suit the peculiar circumstances. The respective states' town planning authorities that administer the zoning and planning legislations are also charged with the responsibility of initiation, formulation and implementation of physical planning and urban development policies and programmes that supplement existing legislation.

The Land Use Act also plays a significant role in physical planning and zoning within the country as certain specific provisions of the Land Use Act relating to zoning rules must also be complied with.

It is prudent for a potential investor in real estate to apply to the relevant state's physical and town planning authorities for planning information on the property to ascertain the

land use and zoning for the area where the property is located and the permissible use.

Prior to the commencement of construction works, the approval of the relevant planning authority is required for all building developments, alterations and renovations; and the conditions for the grant of development permit must conform with the conditions of use stated in the title document or grant of right of occupancy for the land in question.

The permissible use of the land, location and nature of the proposed building development will determine the necessary permits to be obtained as there are restrictions that apply to the use of property in accordance with zoning laws. Generally, the Certificate of Occupancy prescribes the purpose of use which are usually for residential, commercial, recreational, tourism, industrial or mixed-use (residential and commercial)

purposes. It is also commonplace for residential estates to seek to impose restrictions on the design of buildings.

The Building Control Department or Agency of the respective states are responsible for enforcing the laws and regulations on land use and zoning. The relevant authority will issue enforcement notices against the owner of any development commenced without obtaining requisite planning approval and for other cases of contravention such as unauthorized change of use or where the building constitutes a danger to occupiers or the public.

Contravention of physical planning regulations may result in the demolition of the building at costs to be paid by the owner or forfeiture to the property. Criminal prosecution is also prescribed for a contravention of the provisions of physical planning laws and regulations.



## 5. Environmental law

Nigeria is committed to a National Environment Policy that is aimed at ensuring sustainable development on the basis of proper management of the environment. The Nigerian government has therefore published various statutes which set out the liability for environmental pollution and procedure for enforcing public policy on environmental protection and sustainability.

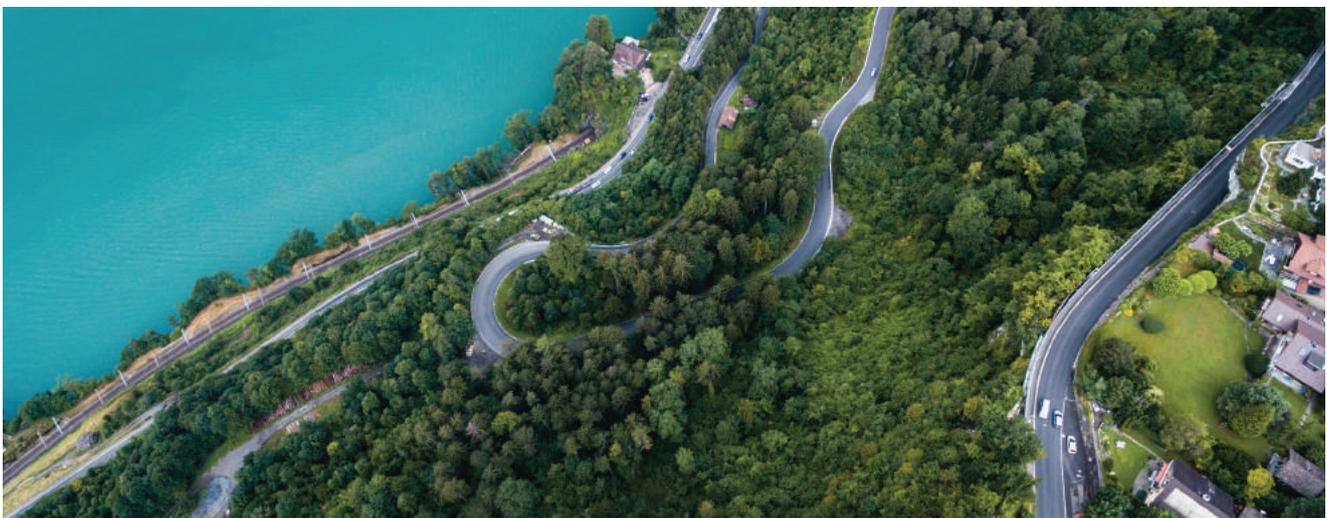
The various states have specific environmental laws mirroring the federal legislation with slight modifications. The environmental legislations in Nigeria include the Environmental Impact Assessment Act, the National Environmental Standards and Regulations Enforcement Agency Act 2007 (NESREA Act) and the Harmful Waste (Special Criminal Provisions, etc.) Act.

The National Environmental Standards and Regulations Enforcement Agency (NESREA) has also developed a number of environmental regulations targeted at particular areas of concern and published in the Federal Government Gazettes. More specific to the construction sector, the National Environmental

(Construction Sector) Regulations seeks to regulate and minimize environmental hazards such as pollution from construction, decommissioning and demolition activities. Also, the National Building Code makes provisions for environmental issues relating to building construction.

The law requires that an Environmental Impact Assessment (EIA) is carried out by professionals and a report issued and filed with the relevant town planning and building control agency of the state. An EIA refers to the process of gathering information about the potential impacts of a proposed development on the environment and using the information to decide whether to proceed. This is to ensure that the potential environmental hazards posed by a proposed building development are identified prior to construction and adequate mitigation actions are put in place. The nature of the building construction or development determines whether the environment assessment report is required.

Generally, the polluter pays principle, which implies that the polluter should bear the cost of preventing and controlling pollution, is applicable. Therefore, the owner or tenant/occupier of a property is directly responsible for the environmental sanitation of their premises. The federal and state laws impose liability for causing pollution or contamination and impose liability for non-compliance by owners of buildings. The buyer or owner of real estate has a responsibility to comply with all environmental laws and regulations affecting its property, but will not be liable for any offence where the pollution or contamination by the property is caused by a third party's action if the owner is not a contributor. A purchaser who discovers any form of environmental contravention by the previous owner will not be held liable for the pollution. The purchaser is however obligated to immediately take appropriate steps to stop the contravention if it is of a continuing nature, otherwise they will be as guilty as the principal party who committed the environmental infraction.



## 6. Leases

### Types of leases

Leases may be classified in accordance with their purpose or tenure (length of the term granted). With respect to purpose of use of property, leases may be categorized as residential, commercial or industrial lease.

### 6.1 Duration

The parties to a lease agreement are at liberty to negotiate and agree to the commercial terms of the lease. As long as the term of years under the head-lease is not exceeded, a lessor may grant to the lessee the entire unexpired term of the lease held under its title or may grant a lesser term, thereby retaining a right of reversion subject to terms and covenants agreed by the parties such as the option of renewal of the lease for a further term.

In state allocations or direct grants of proprietary interests by government, it is the discretion of the state as grantor to give any term of years, typically not exceeding 99 years.

Where the lessor has no intention of renewing the lease, subject to the agreement of the parties, a notice is to be issued to the lessee before the expiry of the lease affirming the lessor's intention not to renew the lease.

A lessee of real property under any category, whether residential or commercial, is protected under the law to hold over possession even after expiration of the lease. The lessor does not have an automatic right to re-enter or recover possession of the property even if the parties inserted in the contract a provision for re-entry into the property by the lessor, upon the expiry of the lease.

If the parties' agreement specifies the mode of notice to determine the lease, it must be complied with, otherwise, the lessor must strictly adhere to the provisions of the law to serve on the lessee, all mandatory notices to determine the lease (Notice to Quit and Notice of Intention to Recover Possession) and seek an order of the court to recover possession and evict the lessee from the property.

A lessee holding over possession after the expiration of its lease is regarded as a statutory tenant and cannot be evicted except by laid down procedures which mandatorily are to be strictly complied with by the lessor. The failure to issue the appropriate notices renders any action taken to recover possession of the property from the lessee invalid.

### 6.2 Rent

Rent is the consideration for the grant of the lease by the lessor to the lessee. Generally, it is negotiated and agreed upon by the parties, and in most cases the parties are guided by the applicable market rental value of the property. There is no specific statute that regulates the sum to be paid as rent. Rent may be paid in advance or in arrears. In Nigeria, the common practice is that rent is usually demanded and paid in advance before the lessor grants possession of the premises to the lessee and executes the Lease Agreement.

However, the Lagos State Tenancy Law, 2011 provides that it is unlawful for a lessor to demand or receive advance payment of rent from a sitting tenant in excess of six months for a monthly tenant and one year for a yearly tenant;

and that it is also unlawful for a new tenant to pay advance rent in excess of one year.

The rent for long-term commercial leases do not have to remain the same for the entire term provided the parties agree in the lease agreement for a rent review clause. Where the lessor fails to negotiate and insert in the lease agreement a condition that the reserved rental can be reviewed within specified periods, the lessor cannot unilaterally alter the agreement and demand a rent review without negotiating with the lessee and obtaining their consent. It is not sufficient that the applicable commercial rates for similar properties in the location of the property differs from the rent paid by the lessee.

### 6.3 Rent review

The parties to a lease are at liberty to contract and specify the rent applicable to the lease from year to year and also agree on rent escalation rates and a review mechanism for the rent.

Commercial leases for shorter terms typically have provisions for rent review where on expiry, the lessee exercises an option to renew the lease for a further period. Furthermore, the lessor in a lease that is expiring is at liberty to negotiate new rent rates as a condition to renew the lease.

For leases directly granted by the state pursuant to the Land Use Act, the governor may revise the rent at such intervals as stipulated in the Certificate of Occupancy, otherwise, at such reasonable intervals within the term of the grant.

In determining the increase in rent, the lessor and the lessee may apply any rate, percentage increment on the base rent for the preceding period, or a specific amount already mutually agreed in the lease agreement to be applicable upon renewal. The parties may also agree to use the central bank inflationary index or the market rental value for similar properties in the location.

It is usual for parties to indicate in the lease agreement that the rent shall be mutually agreed based on market rates and further specify that in the event of a disagreement on the rent, a professional qualified as an estate surveyor/valuer or any other qualified person may be agreed to advise on the rate of the increase of the rent.

It is noteworthy that the Tenancy Law of Lagos state prescribes that any increase in rent must be reasonable and a lessee may apply to court for an order declaring that the increase in rent payable under an agreement is unreasonable. In determining whether an increase in rent is unreasonable, the court shall consider the general level of rents in the locality and any special circumstances relating to the premises.

#### **6.4 Operating expenses**

Generally, the tenant is obligated to pay for operating expenses such as electricity bills, security, cleaning and other maintenance services. In regulated developments, the lessor or its appointed facilities manager may provide services such as security, alternative power supply, cleaning, utility services, refuse

and sewerage disposal and other ancillary services to the lessees of the development who are required to pay a service charge along with the rent.

Usually the lessor has an obligation to insure the property against damages covered by unforeseen issues like fire, natural disasters and other such events which may occur. The lessor's insurance, however, does not have to extend to damages to the lessee's possessions and other fittings within the property and for which the lessee has an obligation to insure. In a property comprising multiple apartments or office spaces with several occupiers as lessees, the lessor may undertake this obligation to insure the property (except the lessee's personal property) and recover the costs of the insurance premium from all the lessees, proportionally.

#### **6.5 Maintenance repair, and renovation at the end of the lease**

Generally, the lessor is responsible for all external and structural repairs required for the property. All internal maintenance and repairs within the premises exclusively occupied by the lessee is the responsibility of the lessee to bear during the term of the lease. However, the parties can deviate from the usual practice by negotiating and agreeing on the apportionment of responsibility for the maintenance and repairs of the property.

At the end of the lease, the lessee is typically liable for the cost of cleaning, clearing and restoring

the property to the condition in which it was at the commencement date, fair wear and tear excepted.

#### **6.6 Assignment/transfers**

Subject to the terms of the agreement between the parties, a lessee can transfer its right and interests in the property to a third party. It is commonplace for lease agreements to restrict the right of the lessee to assign or otherwise transfer the interest in the property by imposing an obligation on the lessee not to transfer the interests or cede possession of the property to any person without the written consent of the lessor and only upon the fulfilment of any condition agreed for the transfer of the lease interests.

#### **6.7 Termination**

The parties reserve the right to terminate a lease where the adverse party is in breach of any of its covenants in the agreement. However, the parties must comply with the legal prerequisite of issuance of appropriate notices.

The lessor should be prepared to take legal action immediately if the lessee holds over possession after the date specified in the notice as a lessee is protected under the law from forceful eviction upon expiry of the lease for as long as the eviction process will take and at the same rental. Therefore, contractual conditions that impose penalties for the lessee to breach its obligations including holding over after expiry should be considered.

It is common for lease agreements to provide for a break clause which permits the tenant to terminate the lease in certain instances. Where the lease is for a fixed term and there is no express provision for early termination, the lessee can only terminate the lease with the consent of the lessor, otherwise the terms of the agreement will remain binding.

The parties can agree to a surrender of the unexpired term of the lease whereby all subsequent obligations to be performed by each party are cancelled effective from the date of the surrender of the lease.

For leases directly granted by the governor, there are specific instances in which the government, federal or state, can terminate the leasehold interests. The Land Use Act empowers the government to acquire land compulsorily from land owners and the acquisition must be for public purpose or for

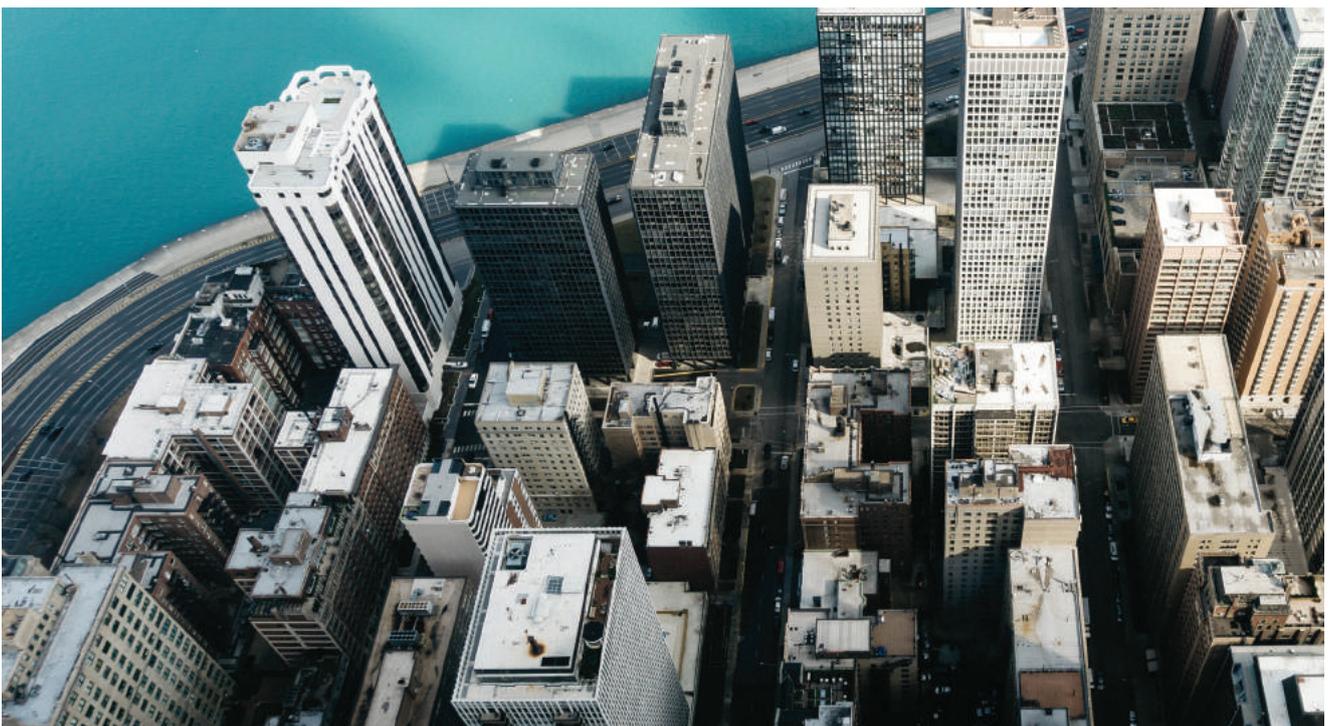
overriding public interest. The term overriding public interest is wide and may include instances where the property is required by the government for public purposes of the government, or for mining purposes or oil pipelines, or for the extraction of building materials, or breach of any of the provisions contained in the Certificate of Occupancy or in any special contract between the government and the occupier or alienation of the occupier's proprietary interests (by whatever form) without the consent of the governor as required by the Land Use Act.

Under the Land Use Act, the government must ensure that adequate notice is issued and served on the owner of the land and compensation for the value of the unexhausted improvements to the land at the date of revocation is paid to the owner. The failure to serve the revocation notice on the land owner has been consistently

held by the courts as capable of rendering the revocation as invalid. Also, the courts have held that the compensation must be adequate and the acquisition of an individual's interests in property by government must be for public purpose, otherwise the revocation is invalid.

### 6.8 Sale of leased property

The sale of a leased property before the end of the term granted does not terminate the interest granted. A lease agreement typically provides that the terms of the lease shall be binding on the lessor's successors in title and assigns.



## 7. Taxes

### 7.1 Transfer taxes

The transfer of real estate interest in Nigeria is subject to taxation. In addition, the governor's consent is subject to payment of official fees and other fixed costs, including taxes for the registration of the transfer. It is noteworthy, however, that there are no taxes on the sale and purchase or transfer of shares in a company holding real estate assets.

The applicable taxes on a direct real estate transfer transaction include capital gains tax (CGT), and stamp duties.

- **Capital gains tax:** CGT is applicable to any gain derived as a result of the sale of property at the time of disposal and is payable by the seller under the law. In practice, however, the buyer at registration of the interests acquired makes the payment for capital gains tax. It is charged at the rate of 10% of the gain made from the disposal of the property.
- **Stamp duty:** All written instruments, including instruments transferring interest in property, are required to be stamped under the Stamp duties Act. Stamp duty is paid at the registration of the transfer deed and the buyer of property is responsible for the payment. Instruments of transfer that are not stamped are prohibited from being admitted as evidence in judicial proceedings. The Federal Inland Revenue Service charges about 1.5% of the value of property as stamp duty.

- **Consent and registration fees:** By law, any transfer of title transaction involving real estate requires the consent of the state governor for validity. The various states have different rates for consent and registration fees.

### 7.2 Value added tax

Value added tax (VAT) is a consumption tax charged and payable on the supply of all goods and services (referred to as taxable goods and services). The law regulating all matters relating to VAT in Nigeria is the Value Added Tax (Amendment) Act 2007 (the Act).

It is a 5% tax on all goods and services that are not listed as exempted or zero rated under the Act. Consequently, VAT applies to transactions involving the supply of goods or services except those specific goods and services listed in the First Schedule to the Act as exempted or zero rated. The incidence of this tax is usually on the final consumer and falls within the authority of the Federal Inland Revenue Service (FIRS) to administer.

Generally, under the Act, rent accruing from lease of property is subject to VAT as rent is not specifically mentioned in the list of exempted items in the First Schedule to Act. In practice, the FIRS, in its published Circular (No. 9701) took a policy-based decision to include rent on residential property as an exempted item in its schedule of exempted VAT items.

The federal government in line with its objective to improve the ease of doing business in Nigeria approved an executive order confirming the exemption of residential properties from the payment of VAT. The executive order is the Value Added Tax Act (Modification) Order. The order is aimed at reducing the tax burden on taxpayers and also to clarify obsolete and ambiguous areas of tax.

As rent on commercial property is not specifically included in the list of exempted items, the intention is clear that VAT applies to rental on commercial properties. Therefore, a lessee of commercial property is liable to pay, in addition to the rent, a sum representing 5% of the rental paid to the lessor as VAT.

The position on the applicability of VAT on outright transfer of interest in real estate is not completely certain. It is noteworthy that in a judgment delivered by the Federal High Court in a case involving the applicability of VAT in respect of the sale of an Oil Mining Lease (OML). The court held that the rights to an OML do not constitute goods under the Act because such rights are intangible property. Accordingly, by the principle of the case, it would appear VAT is not payable on the purchase of real estate, being intangible property.

### 7.3 Other real estate taxes

Owners of real estate in Nigeria are subject to certain recurring taxes for the use of property annually. These include ground rent, tenement rates and such other levies for development and business premises which the government authorities impose on owners and occupiers of real property.

In Lagos state, the land use charge consolidates all property and land-based rates and charges payable under the land rates, neighborhood improvement charge and tenement rate laws. Under the Lagos State Land Use Charge Law, owners/occupiers of both commercial and residential properties are liable to pay land use charge. The sum payable as land use charge is arrived at by multiplying the market value of the property by the applicable relief rate and annual charge rate prescribed.

The Taxes and Levies (Approved List for Collection) Act 1998 also provides for state governments to charge and collect business premises registration fee and development levy annually from property owners.

Withholding tax, an advance payment of income tax, is also applicable to the payment of rent. A lessee paying rent is obligated to withhold 10% for remittance to the tax authority and collect a tax credit note in favor of the owner of the property to offset its tax liability at the end of the tax year. The Personal Income Tax Act and the Companies Income Tax Act provide for withholding tax on rent

payable to the owner of a property for an individual and corporate entity respectively.

### 7.4 Taxation on rental income

Rental income from real estate is subject to the applicable tax laws and rates in the country. A company that owns real estate pays income tax from the profits on the rent based on the applicable rates under the Companies Income Tax Act, which is prescribed at the rate of 30%. The income of an individual owner of real estate is also taxed based on the Personal Income Tax Act which is prescribed at the rate of between 7% and 24%.

The owner of a property on whose behalf withholding tax deductions were made from rental income and remitted to the appropriate tax authorities is entitled to the tax credit arising from the deductions, and the credit may be claimed when filing year-end tax returns.

### 7.5 Taxation on dividends from a company owning real estate

Withholding taxes apply on the dividends or profits due to shareholders of a company or partners in a partnership, with investments in real estate. The shareholders or partners on the other hand, are subject to payment of personal income tax under the Personal Income Tax Act and may apply the withholding tax deductions made from their incomes as tax credit. In the case of a foreign shareholder that is not engaged in a trade or business in Nigeria during the year of

assessment, no tax shall be charged in respect of the dividend except the tax withheld.

### 7.6 Taxation of capital gains

The profit or gain accruing from the disposal of real estate is subject to capital gains tax, after deductions allowable under the Capital Gains Act are assessed. Disposal of assets does not include the conveyance or transfer by way of security of an asset or the retransfer on redemption of security for any sum of money. Under the Capital gains Tax Act, the prescribed rate of capital gains tax is 10%.

Certain forms of disposals and organizations are exempted from the payment of capital gains tax. Exempted disposals include disposals by way of gift, disposals by charitable or educational institution of public character, disposals by cooperative societies, and trade unions.

### 7.7 Real estate investment trusts

Real estate investment trusts (REITs) are a form of collective investment schemes that pool funds from the public for the purpose of investing in and managing assets and are regulated by the Nigerian Securities and Exchange Commission (SEC). They may be privately owned or traded publicly.

REITs are required to register with SEC and must comply with the SEC rules and regulations. Where a scheme is listed, continuing obligations imposed by the Stock

Exchange Listing Rules must also be complied with, as public offers are extensively regulated.

REITs in Nigeria may either be open-ended or close-ended. The distinction between an open-ended and close-ended REIT is that the number of shares in a close-ended REIT are fixed while open-ended REITs do not have a fixed number of shares. At least 75% of a close-ended REIT's total assets must be in real estate, while at least 70% of an open-ended REIT's total assets must be in real estate.

The Securities and Exchange Commission rules permits the real estate investment trusts to hold

or acquire real assets through the use of declaration of trusts where by the legal interests in the real assets subsists in the vendor and all beneficial interests are transferred to the real estate investment trust. This allows for a significant reduction in the applicable land transfer taxes.

Under the Companies Income Tax Act, REITs are treated as companies, and unit holders as shareholders. While the profits earned by collective investments schemes are subject to company income tax of 30%, the government has issued VAT and withholding tax waivers which apply to asset- and mortgage-backed securities. Accordingly, dividends of

publicly traded REIT securities are exempt from withholding tax in the hands of the investors, and VAT and capital gains tax are not applicable on the sale of the securities. Also, it is worth mentioning that where shares are purchased from an existing corporate entity, holding the assets, capital gains tax and stamp duties would not be applicable.

In addition, qualifying REITs may be eligible for the government's grant of Pioneer Status Incentives which are company tax holidays of three-five, under the recent Pioneer Status guidelines.



## 8. Real estate finance

### 8.1 Assets held as security

A lender may create security interests over real property assets including:

- bare land;
- properties or buildings attached to the land;
- intangible rights such as rents, profits and easements; and
- permanent fixtures on the land such as machinery.

The typical forms of security created over real property assets in Nigeria are legal mortgage, equitable mortgage and charge.

A legal mortgage is the most secure and comprehensive form of security interest which involves the transfer of legal interest from a mortgagor to a mortgagee usually by a deed and subject to redemption upon repayment of the loan or payment obligation.

An equitable mortgage, on the other hand, is created under the rules of equity and transfers equitable interest from a mortgagor to a mortgagee. An equitable mortgage may be created by depositing the title deeds with an intention to create a legal mortgage or may take the form of an agreement to create legal mortgage. An imperfect or inchoate legal mortgage qualifies as an equitable mortgage. For instance, where a deed of legal mortgage is not perfected, the interest transferred at that point, is equitable and not legal.

A charge does not create a proprietary right over real property but merely gives a right of repayment of the debt or discharge of other obligations or burdens with respect of the property charged.

It is important to note that to perfect a legal mortgage, the governor's consent, stamping of title documents and registration of the transaction is required to be carried out at the relevant land registry. In addition, where a company is a party to the transaction, registration of the security is required to be effected at the Corporate Affairs Commission.

A secured party can enforce its security interest in accordance with provisions of the security documents and in accordance with relevant law. Security documents typically set out the events that will make the security enforceable and the options available for enforcement. It is commonplace for the security agreement to provide for enforcement through the appointment of a receiver; or for the lender or security trustee to exercise a power of sale over the secured assets.

Generally, a mortgagee under a legal mortgage has several options in relation to the enforcement of the mortgage security. These include:

- applying to court for an order to foreclose the mortgagor's equity of redemption and vest the mortgagor's entire interest in the mortgagee;

- entering into possession of the mortgaged property;
- appointing a receiver manager who shall be responsible for the collection of rents, profits and other monies accruing from the mortgaged property; and
- sale of the mortgaged property.

### 8.2 Further collateral agreements

**Security deed:** A security deed with a charging clause which provides the lender with fixed or floating charge over the borrower's business and undertaking may also provide for security assignment of receivables such as rent from the borrower's property and insurance proceeds.

It is important to note that the law prohibits the assignment of insurance policies as security to non-residents. Therefore, where a non-resident creditor proposes to take security over insurance proceeds, the lender will be required to appoint a local security agent or require the borrower to open an account to which the proceeds will be paid.

**Guarantee agreement:** The lender may request for a parent company guarantee, directors' personal guarantee or third-party guarantee where the asset used as security is deemed not to suffice as collateral or for the purpose of providing additional comfort to the lender.

### 8.3 Taxation on the creation of security

Under Nigerian law, any transfer purporting to grant an interest in land whether by way of an assignment, sublease or mortgage, is required to be perfected. This ensures that there is priority of interest against any third party claims with respect to the property. The perfection process and payments requirements are as follows:

- **Obtaining governor's consent:** Various states have different rates for consent fees. In Lagos state, the rate applicable is 0.25%.
- **Registration with the land registry:** In Lagos state registration is at the rate of 0.5%.
- **Stamping:** The Federal Inland Revenue Service (FIRS) assessed rates for stamping of mortgage documents is 0.375% for transactions involving a corporate entity.



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