

REVIEW OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) BILL 2021

1. Clause 1 of the Bill
2. Clause 3(1) of the Bill
3. Clause 2 of the Bill
4. Clause 3(3) of the Bill
5. Clause 4 of the Bill. REDAN is the principal agency and umbrella body of the organized real estate sector (private and public) recognized by the Federal Government of Nigeria and saddled with the responsibility of ensuring availability of affordable housing for all Nigerians.
6. Allottee in relation to real estate project, means the person to whom a plot, apartment, or building, as the case may be, has been allotted, sold or otherwise transferred by the developer, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise, but does not include a person to whom such plot, apartment, or building, as the case may be, is given on rent. See Clause 41 of the Bill.
7. Clause 41(1) of the Bill
8. Clause 27(1) of the Bill. Failure to do this, the developer may have his license revoked in accordance with clause 23 of the Bill.
9. Clause 27(2) of the Bill. Although the Bill does not define "reasonable time", nevertheless, "reasonable time" could mean the period of time which, in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done. Please see the Supreme Court case of *ARIORI & ORS. v. ELEMO & ORS.* (1983) LPCLR-552(SC).
10. Clause 27(3) of the Bill

Synopsis

On Wednesday, November 17, 2021, the Nigerian Senate passed the Real Estate (Regulation and Development) Bill 2021 (the "Bill"). The objective of the Bill, among others, is to standardize the business of real estate development in Nigeria by regulating the conduct of transactions in the real estate sector. The Bill also seeks to establish the Real Estate Regulatory Council of Nigeria (the "Council") to provide efficient, effective, and transparent administration of the business of real estate development and prescribe minimum standards for the conduct of the business of real estate development in Nigeria. The Bill, therefore, has a general application in every state in Nigeria including the Federal Capital Territory, Abuja ("FCT").³

Notable Features of the Bill

Set out below are our review of notable features of the Bill:

Establishment of the Real Estate Regulatory Council of Nigeria

The Bill establishes the Council to administer the business of real estate development and prescribe minimum standards in the sector. With its headquarters in the FCT⁴, the Council will have the power among others, to regulate the business of real estate development in Nigeria in consultation with the Real Estate Developers Association of Nigeria ("REDAN")⁵. The Bill gives the Council powers to collaborate with the relevant government authorities, agencies, and professionals in the Build industry to make policies, to maintain a conducive macro-economic environment for both Allottees⁶ and developers.

Definition of a Developer

The Bill defines a 'Developer' as a corporate body or person that develops real estate to sell and/or lease to other persons and also includes a buyer or lessee who purchases or leases in bulk for resale/release.

Under the Bill, a Developer includes corporate bodies, individuals, public bodies, cooperative societies, holders of a power of attorney from the owner of the land, such other person who constructs any building or apartment for sale/lease to the general public.⁷

We note that the definition of a 'Developer' as contained in Clause 41(1) is at variance with the requirements for licensing as a Developer, as contained in Clause 19, which provides **that the Developer must be a corporate entity registered with the Corporate Affairs Commission ("CAC")**. In other words, Clause 41(1) expands the definition of a Developer beyond corporate bodies to include natural persons whereas Clause 19 appears to purport that only a corporate body can register as a real estate developer. If this Bill is assented to without the conflicting clauses being resolved, it is likely to create ambiguity in determining who a Developer is and ultimately affect the enforcement of the Bill.

Standardization of Real Estate Projects

To ensure quality and standards, the Bill provides that any proposed real estate project shall be developed and completed by a Developer following the architectural, engineering, and services designs and specifications as approved by the competent authorities. In further protecting the Allottee, the Bill provides that where the Allottee discovers any major structural defect in the project and brings same to the notice of a Developer within one (1) year, including the rainy season, from the date of handing over possession, the Developer shall rectify the defects without further charge, within a reasonable time.⁹ Compensation shall be paid to the Allottee in the manner as provided under the Bill where the Developer fails to rectify the defects within sixty (60) days.¹⁰

Compulsory Licensing of Developers

Under the Bill, all Developers engaged in the business of real estate development in Nigeria are now required to be



11. See Section 1(3) of the Constitution.

12. (1991) 7 NWLR (PT.204) 391. See also AJAO v. ASHIRU (1973) 8 NSCC 525.

13. Clause 19(1) *ibid*

14. Clause 38(6)(a) *ibid*. High Court as used under the Bill means High Court of a State or Federal Capital Territory. See Clause 41(2) *ibid*.

15. Clause 21(1) (a-b) *ibid*

16. Clause 21(5) *ibid*

17. "competent authority" means any authority created under any law made by the appropriate Government authority which has jurisdiction over land in a given location in a given location and has powers to give permission for development of such immovable property. See Clause 41(2) *ibid*.

18. Clause 23(1) *ibid*. For the purposes of this section, the term "unfair practice" is defined in subclause 2 to mean a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including the practice of making any statement, whether orally or written or by visible representation which either falsely represents that the services are of a particular standard or grade, or represents that the developer has approval or affiliation which the developer does not have, or makes a false or misleading representation concerning the services, or permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered.

19. Clause 31 *ibid*

20. Clause 24(1) *ibid*

21. Clause 29(1) *ibid*

22. Clause 29(5) *ibid*

23. *ibid*

24. Clause 29(6) *ibid*. If the Disciplinary Committee finds that the developer has no case to answer, it may recommend warning or acquittal. See Clause 29(7) *ibid*. A developer who willfully fails to comply with any order or direction of the Council under the Bill may have his license revoked temporarily or permanently as the Council determines. See Clause 38(4) *ibid*, while an allottee that willfully fails to comply with any order, decision, or direction of the Council shall be liable to a fine as may be determined by the Council. See Clause 38(5) *ibid*.

compulsorily licensed by the Council upon satisfaction that the Developer:

(a) is a corporate body duly registered by the CAC;

As stated above, this subclause conflicts with Clause 41(1) of the Bill which defines a developer more widely to include both corporate body, public body, cooperative society, and individual. The unlikely purport of Clause 19(1) is that only a corporate body operating as a developer is required to be licensed with the Council. It is doubtful that this is the intention of the draftsman.

(b) shows evidence that at least one (1) of its directors is a Nigerian citizen; ;

(c) has registered with and paid all applicable membership dues to REDAN;

The requirement that a prospective Developer to be licensed with the Council must be registered with REDAN is unconstitutional if read together with Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "Constitution").

Section 40 of the Constitution provides that every person shall be entitled to assemble freely and associate with other persons. See also Article 10 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004. It has been established in a plethora of authorities that the idea of automatic (and forced) membership of an association is an infringement of the fundamental right of freedom of association. See AGBAI v. OKOGBUE. No developer can therefore be compelled to register as a member of REDAN or any other association as subtly imposed by the Bill.

(d) has an ascertainable office or business premises conforming to Money Laundering Act/Counter Terrorism Financing guidelines of REDAN as prescribed by Nigeria Financial Intelligence Unit (NFIU) Act, 2018 and Money Laundering Prohibition Act 2011 (as amended);

(e) has paid the prescribed licensing fees; and

(f) has fulfilled other conditions as may be prescribed by the Council for that purpose.¹³

Again, the Bill has dangerously given enormous powers to an association by incorporating the guidelines of REDAN by reference. Under the Bill, a prospective Developer is required to abide by the guidelines of REDAN to get licensed by the Council. This is a glaring preferential and exclusive treatment of an association registered as an Incorporated Trustee under the Companies and Allied Matters Act, 2020 ("CAMA") in an enactment. If the Bill becomes an Act, it will continue a precarious precedent and inadvertently preclude the formation of reputable future associations of real estate developers in Nigeria. This is an anomaly and hopefully, this will be considered and deliberated upon before the Bill becomes an Act, having the future in mind and other stakeholders who do not wish to join REDAN but intend to be licensed and regulated by the government.

Note that a Developer who deals in the business of real estate development in Nigeria that fails to register and be licensed in accordance with the provisions of the Bill commits an offence and is liable on conviction to a fine of not less than Twenty Million Naira (N20,000,000.00) to be garnisheed from the Developer's bank account(s) by application to the High Court.¹⁴

Compulsory Registration of Real Estate Projects

A remarkable feature of the Bill is the compulsory registration of real estate projects. Under the Bill, every real estate Developer is required to register each real estate project with the Council and is responsible for projects registered.¹⁵ Thus, unless a Developer has registered the real estate project with the Council, the Developer is precluded from selling or offering for sale or inviting persons to purchase in any manner any plot, apartment, or building, in any real estate project, or part of it.¹⁶

The Bill, however, fails to state what becomes of projects existing before the enactment of the Bill. That is, whether the Bill will operate retrospectively concerning existing projects. Although it provides in Clause 40(1) that a Developer shall have one hundred and eighty days (180) from the commencement of the Bill to register with the Council, no similar provision is made specifically with respect to registration of ongoing projects. This important omission allows for speculations and uncertainties.

Further, the Bill empowers the Council to, on receipt of a complaint or the recommendation of the competent authority¹⁷, revoke the license issued to a registered Developer, if the Developer commits default in doing anything required of him under the Bill, violated any terms or conditions of the approval given by the competent authority, or is involved in any kind of unfair practice or irregularities.¹⁸

Duty of Investor to Notify the Council

Another important provision of the Bill is that a prospective investor in the business of real estate development in Nigeria must notify the Council in writing of its intention to invest in a specific real estate project.¹⁹ The practicality of this provision is in doubt except the notification will be indirectly through the developers.

The Introduction of Web Pages for Developers

The Bill also empowers the Council to provide registration numbers and log-in identities to registered Developers.²⁰ Like licensing, this provision will help the Council to keep track of all projects going on in Nigeria for regulation and standardization. It will also help the Allottees to monitor the stages/status of the project by simply liaising with the Council. By this method, it is easy to discover at the early stage, substandard projects, their menace and to quickly address it before it proceeds further.

Disciplinary Measures against Erring Developers

The Bill makes provision for the discipline of Developers who violate the Bill. Under this, there is established for the Council an investigating panel (the "Investigating Panel") and a disciplinary committee (the "Disciplinary Committee"). The Investigating Panel shall be responsible for conducting preliminary investigations into complaints and petitions filed against a Developer and into the actions of licensed and unlicensed developers on allegations of violation of the Bill²¹ and shall refer cases, as appropriate, to the Disciplinary Committee²². The Disciplinary Committee, on the other hand, is charged with the duty of considering and determining any case referred to it by the Investigating Panel²³. The Disciplinary Committee shall make recommendations to the Council which may include suspension or revocation of the license of a Developer that is found guilty of violating the provisions of the Bill or any rule or regulation made under the Bill. The decision of the Council is final and only subject to appeal to the High Court.²⁴



25. Clause 30 *ibid*

26. Clause 36. Note that the Council may collaborate with the relevant government authority in the exercise of its powers under this section.

27. Section 37 *ibid*. Once the Bill is assented to, we hope to see the Council make rules clarifying grey areas in the Bill.

28. Clause 39(1) *ibid*

29. <https://www.africahousing-news.com/why-21-storey-building-collapsed-in-ikoyi-by-tribunal/>

Limitation of a Developer

A developer is not permitted under the Bill to accept a sum more than five per cent (5%) of the cost of the project as an advance payment or an application fee, from a person without first entering into a written agreement for sale/lease with the person which shall set out relevant terms and conditions²⁵. We believe that this provision will ensure probity in the business of real estate development and will curb the incidences of unscrupulous developers stripping unsuspecting investors/Allottees of their monies.

Council's Power to make Rules

The Council is empowered to make its own rules for carrying out the provisions of the Bill, particularly to provide for issues relating to registration/licensing of a Developer, salaries, and allowances payable to the Chairman and other members of the Council, the administrative powers of the Chairman, details to be published and maintained on the website, etc.²⁶ The Council has the power to regulate its proceedings regarding meetings and the performance of its functions by regulations made under the Bill.²⁷

Court with Jurisdiction

The courts having jurisdiction to try offences under the Bill are the High Court of a State and the High Court of FCT.²⁸

Conclusion

In our considered opinion, the introduction of the Bill is a welcome development particularly in the light of the falling standard of the real estate development sector in Nigeria due to unregulated activities. The passing of the Bill came in the wake of rising cases of collapsed buildings majorly due to poor quality structures. Notable is the 21-story building on Gerrard Road, Ikoyi, which collapsed on November 4, 2021, killing at least 44 people.²⁹

The Bill is, however, not without its shortcomings some of which have been discussed above. Firstly, it is our view that the Council established by the Bill should be given more independence. For example, by Clause 3 of the Bill, the Council is still required to consult with REDAN before it can exercise its powers. This, in our opinion, may result in a major clog in the performance of the Council. Even though the Council may collaborate with REDAN and other reputable agencies and associations, we suggest that it should be allowed some autonomy in discharging its duties.

Secondly, it is illegal and unconstitutional to compel developers to become a member of REDAN before being licensed. It is contrary to both local and international human rights laws and conventions. The Bill's inclusion of membership of REDAN as a licensing requirement has inadvertently or not, given REDAN a legal status. Apart from the Bill, we note the adoption of this practice under the CAMA, which in **Section 705** mandates that a person to act as an insolvency practitioner in Nigeria must be registered as a member of the **Business Recovery and Insolvency Practitioners of Nigeria** or any similar professional association approved by the CAC. Even though unlike the Bill, the CAMA extends this privilege to "any similar professional association approved by the CAC", the law has been subjected to heavy criticism among stakeholders with various insinuations of political patronage. No doubt, this would appear to be the impending fate of the Bill if an amendment is not made to that provision. Indeed, **Section 42(1)(b)** of the Constitution prohibits the accordance by virtue of any law in force in Nigeria of any privilege or advantage to any group.

Finally, we opine that the National Assembly should take a cue from other jurisdictions which have in place similar real estate law. For instance, India has in force the **Real Estate (Regulation and Development) Act, 2016** (the "Indian Act") which has substantially the same provisions as the Bill. Unlike the Bill, however, the Indian Act does not contain provisions giving wide powers to an association or group in the real estate sector. For instance, while the Indian Act provides for compulsory registration by a promoter (who performs similar functions like a developer under the Bill), it does not mandate a promoter to become a member of an association or body before being licensed to practice real estate in a State or Union. Also, the Real Estate Regulatory Agency established by the Indian Act is not subject to, and does not consult with, anybody or association before performing its statutory functions.

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