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LUAAAG POSITION PAPER[i]

EXPUNGE THE LAND USE ACT FROM THE CONSTITUTION NOW!

Preamble:

Although the Land Use Act (LUA) of 1978 was enacted *"in the public interest so that the rights of all Nigerians to land could be asserted and preserved by law"*, the way and manner the LUA has so far been applied over the past thirty two (32) years casts serious doubts on its capacity to achieve the stated objectives. For instance, the Act had noble intentions of expanding access to land to all Nigerians irrespective of their social and economic conditions. Also part of its overarching objectives is to check the structural and institutional inequities attending the administration of both urban and non-urban land. Certain developments such as Nigeria's housing deficit currently towering above 16 million, the proliferation of slum settlements and the continuing urban sprawl clearly point towards the extent to which these fine targets have remained unfulfilled.

Concerned about the denials of access to land and the declining rate of housing provision in the country, real estate development practitioners and stakeholders in the Nigerian housing sector have come together under a common platform, known and described as Land Use Act Amendment Advocacy Group[ii] (LUAAAG) with the primary aim of achieving the following objectives:

- Removal of the Land Use Act from the 1999 Nigerian Constitution.
- Advocate for an urgent review of the LUA as a key strategy for expanding access to land and affordable housing, and a critical step forward to Nigeria's achievement of the laudable intentions set out in the Millennium Development Goals (MDGs).
- Campaign for the creation of an enabling environment for the housing development sector to thrive, and for creating wealth for all.

Rationale:

Section 9(2) of the 1999 Constitution of the Federal Republic of Nigeria shields the Land Use Act from periodic legislative reviews, except until a two third majority of both the National Assembly and the legislative houses of thirty six states of the federation consent thereto. This amendment procedure is widely acclaimed to be rigid, eroding the flexibility required to adjust land use plans according to the dictates of social and economic realities and democratic priorities.

The continued entrenchment of the LUA in the constitution has left the country stuck in one direction for decades, with disastrous and potentially economic consequences that now necessitates an urgent reconsideration of the Act's amendment procedure. While seeking the

removal of the constitutional stronghold on the Land Use Act, LUAAAG advocates for the retention of the Act as a federal law, placed under the legislative and jurisdictional ambit of the National Assembly. As with other federal laws, the National Assembly will retain the powers to make any modifications as may be necessary to bring it into conformity with the provisions of the Constitution.

The advocacy around the removal of the Land Use Act is premised on the following grounds:

- **There's An Apparent Conflict Between the Land Use Act and Other Constitutional Provisions**
- **The Origin of the Land Use Act is not in Line with Democratic Norms**
- **The Existing Amendment Procedure of the Land Use Act is Burdensome**
- **The Present Operation and Implementation of the LUA 1978 is inimical to Socio-Economic Growth and National Development**

Explanatory Notes:

1. *Apparent Conflict Between the Land Use Act and Other Constitutional Provisions*

The retention of the LUA in the constitution appears to be in conflict with some other clauses of the Constitution or some explicit constitutional principle. For instance, the LUA has consistently been applied in a way that contravenes the enjoyment of sections 43 and 44 of the Nigerian Constitution, and Article 14 of the African Charter on Human and Peoples' Rights. Both sections guarantee the fundamental rights of all Nigerian citizens to property. The absolute, unregulated powers to expropriate land "in the public interest" vested on the governors of various states of the federation have often been arbitrarily exercised, contrary to the protection afforded Nigerians, especially the poor under the fundamental rights provisions of the Constitution.

Instances abound where validly titled lands granted to individuals or corporate persons were revoked for overriding public interest but are later re-used or re-assigned for purposes other than public interest[iii]. Experience has revealed that such land acquired in this manner is usually sold at near prime market value by the government to land speculators and affluent developers, further putting land and housing far out of reach of the poor[iv]. Affected victims are often not prepared for, or empowered enough to take the tortuous route of litigation[v]. These oppressive practices persist because of the constitutional stronghold around the LUA which makes it difficult to subject the land use policy to the usual legislative and judicial scrutiny required to bring such executive actions under check and in line with democratic practices and ideals.

Furthermore, the 1999 Nigerian Constitution vests the National Assembly with the powers to make laws for the peace, order and good government of the Federation or any part thereof. By locking away the Land Use Act in the Constitution, the power of the National Assembly to exercise that constitutional duty is effectually taken away by the imposition of the two-third majority rule requirement at the federal level and all 36 states of the federation. The implication is that even in the face of an overwhelming national urgency to do so, the National Assembly cannot take nor effect any legislative action on land use, until after the two-third House of Assemblies of all 36 states of the federation have mutually consented to such an action. Nigeria's geographic composition combined with the diversity and plurality of the legislative priorities across the states of the federation makes the achievement of such a feat highly uncertain.

In view of the above, it is hereby submitted that the retention of the Land Use Act in the Constitution may be likened to allowing procedural rules to have pre-eminence over the spirit and intent of the Constitutional as enshrined in the constitutionally guaranteed fundamental rights.

2. *The Origin of the Land Use Act is not in Line with Democratic Norms*

The inclusion of the Land Use Act in the Constitution was imposed through a decree in 1978. Since 1999, Nigeria has been under democratic governance, making it imperative that the Land Use Act be brought in line with democratic norms and principles.

In this respect, the two-third majority requirement at the federal levels and all 36 states constitute a veiled bar on future legislatures from taking steps to modify or amend the Land Use Act. The cumbersomeness and rigidity of the amendment procedure prevents successive legislatures from effectively taking action, and therefore, functions as a constitutional restraint on the future legislature. It is hereby advocated that a military framework and amendment methods foisted on Nigerians through undemocratic practices should not be allowed to subsist under an elected government with duly established democratic institutions. This is particularly imperative at this time when it has become so glaring that the majority-supported legislation is being utilized as a cloak to advance other unconstitutional values.

Expunging the Land Use Act from the Constitution will level the playing field and give citizens the opportunity to vote on land use plans that affect them through the process of consideration of Bills. In addition, retaining the Act as a federal legislation will give more incentive and margin of flexibility to the National Assembly to pursue policies that enhance social and economic vitality, as well as benefit the conservation of natural resources. What is more, a less rigid amendment procedure will inject added transparency and accountability to the land use process to ensure that land use and administration complies with the democratic tenets of non-discrimination, fairness, participation, and equality.

3. *The Existing Amendment Procedure of the Land Use Act is Burdensome*

The current practice that requires two third majority of Federal and State Houses of Assembly is unwieldy, burdensome and ineffective. It also makes legislative undertakings to be time-consuming and far from being cost-effective. Given the importance of land as a vital social and economic resource, it is our considered viewpoint that a law that deals with such an essential resource does not warrant to be subjected to a complicated method of amendment.

It is important to emphasize that through out the thirty two years of its operation; there is no record of a successful attempt to amend even a single provision of the Land Use Act. It is therefore not in the interest of the Nation to continue to ascribe constitutional life to an alleged amendment procedure which has never come into being according to specific methods laid down in section 9(2).

4. *The Current Mode of Amendment is Inimical to Socio-Economic Growth and National Development*

A World Bank (WB) report, "Doing Business in Nigeria 2010" rated Nigeria 178th out of 183 economies with respect to the difficulties and prohibitive costs of registering properties in the country. The report noted that "a large share of property in the country is not formally registered, whilst informal titles cannot be used as security in obtaining loans which limits financing opportunities for businesses" especially small and medium-size enterprises. Until recently, when it was reduced to 15 percent (%) of the value of property, the total cost of perfection (Consent fees, capital gains tax, stamp duties and registration fees) was as high as 40 percent (%) to register title in Lagos State[vi].

The lengthy and costly processes involved in the transfer of land and titling regime not only inhibits speedy access to title documents, but also raises land acquisition and housing costs to a

level that an average Nigerian cannot afford. While these problems persist, Nigerians find it particularly disturbing that so little attention has been paid to a more common threat to private property rights and communal landholdings. Instead, official emphasis has been improperly skewed towards the reverence for out-of-date legislative traditions that have only worked to stifle the return to a more inclusive amendment process.

As a way forward, there is an urgent need to maintain flexibility in our land use plans to allow for business expansion and new technologies that facilitate economic growth. With a housing deficit of about 17 million units which would require about N35 trillion (about $27 billion) to fund, the World Bank estimates that Nigeria needs to produce about 720,000 housing units annually for the next 20 years to be able to close the housing gap in the country[vii]. The explosion of slum communities in urban centers across the country is also a direct consequence of severe housing shortage and the denials of access to land. It is antithetical to development for a country burdened by such grim statistics to continue to retain procedural stumbling blocks in the constitution that ultimately deprive it from promoting and establishing a more orderly approach to land reform.

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[i] This position paper was drafted by Victoria Ohaeri, Program Coordinator, Social and Economic Rights Action Center (SERAC), Lagos

[ii] LUAAAG group comprises Mortgage Bankers Association of Nigeria (MBAN); Social and Economic Rights Action Center (SERAC); Nigerian Institution of Estate Surveyors and Valuers (NIESV); Real Estate Developers Association of Nigeria (REDAN); Urban Spaces Innovation (USI); Lagos Chambers of Commerce and Industry (LCCI)[ii], and Pison Housing.

[iii] Komolafe, 2010, LUAAAG proposal @5

[iv] Felix Morka, A Place to Live: A case study of the Ijora-Badia community in Lagos, Nigeria for "Enhancing Urban Safety and Security: Global Report on Human Settlements 2007 @ page 7

[v] Komolafe, Ibid @ page 5

[vi] MBAN Position paper, 2010 @ 2

[vii] MBAN Position paper, 2010 @ 4

APPENDIX A

PROPOSED AMENDMENTS TO THE LAND USE ACT 1978

Presently, two types of land reform are being promoted in the country. The first involves expunging the Land Use Act of 1978 from the Constitution and deleting those clauses that gave State Governors power to have to consent to mortgage transactions and assignment of land. The second does not entail any such Constitutional amendment, but involves removal of the uncertainties under which most Nigerians continue to enjoy their possessory rights to their land.

Two clauses of the Land Use Act of 1978 are critical in this regard. These are sections 34 (2) and 36 (2). The former relates to land in urban areas and states that: “Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act”.

Similarly in respect of the vast majority of land owners living in rural areas, section 36 (2) states as follows: “Any occupier or holder of such land, whether under customary rights of otherwise howsoever, shall if that was on the commencement of this act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government, and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil.”

These provisions of the Act leave owners and occupiers of land everywhere in the country vulnerable to the claim of any other individuals who may succeed in getting a statutory or even customary right of occupancy over the land for which he was declared to have possessory right under the Act. For such individuals, lack of information, cost or fear of bureaucratic hassles likely to be involved have made them unable to avail themselves of the opportunity offered in Sections 34(3) and 36(3) to apply to the Governor or Local Government Chairman respectively for a formal statutory or customary certificate of occupancy. Essentially, it is this anomaly in the Land Use Act, among other issues, that the proponents of the land reform program seek to address.

Accordingly, the proposed amendments relate to sections 5,7,15,21,22,23 and 28 of the existing Land Use Act 1978 as follows:

Section 5, sub-section (1) (f) of the Act which states that, " it shall be lawful for the governor in respect of land, whether or not in an urban area, to impose a penal rent for a breach of any condition, expressed or implied, which precludes the holder of a statutory right of occupancy from alienating the right of occupancy or any part thereof by sale, mortgage, transfer of possession, sublease or bequest or otherwise howsoever without the prior consent of the governor. The amendment wants the deletion of all the words after sale.

That the words "or subletting" should be deleted from Section 7 of the Act which states that, " It shall not be lawful for a governor to grant a statutory right of occupancy or consent to the

assignment or subletting of a statutory right of occupancy to a person under the age of twenty-two years.

Also, the amendment seeks to delete the word mortgage from Section 15 subsection (b) which states that, "during the term of a statutory right of occupancy, the holder may, subject to the prior consent of the governor, transfer, assign, or mortgage any improvements on the land which have been effected pursuant to the terms and condition of the certificate of occupancy relating to the land.

In Section 21, the amendment seeks to delete all the words after assignment (same as Section 5, subsection (1) (f) quoted above) and making same as subsection 1 and creating a subsection (2) in the following words: "The right of a holder of a customary right of occupancy to alienate such right by mortgage is hereby recognized".

In Section 22, the amendment seeks to delete the words, " mortgage, transfer of possession, sublease or otherwise howsoever", immediately after the word assignment, deleting the proviso to subsection (1) and (2) and creating a new subsection (3) as follows: "the consent of the governor shall not be required for the creation of a mortgage or sub-lease under this section".

Section 23 however, is to be amended by substituting the entire subsection (1) as follows: "A sub-lessee of a statutory right of occupancy, may, with the approval of the statutory right of occupancy, demise by way of sub-underlease to another person, the land comprised in the sublease held by him or any other person of the land" and deleting the provision of subsection (2).

The amendment also seeks to substitute Section 28 subsection(2) paragraph (a) as follows: "the alienation of the occupier by assignment or sublease contrary to the provisions of this Act or any regulations made thereunder", and subsection (3) paragraph (d) as "the alienation of the occupier by sale, assignment or sub-lease without the requisite consent or approval."

Areas of concurrence with the Proposed Bill

Land Use Act 1978	**Land Use Act (Amendment) Act 2009**	**LUAAAG Position**
Section 5 (1) (f)	Delete all the words immediately after "sale"	We concur
Section 7	Deleting the word ' or Subletting'	We concur
Section 15	Delete the word 'Mortgage'	We concur
Section 21	Deleting all the words immediately after 'assignment' and making the holder of a customary right of occupancy to alienate such right by mortgage	We concur
Section 22	Deleting the words 'mortgage or sublease' from subsection 1 and creating a subsection 3 that explicitly states that government consent is not required for creation of mortgage.	We concur
Section 23	Completely substituting the provisions of the sections	We concur

Proposed Areas of Amendment by LUAAAG

Land Use Act 1978	Land Use (Amendment) Act 2009	LUAAAG Position
Section 28	Amend by substituting paragraph (a) with "alienation of the occupier by assignment or sublease…"	The word 'sublease' should also be removed from this paragraph along with 'mortgage' proposed for removal.
Section 28 (5)	Not proposed	Reduce the power of the governor with respect to revocation of rights of occupancy with a view to improving security of tenure for holders of right of occupancy.
Section 30 and section 2 (2) (c) and section 47 (2)	Not Proposed	The right of anyone dissatisfied with the act of the governor to apply to the High court should not be abrogated.
Section 29	Not proposed	Make for adequate compensation for acquisition of land by allowing market forces to determine land value and improvements thereon.
Section 34 (5), (6), (7), (8), and (9), Section 38 and Parts of Section 43	Not Proposed	Stop further expropriation of undeveloped land without any iota of compensation.
Section 47	Not proposed	Expunge this in order to bring the Act under subjugation by the supreme Law of the Land, the Constitution of the Federal Republic of Nigeria.

Aside from the above, administrative provisions may be made to provide a flat administrative charge for the processing of Governor's consent to assign only and the procedure for obtaining the consent simplified.

Benefits of Expunging the Land Use Act 1978 from the Constitution

1. The proposed expunction of the Land Use Act 1978 will reduce the bottlenecks associated with acquisition of landed properties and secure titles.
2. It would reduce institutional delays in secondary transactions in rights of occupancy such as mortgage transactions. For example, when there is a well established property right, more mortgage loans can be made available on reasonable terms thereby ensuring that more Nigerians have access to home ownership.
3. It would facilitate easier and continuous Amendments to the Act, as and when considered desirable to avoid the burdensome process of the majority rule amendment
4. Obtaining Titles to Ownership of Land and Property would be faster without the Governor's Consent to title as currently stands in the Land Use Act 1978 and there would be Security of Tenure to Land
5. Land would become a veritable source of wealth creation for Nigerians because there will be ease in performing Land-based transactions
6. Contribution of Nigerian Mortgage Sector to GDP would become significant due to an increase in Property acquisition through mortgages
7. Higher output level in Nigeria, coupled with higher Productivity from Nigerians
8. Increased Employment Generation particularly in the Construction Industry
9. Reduction in Poverty level in Nigeria
10. Reduced Social/Political Crisis in the country
11. Significant downward trend in corruption/corruption-related matters