

The Land Swap Initiative of the Federal Capital Territory (FCT) in the Context of Nigeria's Legal Framework on Public Private Partnership

By *Faruk Sani*

LL B (UDUSOK); BL; LL M (Unilag); LL M (Southampton, UK); Ph.D. (UDUSOK), Nigeria

Abstract

Faced with huge infrastructure deficits and corresponding funding challenges, the FCT (FCT) Administration instituted the land-for-infrastructure-swap scheme in which the private sector was granted land under the Land Use Act (LUA) in exchange for the provision of specified public infrastructure in a Greenfield district at no financial costs to FCT Administration. As a technique of land asset management of public authorities, such infrastructure would, *prima facie*, include road, electricity and water networks. Though inspired by the National Policy on PPP and the global best practices on development of new cities, the FCT Administration did not follow the extant provisions of the ICRC Act in deference to the LUA, which has made comprehensive provisions on grant and utilization of lands in Nigeria. It was argued that the FCT initiative could not have been land swap, as the object of swap was for things other than land. The paper however established that land swap, as a technique for land-based infrastructure financing, cannot be restricted to exchange of land only. Exchange of land for infrastructure, as seen in Egypt, Denmark, China, Japan and many other countries, were equally referred as land swap schemes, and hence, the FCT scheme eminently qualified as land swap. In reviewing the concept of ownership and the wide powers granted to the Governor under the LUA as well as its entrenchment in the Constitution, which the Supreme Court of Nigeria observed as having extraordinary status, it is obvious that the FCT Minister, by a community reading of sections 299 and 301 of the Constitution and section 13 of the FCT Act, could stipulate infrastructure provision as a condition for land grant without being subjected to the extant legal framework on PPP, and hence recommend the deepening of the scheme.

Keywords: PPP, Land Swap, Ownership of Land, Status of LUA, FCT Applicable Laws

Introduction

In its effort to develop the Federal Capital City (FCC) in line with the Abuja Master Plan, especially to provide infrastructure in six of its new districts, the FCT Administration came up with an initiative, which it referred as land-for-infrastructure swap or land swap, whereby it would grant land to investors under the Land Use Act (LUA) for real property development. In exchange for the grant, the investors would provide specified public infrastructure in the entire district. Such infrastructure included road, water, power, telecommunication, sewage and storm water networks, which were required to be in accordance with the scope and standard of works for district development of the Federal Capital Development Authority (FCDA). Since its inception and gradual implementation, there has been argument on the appropriateness of the term ‘land swap’ to the FCT scheme and whether, as a model of Public Private Partnership (PPP), it complied, or even needed to comply, with the PPP legal framework including the Infrastructure Concession Regulatory Commission (ICRC) Act,ⁱ the Public Procurement Actⁱⁱ and the National Policy on PPP.ⁱⁱⁱ

It is presumptuous to analyze the FCT land swap scheme without considering the peculiarities of Nigeria’s land tenure and land ownership system, as the FCT land swap scheme was done within the context of the LUA, which expressly empowered the Governor, and in the case of the FCT, the Minister, to grant land to any Nigerian with or without any condition. If FCT Administration is to leverage on private funding of its infrastructure, it is necessary to determine whether it is under any obligation to comply with procurement and fiscal responsibility safeguards under Nigerian laws before making such grants. The aim of this paper therefore is to determine whether the FCT scheme could be referred to as land swap based on global parameters and whether it can be regulated under the extant PPP legal framework. The paper therefore is divided into 5 sections to be able to answer these two questions. The first section will look critically at the FCT land swap scheme; the second section will do a conceptual review of the global land swap concept; the third section will discuss ownership of land under the LUA; the fourth section will look at the PPP legal framework and its application to the land swap scheme; while the fifth section is conclusion and recommendation.

The FCT Land Swap Scheme

The FCT land swap scheme is a private sector collaboration project of the Federal Capital Territory (FCT) Administration, which seeks to integrate real property development with infrastructure provision. It was 100% funded by the private sector to be implemented without any financial or technical contribution from either the FCT Administration or any of its agencies. Under the scheme, which was contained in the Federal Government Gazette No. 91 of 2014,^{iv} the FCT Administration was to grant agreed percentage of land (Not less than 60%) in a Greenfield district to a developer for real property development^v on the basis of a special contract envisaged by the Land Use Act (LUA).^{vi} In exchange for the grant, the Developer was to provide primary infrastructure in the agreed district without any financial, technical or demand risk on the part of the FCT Administration.^{vii}

While the release of land titles would be based on certificates of interim measured works, the infrastructure which the Developer would provide in a district included detailed district design, Bill of Engineering Measurement & Evaluation (BEME) and specified kilometers of urban infrastructure and utilities, namely, various sizes, lengths and quantities of roads, Storm Water Drains, Foul Water Drains, Water distribution lines, Street lights, Electrical Power distribution lines, telecommunication ducts and mini Sewage Treatment Plants.^{viii} The Developer would, at the very beginning of the process, deliver a Business plan to show technical capacity, financial capability, managerial competence and project viability.^{ix}

The FCT Administration decided to institute the scheme as solution to observable constraints, which seemed to derail the national aspiration of building a befitting national capital for Nigeria. The constraints included FCT's infrastructure deficit to the scope of 70% of Abuja Master plan; the funding challenges including a debt burden of over US\$3 Billion; the FCT urbanization growth rate, which doubled the national average of 3.5% per annum, and the obligations to provide district infrastructure under existing national plans.^x The FCT's infrastructure deficit followed the national trend, which showed a mismatch between infrastructure investment and population growth rate. For instance, it was reported that as against the national population growth rate of 2.5% per annum, Nigeria's average level of capital expenditure was a mere 1.1% of GDP between 2011 and 2020.^{xi} In fact, it was 0.9% in 2015 and pitiable 0.6% in 2016. Nigeria's public infrastructure investment fared better before

Nigeria's fourth democratic experiment in 1999, as it was 3.5% of GDP between 1981 and 1990; 5.2% between 1991 and 2000; and 2.5% between 2001 and 2010 as against a population growth rate that increased to 3.5% by 2021.^{xii}

Another constraint was the inability of the FCT Administration to achieve its desired objectives in the Mass Housing programme where, due to paucity of funds, it was unable to provide infrastructure within the Mass Housing estates as stipulated in its agreements with private developers.^{xiii} Similarly, its efforts to provide infrastructure using conventional BOT PPP model was not successful, as the project proponent for the Katampe district infrastructure, Deanshanger Project Limited, could not deliver due to its serial breaches of the Concession Agreement. These constraints made private sector funding of infrastructure in FCT districts unavoidable.

Reputable construction, real property and other companies were identified and invited to participate in the Land swap scheme. In view of the federal character principle under section 14(3) of the Constitution and the concept of Abuja as the land for all Nigerians, the FCTA invited investors, identified from its database, on the basis of the six geo-political structure of the nation. All investors were issued with Request for Proposals (RFP) in which they were required to show their technical competence, financial capability and strategy for private sector funding of infrastructure in a district. After the submission, 13 investors executed a Memorandum of Understanding (MOU) with FCT Administration in which it required participants, among other obligations, to fund the production of the preliminary technical works, viz., survey, land use plan, engineering design and the strategy for resettlement and compensation of persons to be affected.^{xiv}

The investors fully funded and, in a joint working collaboration with the FCDA officials, satisfactorily delivered the complete surveys, regional plans and engineering designs of the six districts in two years. Apart from the fact that this activity would have costed the FCT Administration over US\$28 Million, it was doubtful if the FCT Administration, using conventional procurement processes, could complete these preliminary project preparation works within a record time of two years. Having successfully concluded the project design, the 13 investors negotiated the terms of the relationship, agreed on the sharing formula, and thereafter, signed their respective development agreements. The total district infrastructure cost

for the six districts was US\$7.5 Billion while about US\$400 Million would be expended for resettlement of the affected Abuja natives.^{xv}

It is important to point out that in the selection of investors, the FCT Administration neither put in place any competitive procurement process nor utilized the ICRC's National Policy on PPP as a mandatory guide. It identified the 13 investors from a database of over 70 investors that, at one point or the other, submitted unsolicited proposals for district development, mass housing scheme or real property development.^{xvi} The FCT Administration saw its land swap scheme as similar to any ordinary allocation of land to citizens under the LUA.^{xvii} The only difference was in imposing additional and special conditions of infrastructure provision, which was allowed by section 8 of the LUA. It states:

“Statutory Right of Occupancy granted under the provision of section 5(1)(a) may be granted subject to the terms of any contract which may be made by the governor and the holder”.

At this risk of repetition, it is equally important to emphasize that the fundamental objectives of the FCT land swap scheme were to ensure comprehensive development of FCT districts in line with the Abuja Master plan; unlock dead capital by freeing up land with the issuance of title documents to catalyze business activities in the FCT; crash the high property rental value in Abuja; and catalyze a paradigm shift from land ownership to home ownership as truly envisaged under the LUA.^{xviii}

Conceptual Review of Land Swap

The evolutionary concept of land swap arose as a technique in land asset management by public authorities to provide public infrastructure or to fund budgetary deficits,^{xix} and as such, it is often more described rather than defined. The World Bank described it as a tool that empowers a city to trade a municipally owned site with a privately owned site.^{xx} It was also considered to be the substitution of a piece of land in one place with another in either the same locality or elsewhere.^{xxi} Another writer saw it as involving the grant of land to a developer who will in turn provide infrastructure such as good roads, electricity, portable water, drainage, sewer lines and communication ducts to residents.^{xxii} While the two descriptions looked at land swap as an

exchange for land only, the latter description posited that the exchange was for infrastructure only. The three descriptions, observably, appear to be restrictive in view of the wider usage of land swap concept in many countries.

Although the term ‘land swap’ has not been conceptually defined, the word ‘swap’ is defined to mean an exchange of one security for another.^{xxiii} Since the security ought not to be of the same genus, the term ‘land swap’ within the context of PPPs can be extrapolated to mean a grant of land in exchange for either another land, infrastructure, utility or any other service that may be required by the public authority. After analyzing the different manifestations of land-based infrastructure financing, Peterson posited that land swap is a PPP approach for infrastructure installation in new cities.^{xxiv} Where the arrangement between the parties is exchange of land for infrastructure, the developer in many instances would be required to provide not only the internal infrastructure but also a significant portion of the external infrastructure for the public authority.^{xxv}

Arguably, infrastructure investment through the land swap scheme could be more significant in jurisdictions where public authorities own large chunk of lands. These jurisdictions are mostly found in Middle Eastern and African countries where the entire undeveloped land in a country could be under the control of public authorities. The outcome of land swap in such countries could be phenomenal. In countries where the system is private ownership of land however, e.g. United States, land swap would have a limited outcome since ownership of lands by public authorities could not be beyond locations where their public infrastructure, buildings and green spaces are installed.^{xxvi} In contrast, some countries with private ownership of land but where public authorities own large tracts of undeveloped lands and reflect them in their balance sheets, like China, the outcome of land swap induced-investments could be modest. However, in all these categories and depending on the structure of the transactions, land swap model could be a veritable mechanism for public infrastructure investment.

Depending on its aspirations and reality, a public authority could embark on a land swap infrastructure investment using the land vested in it, or the land it holds in trust, or the land it collects through an arrangement with landowners, or even the land it compulsorily acquires.^{xxvii} Such lands could be exchanged for another land as was done in Brazil where the Navy’s Waterfront land was acquired as part of urban regeneration plan for the 2016 Olympics^{xxviii} or

to raise commercial loans for infrastructure development as was done by Orestad Corporation in the development of six town centers and construction of a metro line in Orestad near Copenhagen in Denmark.^{xxix} The land could also be a subject of direct sale as was done by the Port of New York and New Jersey when it sold 16 acres of its landholdings to finance the rehabilitation of transport infrastructure including the Manhattan rail in New York City.^{xxx} It could also form the basis of a land readjustment scheme, more common in Japan and South Korea, where landowners hand over their lands to public authorities for installation of infrastructure and urban development, and at the end of the process, receive about 40% of developed land.^{xxxi} It can also be exchanged for restoration to nature as happened with Netherlands' Dutch National Ecological Network,^{xxxii} or to provide city infrastructure and low income housing at no financial costs to government similar to the system in Cairo.^{xxxiii}

The Cairo's initiative of land for infrastructure installation requires more elaboration. The New Urban Community Authority (NUCA), Cairo's infrastructure agency, agreed to grant a private developer free land measuring approximately 3,360 hectares. In return, the developer would install internal infrastructure valued at E£110 per square meter, external infrastructure valued at E£127 per square meter, and low cost housing to the tune of 7% of the total development costs.^{xxxiv} A similar scenario happened in the construction of Bangalore International Airport. The government acquired 4,260 acres of land through eminent domain and granted it to a consortium of private developers, which dedicated 2000 acres for the airport and the remainder was utilized for commercial development. In exchange for the grant, the government was given 26% shares of the project's special purpose company. In 32 months, a modern airport was constructed with complementary facilities to accommodate 9-10 million passengers at no financial cost to government.^{xxxv} Both the Egyptian and Indian transactions used lands as opportunities for infrastructure leveraging.

This is a new phenomenon, especially in countries where lands are granted to citizens by public authorities either free of charge or at values far below commercial rates. In Morocco, Saudi Arabia, Tunisia, Yemen, Kuwait, Iran and many countries where lands are given to households free or at a fraction of market values, significant infrastructure deficits are usually rampant.^{xxxvi} Abuja is a classical example of places where lands are given to households free or at a fraction of market values. The idea of capturing true market values of land has created opportunities for

public authorities to provide public infrastructure using resources outside their budgets. Beside the land swap arrangement, other techniques of capturing land values to the benefit of public authorities, which are being tried in many jurisdictions included direct sale or auction of public lands to developers,^{xxxvii} capitalizing the future value gains of land to be paid by immediate beneficiaries,^{xxxviii} imposition of betterment levies imposed on affected landowners,^{xxxix} negotiating with landowners on appropriate financial contribution for infrastructure installation,^{xl} public acquisition of land by a public authority and the subsequent resale at commercial rates,^{xli} developer exactions where developers are required to either install internal infrastructure that meets development standard or pay for the infrastructure elements usually provided by the public authority.^{xlii}

The different models for land-based infrastructure financing as listed above should not be confused with the main objectives in a land swap arrangement. The fundamental objective of a Land swap scheme is public infrastructure provision and its management. Although there are few cases on the subject, the case of *Helton v City of East Ridge*^{xliii} however gave clue as to the infrastructure objectives of land swap arrangements. The court held that the swap of 27.5 acres of land in Camp Jordan Park to HAF Inc. for the installation and management of facilities for 25 years and for which the company would pay US\$1 a year for 12 years and thereafter US\$500 a year, was not unreasonable, unfair and did not offend the plaintiff's rights under the Constitution of the United States.^{xliv}

The Ownership of Land Under the Land Use Act;

In Nigeria, the land tenure system is regulated by the Land Use Act (LUA)^{xlv} which, based on the country's legal jurisprudence, has been described as an ordinary statute, which is extraordinary by virtue of its entrenchment into the Constitution.^{xlvi} The LUA, conceived by the Murtala/ Obasanjo Administration and accommodated in the Nigerian Constitution, effectively changed the land tenure system in Nigeria. It removed the concept of land ownership in citizens to that of right of occupancy. Apart from making land available to government, its singular doctrinal philosophy was to ensure and preserve the rights of all citizens to use and enjoy Nigeria's lands. The Government, in accepting the recommendation for the promulgation of the LUA, stated thus:

“All Nigerians are collectively owners of all lands in the country and the rights of all Nigerians to use and enjoy the lands of the country and the natural fruits thereof in sufficient quantity to enable them provide for the sustenance of themselves and their families should be ensured, protected and preserved. Ownership of land per se is irrelevant. What is important is the use to which land is put and no Government should abdicate its responsibility in respect of a proper planning of land use within its territory.”^{xlvii}

The preamble to the LUA was very clear in reflecting the above philosophy and, which by section 1 of the Act, vested all lands within the territory of a state in the Governor of that State and by extension, in the FCT Minister with respects to the Federal Capital Territory,^{xlviii} to hold in trust for the use and common benefit of all Nigerians. Shedding light in the concept of land vestment in the LUA, Professor Olawoye emphatically opined that the State Governor owns the legal title subject to the provisions of the Act.^{xlix} As at today therefore, no person in Nigeria could exercise ownership rights over any piece of land, as the highest title available is a leasehold right of use.¹ In *Nkwocha v Governor of Anambra State*,^{li} the Court observed that ‘it is an understatement to say that this Act abrogated the right of ownership of land hitherto enjoyed by all Nigerians’.^{lii} The maximum rights exercisable over land is a finite right of occupancy, which the Act described as ‘customary’ in the case of rural lands and ‘statutory’ in the case of urban lands. In the case of Abuja, the entire land within the Federal Capital Territory had been declared as urban land. The importance of this classification is in the scope of power of the granting authority. While the Governor grants statutory rights of occupancy over urban lands,^{liii} the customary rights of occupancy over rural lands are within the ambit of local government authorities.^{liv}

It is obvious from its language that the LUA intended and, indeed, created a trust relationship between the Governor and the citizens. A *Trustee* has the legal title to the object of trust and as such could exercise all the incidents of ownership for the benefit of the beneficial owner, commonly referred as *cestui que trust*. By describing the Governor as a Trustee, the law imposes upon him an obligation of *Uberrima fidei* or utmost good faith, an obligation that is comprehensively regulated under the common law. To underscore this Trust relationship, the

LUA goes to create wide-ranging powers exercisable by the Governor, which it said should be for the use and common benefit of all Nigerians.

Under section 5 of the LUA, the Governor has the power to grant land to any person for all purposes. It needs to be state that the size, object or subject of grant was not restricted under the LUA. The only restriction, apart from planning and development control purposes, was in the deemed rights of occupancy, which for the purposes of the grant was restricted to a half hectare.^{lv} The ‘half hectare’ rule, though widely criticized, is and remains the extant law in Nigeria. To strengthen the Minister’s exercise of discretions as a legal owner and *Trustee* under the LUA, a window was created in section 8 to enable him exerts maximum value in his grants. The section reads:

“Statutory Right of Occupancy granted under the provision of section 5(1)(a) may be granted subject to the terms of any contract which may be made by the governor and the holder”.

The LUA mandates the National Council of States to make regulations relating to the terms and conditions upon which special contracts may be made under section 8.^{lvi} The Council has not made any regulations in this regard. This might be due to the raging debate on whether or not the Council can regulate Governors in the exercise of their statutory powers under the LUA, especially that such land matters are neither listed in the Exclusive Legislative List nor in the Concurrent Legislative List, thereby making them a Residual list within the exclusive powers of the states.^{lvii} It is arguable that on this account, the sweeping powers of the Governor under the LUA, the language of section 8 that stated ‘made by the Governor’ and, in the absence of any existing relevant regulation, the Governor or Minister, in the case of FCT, is on the right course to stipulating terms and conditions of the special contract.

In addition to these rights of grants, the Minister has the power to grant easement and demand rentals, impose penal rents for breach of covenant to develop, enter and inspect any land at any reasonable hour^{lviii} as well as revoke any certificate of occupancy for a variety of reasons including breach of any term of the special contract.^{lix} From the totality of these rights, which coincides with the fundamental feature of ownership that others are bound to accept the decision of an individual with respect to his property as final,^{lx} it is obvious that the LUA

intended, and indeed made the Governor to be the legal owner, and to exercise ownership rights over all lands within the territory of a state. The only exceptions are those lands vested in the Federal Government.^{lxi}

PPP Legal Framework and its Application to Land Swap Scheme;

Public Private Partnership (PPP) is a long-term contract for private sector participation in the provision of public infrastructure and services on the basis of shared risks, shared resources and shared rewards. Its legal regime in Nigeria cuts across substantive, regulatory and financial legal frameworks and the strategic plans of both the Federal and the State Governments. The frameworks and national plans underpinning the policy and practice of PPP in Nigeria included such enabling legislation as the Constitution of the Federal Republic of Nigeria,^{lxii} the Infrastructure Concession Regulatory Commission Act,^{lxiii} the Public Enterprises (Privatization and Commercialization) Act,^{lxiv} the Electric Power Sector Reform Act,^{lxv} the Deep Offshore and Inland Basin Production Sharing Contract Act,^{lxvi} the Road Infrastructure Development and Refurbishment Investment Tax Credit Order^{lxvii} are part of the PPP legal framework at the federal level. At sub-national levels however, they include the Lagos State Public Private Partnership Law,^{lxviii} the Cross River Public Private Partnership Law 2010, and Oyo State Public Private Partnership Law 2013.

While the above instruments enable the practice of PPP in Nigeria, there is another category of legislation that must be complied with in PPP arrangements of the Federal Government. These include the Public Procurement Act,^{lxix} the Fiscal Responsibility Act,^{lxx} the Finance (Control and Management) Act,^{lxxi} the Loans Act^{lxxii} and the Loans (State Development) Act,^{lxxiii} the Debt Management Office Act,^{lxxiv} Environmental Impact Assessment Act,^{lxxv} and the Nigerian Urban and Regional Planning Act.^{lxxvi} Other legislation that impact to PPP systems and processes are the Companies and Allied Matters Act,^{lxxvii} Companies Income Tax Act,^{lxxviii} the Land Use Act,^{lxxix} Utilities Charges Commission Act,^{lxxx} and the Nigerian Investment Promotion Commission Act.^{lxxxii} There is also sector specific legislation that played major role in consummated PPP projects in Nigeria, which certainly are not of much relevance to this paper. These include the Nigerian Ports Authority Act,^{lxxxii} the Federal Airports Authority of Nigeria Act,^{lxxxiii} and Federal Highways Act.^{lxxxiv}

The National strategic plans, being the roadmaps for the stable and sustainable development of a country in the short, medium and long-term, has played a key role in Nigeria's PPP strides. All the Nigeria's national plans since the Structural Adjustment Programme (SAP) of 1986 up to the Vision 2020 of 2010 and the extant national development plan, the Economic Recovery and Growth Plan (EPRG) of 2017,^{lxxxv} have prioritized PPP as a major component in the development and funding of Nigeria's public infrastructure projects. Its predecessors are the Nigeria's Integrated Infrastructure Master Plan (NIIMP)^{lxxxvi} developed in 2014, the Nigeria's Industrial Revolution Master Plan 2014 (NIRMP),^{lxxxvii} and Nigeria's Vision 20:2020 (NV20:2020)^{lxxxviii} in December 2010. These National and strategic plans are critical in understanding the application of PPP regulations to PPP projects in Nigeria.

The basic issue is to what extent is the FCT Administration bound by these legislations and National plans. The Constitution made a special provision for the FCT. It provides that the provisions of the Constitution shall apply to the FCT as if it were one of the states of the Federation, and that all legislative, executive and judicial powers vested in a State's House of Assembly, Governor and Courts shall respectively vest in the National Assembly, the President and the FCT Courts.^{lxxxix} It went further to provide that references to persons, offices and authorities of a state were references to the persons, offices and authorities of the Federation with like status, designations and powers.^{xc}

In the same vein, the FCT Act provides that, in addition to any law having effect or made applicable throughout the federation, the laws set out in the second schedule to the Act shall apply in the FCT.^{xc1} By a community reading of section 299 and 301 of the constitution as well as section 13 of the FCT Act therefore, it is obvious that all laws of the National Assembly and all policies of the Federal executive, including PPP legal frameworks at the Federal level, are applicable to the FCT. In *Ibori vs Ogboru*,^{xcii} the court held that by the combined provision of section 299 and 301 of the Constitution, the FCT is treated like a State while the National Assembly makes law for the FCT. See also *Attorney General of Abia State vs Attorney General of the Federation*.^{xciii}

Another important provision of the constitution is section 302 regarding the power of the president to appoint a Minister for the FCT, who would exercise powers and functions, including those under the Land Use Act, as the President might delegate. However,

notwithstanding the application of Federal laws and policies to FCT Administration and the delegation of powers by the President, the Supreme Court was, in a unanimous decision, emphatic that neither the FCT Minister nor the Federal Capital Development Authority (FCDA) are agencies of the Federal Government as they are agencies of the FCT, which is a deemed State under the Constitution.^{xciv}

It must be pointed out at the outset that in coming up with the land swap scheme, the FCT Administration stated categorically that policies, which influenced its decision were the Abuja Master plan, National Implementation Plan II (NIP II) under Nigeria's Vision 20-2020 and the 30-year Nigeria Infrastructure Master Plan.^{xcv} It recognized that the FCT Administration was to attract a minimum of 40% of its infrastructure investments from the private sector and to ensure the development of at least six districts under the first phase of the NIP II.^{xcvi} It also stated categorically that the land swap scheme was structured as a PPP policy to ensure private sector provision of infrastructure within the designated districts of the FCC.^{xcvii} In view of the fact that the provision of the ICRC Act applies to investment and development projects relating to infrastructure of ministries and agencies of the Federal Government,^{xcviii} it goes without saying that the ICRC Act, the National Policy and all other laws under the PPP legal framework would presumably apply to FCT land swap scheme. To hold this argument, with all due respects, appears to gloss over the provisions and status of another important law of the National Assembly applicable to FCT, the Land Use Act (LUA).

The FCT Administration made it clear that its land swap scheme was essentially a land allocation under the LUA,^{xcix} in which the Minister could exercise powers under section 8. The LUA is a comprehensive legislation that had been observed to endow the Governor with not only executive powers but also with legislative and judicial powers.^c Such legislation, arguably, cannot give way, be subordinated or subjected to any legislation of lower or even similar status like the ICRC Act or any other legislation of the National Assembly. The notion becomes reinforced considering the extraordinary status of the LUA, as it is entrenched in the constitution and stipulated to be beyond invalidation.^{ci} As a result of its constitutional entrenchment by section 315(5), there are raging debates as to whether the LUA is an existing law, or it is equivalent to constitutional provisions, or it supersedes the constitution, or whether it is even an integral part of the Constitution.

In *Nkwocha v Governor of Anambra State*,^{cii} the Supreme Court stated unambiguously that the LUA is not an integral part of the constitution and that it is an ordinary statute, which became extraordinary by virtue of its entrenchment in section 315(5). To underpin its extraordinary status, the constitution further provides that the LUA can not be altered or repealed except in accordance with section 9(2) of the constitution, i.e. a proposal for the alteration of the LUA is to be supported by not less than two-thirds majority of all members of the National Assembly and approved by the resolution of the Houses of Assemblies of not less than two-thirds of all the States in Nigeria.^{ciii} The ICRC Act or any similar national legislation within the PPP legal framework neither has this extraordinary status nor enjoys such strengths and vigour as the LUA.

Beside the extraordinary status of the LUA, there is the important rule of interpretation that strengthens the exclusive application of the LUA to the FCT land swap scheme. If the ICRC Act had intended to oust or exclude the application of section 8 of the LUA, it would have stated so clearly and unambiguously. In *Okeke v AG, Anambra State*,^{civ} Uwaifo JCA observed that once the provision of an Act ousting any specific matters are clear and unambiguous, the court is bound to observe and apply them. Incidentally, there is no such clear and unambiguous provision in the ICRC Act or any of the legislation under Nigeria's PPP legal and regulatory framework.

However, it must be pointed out that legislation that do not relate to the validity, limitation or otherwise of the Minister's powers of grant under the LUA, could apply to the scheme. Such legislation could relate to general regulations for project implementation or execution. For instance, it is obligatory to comply with the provisions of the Environmental Impact Assessment Act^{cv} and Nigerian Urban and Regional Planning Act^{cvi} in the execution of any infrastructure works whether or not it is a PPP, and notwithstanding its PPP model or design.

Summary, Conclusion and Recommendation

The paper had comprehensively looked at the FCT land-for-infrastructure-swap scheme within the context of the global land swap concept, and concluded that the scheme was, to a large extent, one of the land management techniques employed by public authorities to ensure private sector participation in the provision of public infrastructure and services. To the extent that

land was being swapped for infrastructure, the FCT scheme could rightly be termed, and eminently qualified, as a land swap. In the same vein, the concept of ownership under the Land Use Act, which vests legal title over all FCT lands in the Minister, has made it imperative to determine the extent to which national legislations and PPP policies are applicable to the FCT land swap scheme.

While it is beyond doubt that the FCT Administration is bound to apply all National legislations and policies in the exercise of its functions, powers and responsibilities under the FCT Act, the combined effect of sections 299 and 301 of the Constitution as well as the entrenchment of LUA in the Constitution displace the application of any law or policy that limits, subjects, undermines or compromises the powers of the Minister to grant land. Examples of such legislations are the ICRC Act, the Public Procurement Act and the National Policy on PPP. The FCT Administration is however bound by any legislation that relates to the execution of infrastructure works, e.g. the Environmental Impact Assessment Act and the Nigerian Urban and Regional Planning Act. It is therefore the conclusion of this paper that the LUA is adequate in validly and exclusively implementing the FCT land swap scheme.

Although it is too early in the day for assessment, the timely and satisfactory completion of preliminary technical works in respect of the six FCT Greenfield districts without any financial commitment to the FCT Administration is a clear indication of the potential efficacy of the land swap scheme in the provision of public infrastructure works. As the only Ministry or Agency of the Federal Government that exercises extensive powers and functions of a State Governor under the LUA, the FCT Administration should deepen its land management technique by continuing to use land swap as a mechanism for infrastructure provision in its undeveloped districts. It is in this regard, and as drawn from the discourse in this paper, that the following recommendations are suggested:

1. Since there is significant infrastructure and housing deficits in the FCT, and considering the commercial value of landed properties in Abuja, the FCT Administration should deepen its private sector collaboration in the provision of infrastructure and services on the basis of the land swap scheme;
2. The Infrastructure Concession Regulatory Commission (ICRC) should accommodate the peculiarities of the FCT land swap scheme in its PPP processes. It should consider

it as a substantive PPP model under which projects and services could be conceptualized, prepared and executed exclusively within the framework of the Land Use Act, and hence, would afford the Commission the opportunity to advise, regulate, monitor and supervise implementation of the scheme for more effectiveness;

3. The FCT Administration should strengthen its institutional structures in the implementation of the land swap scheme, as the joint working collaboration between the FCTA officials and the investors had shown that such collaboration is critical to the success or otherwise of PPP infrastructure projects; and
4. The FCT Administration should come up with a comprehensive PPP legal framework applicable to the land swap scheme to determine specific legislation and policies that readily add value to the execution of its land swap scheme, but do not limit, undermine or compromise the Minister's powers under the LUA.

Bibliography

Abuja Infrastructure Investment Centre, 'Report on FCT Land Swap Initiative' (FCTA, 2015).

Agwu K. and Udobi N. A., 'Adopting and Adapting Land Swap Model Toward Boosting Urban Housing Stock in Nigeria' [Feb. 2021](4)(8), *Iconic Research and Engineering Journal*, <<https://irejournals.com/formatedpaper/1702596.pdf>>.

Arimoro A. E., *Legal Framework For PPP: South Africa and Nigeria in Focus*, <<https://www.researchgate.net/publication/331547104> The Legal framework for public-private partnership South Africa and Nigeria in focus>.

Bakker M. M. and Alam S. J. and Rounsevell M. D. A., 'Land Use Change Arising from Rural Land Exchange: An Agent Based Simulation Model' (2014) <<https://link.springer.com/article/10.1007/s10980-014-0116-x>>.

Banks B., 'Planning to Deliver' (Ernst & Young), [2013], *Dynamics*, Issue 8, December 2013 <[https://www.ey.com/Publication/vwLUAssets/ET_-_Planning_to_deliver/\\$FILE/EY-Dynamics-Issue-v8-Planning.pdf](https://www.ey.com/Publication/vwLUAssets/ET_-_Planning_to_deliver/$FILE/EY-Dynamics-Issue-v8-Planning.pdf)>.

Boston Consulting Group (BCG), *Unlocking Nigeria's Potential: the Path to Wellbeing* (2016), <<https://www.bcg.com/publications/2016/public-sector-globalization-unlocking-nigerias-potential.aspx>>.

Garner B. A., *Black's Law Dictionary*, (Thomson Reuters, 10th Ed., 1995).

Hemsley S., 'Land Swap Between the City and Owner of Private Property' (December, 2008) <<https://www.mtas.tennessee.edu/knowledgebase/land-swap-between-city-and-owner-private-property>>.

Idris A. and Kura S. M. and Bashir M. U., 'Public Private Partnership in Nigeria and Improvement of Service Delivery: An Appraisal', [2013], *IOSR Journal of Humanities and Social Sciences* (IOSR-JHSS), Vol. 10 Issue 3 (Mar – Apr 2013), <[http://wwwiosrjournals.org/iosr-jhss/papers/Vol10-issue3/L01036371 .pdf?id=6225](http://wwwiosrjournals.org/iosr-jhss/papers/Vol10-issue3/L01036371.pdf?id=6225)>

Katz L., *The Concept of Ownership and the Relativity of Title* (2011)

Nwangwu G., *Public Private Partnerships in Nigeria: Managing Risks and Identifying Opportunities* (Palgrave Macmillan 2016). Budget IT, 'Unboxing FG's 2016 Proposed Budget', (5 February 2016) <<https://yourbudget.com/wp-content/uploads/2016/02/Unboxing-FGs-2016-Budget.pdf>>.

Olakanmi J., *Land Law: Readings & Cases* (Panaf Press, 2009).

Otubu A. K., 'Land Administration in 21st Century Nigeria and the Land Use Act: Need for Reforms' <https://www.researchgate.net/publication/32299820_Land_Administration_in_21st_Century_Nigeria_and_the_Land_Use_Act_Need_for_Reforms>.

Otubu A. K., 'The Land Use Act and the Land Ownership Debate in Nigeria: Resolving the Impasse' <https://www.researchgate.net/publication/272173374_The_Land_Use_Act_and_Land_Ownership_Debate_in_Nigeria_Resolving_the_Impasse>.

Peterson G. E., *Unlocking Land Values to Finance Urban Infrastructure* (The World Bank, 2009).

Shuaibu U., 'Eye on Abuja: What is Land Swap?' *The Daily Trust* (Kaduna, 24 February 2014).

Uche Modum, 'Legal Reform of the Land Use Act: Protection of Private Property Rights to Land in Nigeria' (PhD Thesis, University of Manchester, 2012) <https://www.research.manchester.ac.uk/portal/files/54521506/FULL_TEXT.PDF>.

Uroko C. and Edeh H., Abuja Land Swap: Investors Take Position as Natives Endorse Initiative, (Businessday Online Newspaper, 2013) <<https://archive.businessday.ng/real-estate/article/abuja-land-swap-investors-take-position-as-natives-endorse-initiative/>>.

World Bank, 'Land Swaps', <<https://urban-regeneration.worldbank.org/node/27>>.

Endnotes

ⁱ Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act (ICRCA 2005) Cap. 125A, LFN 2004.

ⁱⁱ Public Procurement Act 2007 (as amended) (PPA 2007), Cap. P44, LFN 2004.

ⁱⁱⁱ Infrastructure Concession Regulatory Commission, 'The National Policy on Public Private Partnership' [July 2009], 62 <<https://estateintel.com/app/uploads/2016/05/National-Policy-on-Public-Private-Partnership.pdf>> Accessed 09 February 2024.

^{iv} Phase IV Transformation Agenda Project: Land for Infrastructure Swap Model [Federal Republic of Nigeria Official Gazette, 11 April 2014] Government Notice No. 236, No. 91, vol. 101, 237-241.

^v Ibid, s. 1.

^{vi} Land Use Act 1978, s. 8.

^{vii} Ibid, Gazette No. 91, s. 2.

^{viii} Ibid, s. 3.

^{ix} Ibid, s. 4.

^x Abuja Infrastructure Investment Centre, 'Report on FCT Land Swap Initiative' (FCTA, 2015), 6-11.

^{xi} Chris Ugwu, Nigeria's Public Infrastructure Investment fails to match Population Growth of 2.5% P/A-Report, (Nairametrics Online, 2024) 1 <<https://nairametrics.com/2024/03/23/nigerias-public-infrastructure-investment-fails-to-match-population-growth-of-2-5-p-a-report/>> accessed 23 March 2024.

^{xii} Ibid.

^{xiii} Ibid, 6.

^{xiv} Chuka Uroko and Harrison Edeh, Abuja Land Swap: Investors Take Position as Natives Endorse Initiative, (Businessday Online Newspaper, 2013) 1 <<https://archive.businessday.ng/real-estate/article/abuja-land-swap-investors-take-position-as-natives-endorse-initiative/>> Accessed 20 February 2024.

^{xv} Report on FCT Land Swap Initiative, 37.

^{xvi} Ibid, 22.

^{xvii} Ibid, 16.

^{xviii} Ibid, 10.

^{xix} Peterson, 48.

^{xx} World Bank, 'Land Swaps', 1 <<https://urban-regeneration.worldbank.org/node/27>> Accessed 24 February 2024.

^{xxi} Umar Shuaibu, 'Eye on Abuja: What is Land Swap?' *The Daily Trust* (Kaduna, 24 February 2014) 32.

- xxii Kenneth Agwu and Alexander Nnamdi Udobi, 'Adopting and Adapting Land Swap Model Toward Boosting Urban Housing Stock in Nigeria' [Feb. 2021](4)(8), *Iconic Research and Engineering Journal*, 19 <<https://irejournals.com/formatedpaper/1702596.pdf>> Accessed 20 February 2024.
- xxiii Bryan A. Garner, *Black's Law Dictionary*, (Thomson Reuters, 10th Ed., 1995), 1677.
- xxiv George E. Peterson, *Unlocking Land Values to Finance Urban Infrastructure* (The World Bank, 2009) 59.
- xxv *Ibid*, 59.
- xxvi *Ibid*, 49.
- xxvii This option of compulsory acquisition may not work in Nigeria in view of the Supreme Court decision in *Ereku v The Military Governor of Mid-Western State* (1974) 10 SC 59 that the acquisition of land by government for private need of a private person was unlawful.
- xxviii World Bank, 'Land Swaps', 1.
- xxix Peterson, 34.
- xxx *Ibid*, 51.
- xxxi *Ibid*, 59.
- xxxii Bakker et al, 'Land Use Change Arising from Rural Land Exchange: An Agent Based Simulation Model' (2014) 2 <<https://link.springer.com/article/10.1007/s10980-014-0116-x>> Accessed 23 Feb. 2024.
- xxxiii Peterson, 59.
- xxxiv *Ibid*, 60.
- xxxv Peterson, 70.
- xxxvi *Ibid*, 60.
- xxxvii *Ibid*, 33.
- xxxviii *Ibid*, 35.
- xxxix *Ibid*, 36.
- xl *Ibid*, 38.
- xli *Ibid*, 41.
- xlii *Ibid*, 45.
- xliii 1993 WL 124673 (Tenn. Ct. App. April 22, 1993).
- xliv Sid Hemsley, 'Land Swap Between the City and Owner of Private Property' (December, 2008), 2 <<https://www.mtas.tennessee.edu/knowledgebase/land-swap-between-city-and-owner-private-property>> Accessed 24 February 2024.
- xliv Land Use Act 1978, Cap. L5, LFN 2004.
- xlvi *Nkwocha v Governor of Anambra State* [1984] 6 SC 362 @ 404.
- xlvii Same philosophy was repeated in the preamble to the Act.
- xlviii Land Use Act 1978, s. 51(2).
- xlix C. O. Olawoye, 'Statutory Shaping of Land Law and Land Administration up to the Land Use Act, in Jide Olakanmi, *Land Law: Readings & Cases* (Panaf Press, 2009), 25.
- ¹ Akintunde Kabir Otubu, 'The Land Use Act and the Land Ownership Debate in Nigeria: Resolving the Impasse' 15 <https://www.researchgate.net/publication/272173374_The_Land_Use_Act_and_Land_Ownership_Debate_in_Nigeria_Resolving_the_Impasse> Accessed 20 February 2024.
- li [1984] 6 SC 362 @ 404.
- lii *Ibid*, Per Obaseki JSC.
- liii Land Use Act 1978, s. 2.
- liv *Ibid*, s. 3.
- lv *Ibid*, s. 34(5).
- lvi Land Use Act 1978, s. 46(1).
- lvii Akintunde Kabir Otubu, 'Land Administration in 21st Century Nigeria and the Land Use Act: Need for Reforms' 4 <https://www.researchgate.net/publication/32299820_Land_Administration_in_21st_Century_Nigeria_and_the_Land_Use_Act_Need_for_Reforms> Accessed 20 February 2024.
- lviii Land Use Act 1978, s. 11.
- lix *Ibid*, s. 28.
- lx Katz L., *The Concept of Ownership and the Relativity of Title* (2011) quoted in Akintunde Kabir Otubu, 'The Land Use Act and the Land Ownership Debate in Nigeria: Resolving the Impasse' 15 <https://www.researchgate.net/publication/272173374_The_Land_Use_Act_and_Land_Ownership_Debate_in_Nigeria_Resolving_the_Impasse> Accessed 20 February 2024.
- lxi Land Use Act, s. 49(1).
- lxii Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) Cap. C23, LFN 2004.
- lxiii Cap. 125A, LFN 2004.

- lxiv Cap P38, LFN 2004. The Act establishes the National Council on Privatization and the Bureau of Public Enterprises.
- lxv Electric Power Sector Reform Act (EPSRA 2005), Cap. E7, LFN 2004.
- lxvi Deep Offshore and Inland Basin Production Sharing Contract Act (DOA 1999), Cap D3, LFN 2004
- lxvii Road Infrastructure Development and Refurbishment Investment Tax Credit Order, No. 007 of 2019 (Executive Order 007).
- lxviii Lagos State Public Private Partnership Law 2011 (LPPPE 2011); <<https://laws.lawnigeria.com/2019/05/07/lagos-state-public-private-partnerships-law/>>. Accessed 04 March 2024.
- lxix Cap. P44, LFN 2004.
- lxx Fiscal Responsibility Act 2007 (FRA 2007), Cap. F40, LFN 2004.
- lxxi Finance (Control and Management) Act 2004 (FCMA), Cap. F26, LFN 2004.
- lxxii Loans Act Cap. L15, LFN 2004.
- lxxiii Loans (State Development) Act Cap. L16, LFN 2004.
- lxxiv Debt Management Office Establishment, Etc.) Act 2003 (DMOA 2003), Cap. D12, LFN 2004.
- lxxv Environmental Impact Assessment Act No. 86 of 1992 (EIA 1992), Cap. E12, LFN 2004.
- lxxvi Nigerian Urban and Regional Planning Act (NURPA), Cap. N138, LFN 2004.
- lxxvii Companies and Allied Matters Act 1990 (CAMA 1990), Cap. C20, LFN 2004.
- lxxviii Companies Income Tax Act 1961 (as amended) (CITA). Cap. C21, LFN 2004
- lxxix Land Use Act 1978 (LUA 1978), Cap. L5, LFN 2004.
- lxxx Utilities Charges Commission Act 1992 (UCCA), Cap. U17, LFN 2004.
- lxxxi Nigerian Investment Promotion Commission Act (NIPCA 1995), Cap. N117, LFN 2004.
- lxxxii Nigerian Ports Authority Act 1964 (as amended) (NPAA 1964), Cap. N126, LFN 2004.
- lxxxiii Federal Airports Authority of Nigeria Act 1996 (FAANA 1996), Cap. N5, LFN 2004.
- lxxxiv Federal Highways Act 1956 (FHA 1956), Cap. F13, LFN 2004
- lxxxv Economic Recovery and Growth Plan 2017 – 2020 (EPRG 2017) (February 2017).
- lxxxvi National Planning Commission, *The Nigeria's National Integrated Infrastructure Master Plan: Final Report*, [October, 2014].
- lxxxvii Nigeria's National Strategic Industrial Development Revolution Plan [2014].
- lxxxviii National Planning Commission, *Nigeria Vision 20: 2020: Economic Transformation Blueprint* [2010].
- lxxxix CFRN 1999, s. 299(a) and (b).
- xc CFRN 1999, s. 301(c).
- lxi FCT Act, s. 13(1).
- lxii (2005) 6 NWLR (Pt. 920) 102 @ 106.
- lxiii (2002) 6 NWLR (Pt. 763) 264 @ 448.
- lxiv *Hajia Yinusa Bakari v. Deaconess (Mrs) Felicia Ogundipe & 3 Ors.* (2021) 5 NWLR (Part 1768) 1.
- lxv Report on FCT Land Swap Initiative, 9.
- lxvi *Ibid*, 10.
- lxvii Report on FCT Land Swap Initiative, 5.
- lxviii ICRC Act, s. 1(2)
- lxix Report on FCT Land Swap Initiative, 16.
- c Akintunde Kabir Otubu, 'Land Administration in 21st Century Nigeria and the Land Use Act: Need for Reforms' 14 <https://www.researchgate.net/publication/32299820_Land_Administration_in_21st_Century_Nigeria_and_the_Land_Use_Act_Need_for_Reforms> Accessed 20 February 2024.
- ci CFRN 1999, s. 315(5)(d).
- cii [1984] 6 SC 362 @ 404, per Eso JSC.
- ciii Uche Modum, 'Legal Reform of the Land Use Act: Protection of Private Property Rights to Land in Nigeria' (PhD Thesis, University of Manchester, 2012) 118 <https://www.research.manchester.ac.uk/portal/files/54521506/FULL_TEXT.PDF> Accessed 20 February 2024.
- civ (1992) 1 NWLR (Pt. 215) 60 @ 86.
- cv Environmental Impact Assessment Act No. 86 of 1992 (EIA 1992), Cap. E12, LFN 2004.
- cvi Nigerian Urban and Regional Planning Act (NURPA), Cap. N138, LFN 2004.