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Real Estate

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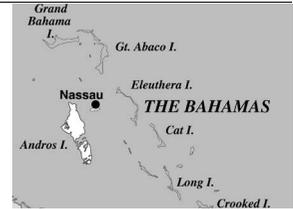
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BAHAMAS

Law and Practice

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1. General

1.1 Main Sources of Law

The Bahamian legal system is based on the English common law system and the main sources of real estate law are local legislation, local case law and case law from Commonwealth jurisdictions.

1.2 Main Market Trends and Deals

In recent years, the real estate market in The Bahamas has continued to show strong and healthy activity and a stable or well-measured rise in pricing. The construction industry supporting the market has performed well and has kept pace with needs and demands.

Baha Mar Resort & Casino

In mid-2017 the USD2 billion landmark Baha Mar Resort & Casino opened. The resort is comprised of three well-known branded hotels (Rosewood, SLS and Grand Hyatt), more than 30 restaurants and bars, a casino, the Jack Nicklaus Signature “Royal Blue” Golf Course and various other amenities. Meeting with great success internationally, the opening has also had a direct and immediate impact on local island employment and the economy. The opening was followed by the completion in 2018 of condo-hotel aspects that brought more than 200 luxury condominium units to the market. In October 2019, Baha Mar also unveiled a USD300 million proposed expansion and development of a major water park which is expected to have a direct knock-on effect of also increasing commercial activities and property values in the surrounding area.

Other Flagship Developments and Private Residential Rentals

The growth and momentum of Baha Mar, coupled with the consistently good performance of Atlantis Resort & Casino, Albany Resort, and other flagship communities and developments, the expansion and development of further cruise ship destinations in the islands, and the popular rise in private residential rentals (through Airbnb, HomeAway and VRBO), have resulted in 2019 being a year of record-breaking visitor arrivals to The Bahamas.

The continued attractiveness to non-Bahamian buyers of pre-construction purchase structures and condominium acquisitions has also been a prominent feature of the real estate market in recent years. Albany Resort recently unveiled its eighth phase of marina condominium residences; Thirty Six PI and One Cable Beach have been brought to successful completion; Hurricane Hole Paradise Island is underway and slated to be developed as a USD250 million five-year project; and GoldWynn Residences is well advanced as a 176-unit luxury beachfront condo-hotel development.

Rebuilding after Hurricane Dorian

While Hurricane Dorian significantly impacted the northern islands of The Bahamas in September 2019, it left the vast majority of the country untouched. The Bahamas government moved quickly in affected areas to begin restoration of infrastructure and services and has offered a range of tax relief measures (on value added tax, real property tax and customs duties) to support and encourage redevelopment. Flagship developments (such as Baker’s Bay and Winding Bay) and the iconic, historic tight-knit communities of the cays (Elbow Cay, Guana Cay, Man-O-War Cay, Green Turtle Cay, Treasure Cay), that constitute major mixed-Bahamian and second-home owner communities, have also driven the rebuilding process. The rebuilding process is also expected to be greatly strengthened by the USD300 million five-star residential, resort and marina development approved for South Abaco, to be undertaken by the Tyrsoz Family Holdings group, announced by The Bahamas government in February 2020.

Tax Amendments

In line with such economic activity and growth, in July 2019 The Bahamas government took the opportunity to overhaul the tax regime relating to real estate (now subject to value added tax, rather than stamp duty), restructure operations under the Central Revenue Administration and Department of Inland Revenue, amend the Real Property Tax regime to provide for better categorisation of taxable properties, and implement a number of “relaxed” or “liberalised” policy changes to make it easier to do real estate business.

1.3 Impact of Disruptive Technologies

Generally speaking, real estate purchasers and developers have taken a guarded approach to the introduction of digital or decentralised purchase and finance technologies and have continued to approach transaction structuring through conservative and established practices. However, The Bahamas government is taking steps to prepare for the anticipated introduction of digital asset business to The Bahamas in due course and recently published the draft Digital Assets and Registered Exchange Bill for industry consultation. The Bill prescribes the legal requirements for issuance and sale of digital tokens, and the regulation of issuers and those conducting digital asset business in or from The Bahamas.

1.4 Proposals for Reform

The current government administration has stressed as a priority the importance of improvement of the ease of doing business in its agenda. While no new legislative amendments are presently pending, it is anticipated that further reforms in real estate law and practice (building on those already adopted in 2019) may be forthcoming in the near future.

2. Sale and Purchase

2.1 Categories of Property Rights

Real estate can be held as freehold title absolute or leasehold.

2.2 Laws Applicable to Transfer of Title

In The Bahamas, the Conveyancing and Law of Property Act of 1909 principally governs the determination of title to real property and conveyancing transactions. The title to condominium units is governed by the Law of Property and Conveyancing (Condominium) Amendment Act 2003. The laws applicable to transfer of title do not vary between commercial and residential properties, but certain acquisitions by non-Bahamians would require prior government approval (see **2.11 Legal Restrictions on Foreign Investors**).

2.3 Effecting Lawful and Proper Transfer of Title

The transfer of title must be effected in writing and is done by a deed which is signed, sealed and delivered. Once completed, the deed must be stamped by the Department of Inland Revenue and any applicable taxes on the transaction must be paid. The deed is then lodged in the Registry of Records to establish its priority against subsequent purchasers, encumbrances or liens. The original deed, once recorded, is returned to the purchaser for safekeeping together with any other original deeds in the chain of title that may change hands on closing.

2.4 Real Estate Due Diligence

As there is no land registry in The Bahamas, good and marketable title to land is determined by searches that are conducted against the names of predecessors in title and the seller in the Registry of Records, Supreme Court Registry, Companies Registry and Probate Registry.

In a purchase and sale transaction, Bahamian law requires that title traces back to a “root of title” (ie, to a deed not less than 30 years old), to a “Crown Grant” or to a Certificate of Title issued in accordance with the Quieting Title Act, and that there be an unbroken chain of documentary title from such point to the seller’s ownership.

In the course of a standard purchase and sale transaction it is usually necessary for a purchaser’s attorney to raise “requisitions” in respect of the title to a property, which can vary widely in nature, to ensure that areas of uncertainty, and inconsistencies or defects in title are addressed by a seller or their counsel prior to closing.

The majority of purchasers or mortgagees rely upon Bahamian counsel to investigate title and provide a written legal opinion certifying the good and marketable nature of the title to be acquired or held as security before closing on the transac-

tion. The opinion is backed by the firm’s professional indemnity insurance. However, title insurance is offered in The Bahamas by a number of title insurance agents representing major international title insurance companies and the procedure to acquire insurance is usually handled by local counsel, but is no different to what foreign buyers may be accustomed to in their home jurisdictions. In some cases, certain developers will provide only for title insurance to be issued to buyers under their purchase contracts, and will not adduce title to a property or address requisitions, in order to streamline and expedite the sales process.

2.5 Typical Representations and Warranties

In The Bahamas, it is increasingly becoming the practice for real estate purchase and sale agreements to include basic representations and warranties by the parties, but this is subject to the nature of the transaction and sophistication of the parties, and not all firms have adopted such practice.

A purchaser may have remedies commonly available under common law for misrepresentation or breach of agreed representations/warranties. In the absence of agreed seller-disclosures, representations and warranties, the representations and warranties of a seller are limited under Bahamian law and generally relate to implied covenants for title only (ie, regarding the right to convey, quiet enjoyment, freedom from incumbrance, further assurance).

The general position under Bahamian law, and a matter of good commercial local practice, is that the buyer must satisfy themselves as to the condition and fitness for intended use and purpose of the land they intend to purchase before proceeding and carry out all necessary due diligence that it would be prudent to undertake.

2.6 Important Areas of Law for Investors

While obtaining general guidance on Bahamian real estate law and contracts is important, an investor should ensure that they are advised on:

- how closing and carrying costs may arise (whether as taxes or additional fees);
- the preferable structure for the holding of title to their property (and how this may interplay with estate planning or exchange control considerations);
- how zoning or planning may affect desired development plans;
- in the case of non-Bahamians, the regulatory requirements for owning and developing real estate or operating a business in The Bahamas; and
- in the case of non-Bahamians interested in establishing immigration status in The Bahamas by virtue of their pur-

chase and investment, the considerations to be understood in planning and co-ordinating the two goals.

2.7 Soil Pollution or Environmental Contamination

The environmental liability laws of The Bahamas are contained in various statutes but the Environmental Health Services Act 1987 and Environmental Planning and Protection Act 2019 are of principal importance. Generally speaking, the environmental laws are not onerous and seek to hold liable the person responsible for any environmental damage.

A buyer of real estate in which there is soil pollution or environmental contamination may (practically speaking, as much as legally speaking) inherit the responsibility of remediating pre-existing environmental issues. However, Section 28 of the Environmental Planning and Protection Act 2019 provides that liability for historical pollution is imposed on any person found to have polluted the environment before the coming into force of the Act. It is worth noting that the Act came into force on 20 January 2020 and many of its administrative provisions have not yet been fully implemented, nor have the provisions imposing duties of care or liabilities been tested in practical application and effect. It remains to be seen (but certainly appears that it might be the case) whether environmental liability and remediation costs may be borne by a prior landowner under Section 28, notwithstanding that they had subsequently disposed of or sold the land to a third-party purchaser, or whether such liability would not simply be inherited by a successor in title or the current owner of the damaged or polluted land.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

There are a number of Bahamian statutes which include provisions relating to the development and use of land but, generally speaking, development, planning, zoning and land use regulations are set out in the Planning and Subdivision Act, 2010 (P&S Act) and related subsidiary legislation.

The P&S Act contemplates that a “Land Use Plan” shall be adopted for each island in the Commonwealth of The Bahamas and work on developing those plans is underway, but unfinished. In the interim, it is standard practice for a buyer who wishes to ascertain the permitted uses of a parcel of real estate under applicable zoning or planning law, to contact the Town Planning Committee in the Department of Physical Planning for confirmation of the permitted or zoned use of that property under historic zoning orders or the current non-statutory land-use plans.

Approvals in Principle

Where a purchaser has particular development plans in mind for a parcel of land, the securing of requisite approvals (or, more often, “approvals in principle”) from the Town Planning Committee to facilitate the development, operation and management of the desired activity on that land would be a condition for closing the purchase transaction. The issuance of further project-specific final approvals from the Town Planning Committee would often be undertaken following completion of the purchase.

Such approval in principle is often sought from the highest levels of government in the purchase and development approval process, and covered in a buyer’s or developer’s application to the National Economic Council and Bahamas Investment Authority (mentioned in **2.11 Legal Restrictions on Foreign Investors**). In the case of major development projects, the buyer/developer and The Bahamas government will often enter into written and signed “Heads of Agreement” confirming approved uses, permitted development plans and related matters.

2.9 Condemnation, Expropriation or Compulsory Purchase

The Bahamian constitution protects private property rights and the powers or rights of condemnation, expropriation or compulsory purchase (referred to as “compulsory acquisition” in The Bahamas) by The Bahamas government are limited and must be exercised strictly in accordance with relevant statute law.

Examples of where such government powers exist under statute law include:

- under the Acquisition of Land Act, 1913, land may be compulsorily acquired for public purposes and subject to the process set forth in the Act for making declarations, giving notice, and paying to the owner or occupiers of such land satisfactory compensation (this power is most often seen exercised where land areas are needed to expand public roads or turning areas);
- under the Proceeds of Crime Act 2018, Confiscation Orders may be issued where property was acquired or gifted with proceeds from illegal activities;
- under the Environmental Planning and Protection Act 2019, Administrative Orders may be issued in respect of environmentally damaged land, harmful equipment or activities, and Closed Area Orders may be issued in respect of environmentally sensitive areas;
- under the Real Property Tax Act, the public treasurer has the power to sell certain land where annual property taxes are in arrears; and

- under the Building Regulations Act, 1971, the responsible minister for building regulations has the power to condemn and/or destroy unsafe or derelict structures.

2.10 Taxes Applicable to a Transaction

Generally speaking, all sales and transfers of land between third parties, whether direct or indirect, attract value added tax (VAT) payable to the Public Treasury under the Value Added Tax Act.

VAT on a transaction is calculated on either the consideration paid for the property or the market value of the property, whichever is greater. The rate of VAT payable on the sale and purchase of land are: 2.5% where the transaction is less than USD100,000 in value; and 10% where the transaction is greater than USD100,000 in value.

It is customary for a buyer and seller to agree in a typical sale and purchase transaction to share the payment of the applicable tax equally, but this is a business decision for the parties and not required by law.

The transfer of shares of a land-owning company (or its parent) similarly attracts VAT and, under the VAT Rules for Real Estate, 2019, any real property owned by a land-owning company is deemed to be transferred in the same proportion of value as the interest transferred/acquired in the land-owning company.

There are certain exempt (or rather, “zero-rated”) transfers of real estate, or transfers which may be eligible to partial exemptions. These include, for example, certain voluntary intra-family transfers, corporate intra-group transfers, estate planning transfers, acquisitions in special economic recovery (hurricane impacted) zones, purchases and mortgages by first-time homeowners, and transfers of residential mortgages.

In the case of financing transactions (including purchase or construction financing), under the VAT Act, a debenture or mortgage that secures a monetary obligation also attracts VAT at a rate of 1% of the monetary obligation secured.

2.11 Legal Restrictions on Foreign Investors

While foreign direct investment in targeted sectors of the economy is generally encouraged in The Bahamas and successive government administrations have supported and facilitated it, such investment is also regulated, and foreign investors and purchasers must obtain government approvals that range in nature and process depending (in the case of real estate-related investments) upon the type of purchaser, the land to be acquired, and the intended development or use planned for the land.

The BIA and the NEC

Applications for requisite approvals are submitted to the Bahamas Investment Authority (BIA), which is a government department based in the office of the prime minister. In the case of major investment or development projects, applications for approval are considered by the National Economic Council (NEC), a non-statutory committee within the BIA that is comprised of the prime minister, members of the cabinet of The Bahamas government and other senior policy advisers. Once an application is approved by the NEC/BIA, all other approvals required from other departments and agencies will follow (subject to compliance with the further necessary steps and procedures).

The IPL Act

In the case of land transactions (other than one-off purchases of residences or vacation homes), in accordance with the International Persons Landholding Act (IPL Act), a foreign purchaser must obtain an “International Persons Landholding Permit” in respect of the land they intend to acquire. The application is made to a government department called the Investments Board. Where a permit is required under the IPL Act, it must be obtained as a condition for closing on the purchase transaction and, in the absence of obtaining it, a buyer’s conveyance would be deemed null and void in law.

Where a foreigner is purchasing real estate for single-family residential use only (whether for long-term use, or periodic use as a vacation home), under the IPL Act the purchaser does not have to obtain a permit as a condition for completion, and may simply register their purchase of the land following closing of the transaction and payment of the tax on the transaction. The purchaser is issued a “Certificate of Registration” in such instances.

In either case, the permit or certificate obtained by the foreign purchaser is attached to their title deed when it is lodged for recording in the Registry of Records and recorded with it. The current, one-time fee payment to the Public Treasury for a permit is USD500 and for a certificate is USD250.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

The manner in which commercial real estate transactions are financed can vary widely depending upon the size of the project and loan, and the parties involved.

In The Bahamas, well-established licensed local banks and financial institutions that offer traditional financing for projects

of all types and commercial banking options, or that often act as security trustees, have a very strong presence.

In addition, The Bahamas government has, subject to exchange control regulations and the usual vetting and approval procedures for foreign investors, historically also permitted financing of local commercial projects by international lenders. Where a foreign lender intends to advance a loan and hold Bahamian real estate as security for it, an application is made to the Investments Board for a mortgagee's Landholding Permit to be issued under the IPL Act and to the Central Bank of The Bahamas for requisite approvals to be issued to the lender under Bahamian Exchange Control Regulations.

In major financing transactions, where there may be a group of syndicated lenders, it is often the case that a collateral trust would be established and that the mortgages, security instruments and other Bahamian collateral securing the loan would not be held directly by any lender, but would be held by a specially formed Bahamian security trustee as a collateral agent for the named beneficiaries of the trust from time to time. The trustee of the collateral trust is, typically, a Bahamian company that holds an unrestricted Banking and Trust Licence in The Bahamas. Quite often, it is preferred that the collateral trustee should hold the trust assets under the collateral trust in a wholly-owned special purpose Bahamian International Business Company, all of the issued shares of which would constitute the corpus of the collateral trust, with the company, in turn, holding the security instruments.

3.2 Typical Security Created by Commercial Investors

Forms of security for financing the acquisition and development of commercial real estate can vary widely, but the most common forms of security include:

- legal charges;
- debentures (by companies);
- legal or equitable mortgages;
- pledges/charges over shares of a land-owning company or its parent;
- assignment of rents or other revenue;
- assignments of insurance;
- promissory notes; and
- corporate or personal guarantees.

Under the Conveyancing and Law of Property Act, 1909 a legal mortgage of real property, personal property and fixtures has the effect of conveying and transferring title to the lender, leaving the borrower with an equitable right to redeem the mortgage by payment of the mortgage debt.

Under the Companies Act, 1992 and the International Business Companies Act, 2000 a company may by debenture charge real property and specific personal property by way of legal mortgage and create a first priority floating charge on all other present and future assets and undertakings (including intangibles), which would crystallise in the event of default.

A legal mortgage or debenture must be made or issued as a deed and should be recorded in the Registry of Records to preserve priority against subsequent encumbrances.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

While a lender is not required to hold a bank or trust licence in order to lend money to an entity based in The Bahamas, a foreign lender intending to acquire an interest in real estate as a mortgagee by virtue of a legal mortgage must obtain a permit from the Investments Board under the IPL Act and a legal mortgage is deemed to be null and void in law in the absence of such a permit.

As with the granting of a permit to a foreign purchaser of real estate, a permit granted to a lender is transaction specific, but generally speaking, such permits are routinely issued by the Investments Board upon submission of a completed application and standard due diligence.

In addition, as required by the Exchange Control Regulations Act (which regulates transactions between "resident" and "non-resident" entities), a lender (whether deemed to be "resident" or "non-resident" for exchange control purposes) will have to obtain certain approvals from the Exchange Control Department of the Central Bank of The Bahamas in order to lend money in foreign currency (including to a Domestic Company or an IBC that is deemed to be "resident" for exchange control purposes). Such exchange control approvals typically also include the lender obtaining confirmation from the Central Bank that, upon draw-down of the loan by the borrower, the lender will be granted "approved loan status" (also referred to as "approved investment status") in order for the lender to receive repayments in foreign currency from the borrower.

Subject to the pre-closing approvals mentioned above, a lender is not required to obtain any further government approvals to facilitate a proposed loan transaction or to seek government approval in respect of any of the remedies the lender may seek to exercise in respect of its security (other than judicial approvals that they may elect to seek).

It should be noted that, as a matter of policy rather than law, the Investments Board requires a foreign entity (whether a lender or a purchaser) intending to acquire an interest in real estate in The

Bahamas to register as a foreign company under the Companies Act of The Bahamas as a condition for obtaining approvals from the Board.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Under the VAT Act a debenture or mortgage which secures a monetary obligation would attract VAT at a rate of 1% of the monetary obligation secured. Where additional security is granted in respect of the same loan, and the principal instrument attracts tax at a rate of 1%, the collateral security documents would attract only nominal tax of USD10. The industry standard is for applicable tax and related closing costs to be paid by the borrower.

3.5 Legal Requirements Before an Entity Can Give Valid Security

There are no rules or requirements that must be complied with before an entity can give valid security, save for the government approvals mentioned in **3.1 Financing Acquisitions of Commercial Real Estate** and the matters of general law which specify that, where a party may be a corporate entity:

- the proposed loan transaction and grant of security is completed in accordance with its corporate governance requirements; and
- where a corporate guarantee is given as security, the giving of the guarantee is considered as having reasonably been in the interests of the guarantor and done with commercial justification.

3.6 Formalities When a Borrower Is in Default

A legal mortgage of real property in The Bahamas has the effect of conveying title to a lender, and under Bahamian law a lender may, in the event of default by the borrower:

- exercise its power of sale of the property to a third-party purchaser without judicial sanction;
- seek (voluntarily, and not by requirement of law) judicial sanction of the sale of the property to a third-party purchaser; or
- apply to the courts for a Foreclosure Order which would extinguish the borrower's right to redeem the mortgage and result in absolute ownership by the lender.

Under the Conveyancing and Law of Property Act a lender becomes entitled to exercise the power of foreclosure sale (which is the most common and expedient remedy used by lenders) under one of the following circumstances:

- notice requiring payment of the mortgage money has been served on the borrower, and default has been made in pay-

ment of the mortgage money, or of part thereof, for three months after such service; or

- some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
- there has been a breach in observing or performing some provision contained in the mortgage deed or in the Act, on the part of the borrower or of some person who agreed to arrange the mortgage, other than and besides a covenant for payment of the mortgage money or interest thereon.

Formal written notice of default is required to be served under any mortgage and the notice period would be stipulated in the mortgage. It is also not uncommon for a mortgage to stipulate shorter default timelines in substitution for the above provisions of the Act save that, in the case of mortgaged properties that constitute a borrower's primary residence, there are certain required procedures and minimum notice periods to be complied with under the Homeowners Protection Act, 2017.

3.7 Subordinating Existing Debt to Newly Created Debt

A legal mortgage or debenture should be recorded in the Registry of Records to preserve priority against subsequent encumbrances. It is possible for a secured lender with senior priority, as a commercial business decision, to contractually agree to subordinate its debt, and/or a newly created debt, to another lender. A subsequent action for foreclosure can be brought by any lender of property, whether it is the first or subsequent lender.

3.8 Lenders' Liability Under Environmental Laws

A freehold or leasehold mortgagee who is not in possession would not be liable for environmental damage, provided that the mortgagee has not itself caused damage to the property. Where a mortgagee is responsible for the actual damage, they would be liable for the remediation costs and fines.

3.9 Effects of Borrower Becoming Insolvent

Valid security interests created in favour of a lender do not become void if the borrower becomes insolvent, and a lender may exercise the remedies mentioned in **3.6 Formalities When a Borrower Is in Default** granted under a debenture or mortgage, irrespective of the borrower's solvency. Typically, a properly drawn mortgage would reflect that insolvency of the borrower (or commencement of such proceedings which are not subsequently stayed) would be deemed to be an act of default and entitle the lender to exercise its remedies under the mortgage.

3.10 Consequences of LIBOR Index Expiry

Due to the frequency with which interest rates on local facilities were set with reference to the London Interbank Offered Rate (LIBOR), most local commercial banks that referenced LIBOR rates have begun to review those facilities and take steps

to address the agreement and use of alternative reference rates with customers, where necessary. However, a large majority of domestic lending transactions are calculated by reference to the domestic bank's prime lending rate and will not be impacted by the expiration of the LIBOR index.

4. Planning and Zoning

4.1 Legislative and Government Controls Applicable to Strategic Planning and Zoning

There are a number of Bahamian statutes which include provisions relating to the development and use of land but, generally speaking, development, planning, zoning and land use regulations are set out in the Planning and Subdivision Act, 2010 (P&S Act) mentioned in **2.8 Permitted Uses of Real Estate Under Zoning or Planning Law** and related regulations.

The P&S Act provides for the overall structure for the administration of development, planning and zoning matters by the Department of Physical Planning, Town Planning Committee and related sub-committees and appeal boards. The P&S Act also provides for the establishment of land use plans, zoning plans, development controls, environmental controls and related by-laws; and the requisite approvals that must be obtained in respect of proposed developments and the process for obtaining such approvals. All manner of development matters fall within the purview of the Department of Physical Planning under the P&S Act, ranging from minor lot or parcel-specific boundary line adjustments and setbacks, to planning of major resort and marina development projects.

In the case of significant development projects, or projects which may affect coastal, wetland or other environmentally sensitive areas, the BIA and the Department of Physical Planning work in close conjunction with The Bahamas Environment, Science and Technology (BEST) Commission when reviewing development applications. In connection with proposed development projects, the BEST Commission reviews and provides commentary on environmental impact assessments (EIAs) and environmental management plans (EMPs).

Other environmental agencies that are often involved in elements of a major purchase or development project include:

- Ministry of the Environment and Housing, which has responsibility for protecting and conserving the health and sustainability of the natural environment in The Bahamas;
- Ministry of Public Works and Utilities, which has responsibility for overseeing and maintaining public roads and other physical infrastructure of The Bahamas, and (together with

the Ministry of the Environment) for administration and enforcement of the Building Codes;

- Ministry of Agriculture, Fisheries and Local Government, which has responsibility for leases of agricultural land, and (together with the Fisheries Department) managing the fisheries industry and marina protected areas;
- Department of Environmental Health Services, which has responsibility under the Environmental Health Act, 1987 and related regulations for the protection of public health, certain environmental controls, waste collection, sanitation and landfill operations;
- Bahamas Public Parks & Public Beaches Authority, which has responsibility for public parks, beaches and recreational areas;
- Forestry Unit, which has responsibility under the Forestry Act, 2010 for certain forested areas, parks, protected areas, and relations with non-government organisations;
- The Bahamas National Trust, which is a non-profit quasi-government agency, responsible for conserving and protecting the natural and historic resources of The Bahamas and ecosystems, and for establishing and managing the country's numerous national parks;
- Bahamas National Geographic and Information Systems Department, which is responsible for oil and natural gas exploration and regulation, alternative and renewable energy, and aragonite mining; and
- Water and Sewerage Corporation, a statutory corporation which is responsible for the management of the country's water resources.

4.2 Legislative and Government Controls Applicable to Design, Appearance and Method of Construction

Construction in The Bahamas is regulated under the P&S Act and the Building Regulations Act, 1971 which is supplemented by the Bahamas Building Code. The purpose of the Code is to provide certain minimum standards, provisions and requirements for safe and stable building design, methods of construction and uses of materials.

A building permit issued by the Building Control Department of the Ministry of Works is generally required for all new construction, additions and alterations (including decks, sheds, retaining walls and fences), and must be obtained prior to commencement of such works.

4.3 Regulatory Authorities

The Town Planning Committee of the Department of Physical Planning is responsible for regulating the development and designated use of individual parcels of real estate under the P&S Act. In the case of "Out Islands" (islands in the Commonwealth of The Bahamas other than New Providence Island), certain

functions and powers of the Town Planning Committee may be delegated to District Councils under the Local Government Act, 1996.

4.4 Obtaining Entitlements to Develop a New Project

The P&S Act provides the regulatory framework for new developments, major refurbishments or change of use of a developed property, and no development of land is permitted without the appropriate approval.

Application Process

All applications relating to development of properties in a zoned area are to be submitted to the director and must be in the form stipulated in the Planning and Subdivision Act (Application Requirements) Regulations, 2011. An applicant must also post “Development Application Signs” and give notice of the pending development application in accordance with the Planning and Subdivision Act (Public Notice) Regulations, 2011.

The Town Planning Committee then holds public hearings to engage public consultation on development projects, and provides notice of such meetings. Within seven days of its eventual decision, the Committee must give written notice of the decision to the applicant and each person who made a written request to be notified. In reply to an application (eg for site plan control) the Committee may then grant Preliminary Support of Application, with such conditions or amendments as deemed appropriate.

Rights of Third Parties

Interested third parties have the right to attend the public hearing and express their views (whether in support or opposition). Upon request, an interested third party may have the Department of Physical Planning make any application available for public review during normal business hours. An interested third party may, in support or opposition to a development application, tender written submissions to the Department prior to a public hearing, or providing oral or written submissions to the Committee at a public hearing.

4.5 Right of Appeal Against an Authority’s Decision

The decision of the Town Planning Committee under the P&S Act is final and binding unless appealed to the Subdivision and Development Appeal Board (Appeal Board) within 21 days after making the decision.

A party aggrieved by a decision of the Committee may appeal to the Appeal Board, including appealing against any decisions by the Committee relating to a development application or to extinguish the effect of a restrictive covenant. The right of appeal

lies not only with the applicant but also with any person who has an interest in the matter.

An appeal to the Appeal Board must be conducted in accordance with the relevant regulations (the Subdivision and Development Appeal Board Rules, 2011). No development or building may proceed on any land which is the subject of an appeal to the Appeal Board.

The decision of the Appeal Board is final and binding, unless appealed to the Supreme Court within 21 days of making the decision. An appeal to the Supreme Court may only be based upon a point of law, and not on any matter of fact or the merits of any decision by the Board.

It is worth noting that non-compliance with the requirements and procedures set forth in the P&S Act and regulations, and procedural impropriety have, in recent years, become the grounds for a number of successful judicial review actions, some of which (at considerable cost) have been ultimately appealed to the Privy Council. With that in mind, a developer would be well-served to ensure that careful regard is given to the process and requirements of the P&S Act, to safeguard themselves against the potential risk of opponents to the development later finding a foothold for overturning approvals that may have been hard-sought.

4.6 Agreements with Local or Government Authorities

A purchaser or developer intending to carry out a major development project will often enter into written and signed “Heads of Agreement” with The Bahamas government to agree and confirm approved uses, permitted development plans and related matters (which may include a range of additional licences, permits, consents or sub-approvals that are necessary to facilitate the successful acquisition, development and management of the project, and which may also include special exemptions, concessions or incentives to be granted to the developer under the Hotels Encouragement Act, 1954 or otherwise).

Developers of major projects may also need to secure utility franchise agreements from the local utility statutory corporations and would seek, at the time of applying for acquisition and development approvals, approval-in-principle from the NEC/ BIA for the right to enter into such agreements.

4.7 Enforcement of Restrictions on Development and Designated Use

The failure to adhere to and observe restrictions on development and designated use may result in fines under the P&S Act. The minister responsible for the environment has certain statutory powers to access and inspect premises to ensure that

such matters are being complied with, and to investigate non-compliance. This may also result in an action for judicial review or for an injunction against works or activities being brought by private citizens.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

The entities used predominantly in The Bahamas by investors to hold title to real estate are:

- a “Domestic Company” (also often referred to as a “Local Company”), incorporated under the Companies Act, 1992 (which is the preferred entity used by Bahamian investors);
- a Bahamian International Business Company (IBC), incorporated under the International Business Company Act, 2000 (which is the preferred entity used by non-Bahamian investors); or
- a foreign corporation (eg a US Limited Liability Corporation), that is registered as a “Foreign Company” with the Bahamas Companies Registry.

5.2 Main Features of the Constitution of Each Type of Entity

A Domestic Company has limited liability (unless formed specifically as an unlimited liability company) and may carry on any business in, or from within, The Bahamas.

A Domestic Company will be designated as “resident” for exchange control purposes under Exchange Control Regulations if it:

- owns land in The Bahamas;
- carries on business in the domestic economy; or
- if the beneficial owner is Bahamian or a work permit holder or a permanent resident with the right to work.

A Domestic Company can only maintain foreign currency accounts with the prior permission of the Central Bank of The Bahamas.

An IBC is a limited liability company which may carry on business in any part of the world and is primarily intended to operate outside of The Bahamas. To conduct business in or from within The Bahamas, an IBC requires certain government regulatory approvals. An IBC is restricted from carrying on business with persons (corporate and individual) resident in The Bahamas, unless designated “resident” for exchange control purposes and, where that is desired in connection with intended or pending purchase of real estate, an application for appropriate designa-

tion of a land-owning IBC would customarily be made in the course of the transaction.

5.3 Minimum Capital Requirement

The authorised capital of an IBC may be divided into shares of a fixed amount, but IBCs may also have shares of no par value. Common shares, preference shares, redeemable shares or any combination thereof are permitted, but only registered shares are permitted (and bearer shares are not permitted). Generally, the preferred minimum authorised capital is USD5,000 divided into 5,000 shares of USD1 par value each.

Similarly, the majority of Domestic Companies are incorporated with an authorised share capital of USD5,000 divided into 5,000 ordinary shares of USD1 each, although other options and amounts are available and these can be tailored to meet the requirements of the investor.

5.4 Applicable Governance Requirements

Every IBC must have a registered agent and maintain a registered office in The Bahamas. An IBC may have a sole director and/or a sole shareholder. The appointment of officers is optional. The powers and objects of an IBC are typically to engage in any activities that are not prohibited under any law in force in The Bahamas.

A Domestic Company must also have a local registered office. The company must have a minimum of two directors, two shareholders, a president and a secretary.

In the case of both an IBC and Domestic Company, the constitutional documents of the company (namely, the memorandum and articles of association) determine the powers of its board of directors and officers, and the management of the affairs of the company’s operations and business.

5.5 Annual Entity Maintenance and Accounting Compliance

For an IBC, the annual government fees are determined based on the authorised share capital. Where the authorised share capital for one year does not exceed USD50,000, the fee is USD365; where the authorised share capital exceeds USD50,000, the fee is USD1,030.

For a Domestic Company, the annual government fees are determined based on beneficial ownership. A government fee of USD350 per year is payable for companies beneficially owned by Bahamians, and USD1,000 a year is payable for companies owned by non-Bahamians.

For a non-Bahamian Company registered in the Bahamas Companies Registry as a Foreign Company, the annual government

fee payable to the registrar general (not in the year of registration) is USD1,000.

In the case of all companies mentioned here, professional fees are typically also payable to the financial and corporate service provider in connection with the maintenance of the company and registered agent/office services.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Occupation and use of a property may be established in The Bahamas without outright ownership under a lease or a licence.

Under a Bahamian lease a tenant is contractually granted the right of exclusive possession of a property for a specified period of time subject to the terms and conditions of the agreement and the rents thereby secured. Under a licence, an owner grants permission to a licensee for the use and occupation of a property. However, unlike a tenant under a lease, the licensee does not have exclusive possession or proprietary rights to the property.

6.2 Types of Commercial Leases

At this time, standardised forms of commercial leases have not been adopted and agreed for use in The Bahamas. While the preferred forms of lease agreement used are generally comparable and similar in style and content, there can naturally also be wide variation between those used by smaller local developers or landlords, and those used in larger resort, tourist or commercial complexes which require more sophisticated provisions.

6.3 Regulation of Rents or Lease Terms

Lease agreements and the terms between the parties are freely negotiable and subject to contract. Certain limited covenants are implied by the Conveyancing and Law of Property Act, 1909 but the material commercial terms are open to agreement between the parties.

6.4 Typical Terms of a Lease

In July 2019 The Bahamas government overhauled the tax regime for real estate transactions and made leases (along with many other real estate transactions) subject to VAT. In late November 2019 the VAT Rules for Real Estate 2019 were published by the VAT Department. Given the very recent implementation of the new VAT Rules the impact of the tax changes on the landlord/tenant area of the real estate market remains to be seen. However, it is widely expected that an immediate consequence will be that, in all likelihood, commercial leases will not exceed five years going forward – as the tax treatment of such long-term leases is less favourable.

Under a typical Bahamian lease agreement it is generally industry standard that:

- the tenant is responsible for repairing the leased premises;
- the landlord insures and maintains the building and the common parts; and
- rent and additional charges (such as common area maintenance charges and/or utility charges) are paid monthly or quarterly, and generally in advance.

6.5 Rent Variation

Variation of rent is freely negotiable and subject to the contractual agreement of the parties. It is often the case that well-drawn commercial leases make provision for rent to be reviewed or updated at a certain agreed stage or date but, practically speaking and more commonly, the issue is addressed when the lease falls due for renewal.

6.6 Determination of New Rent

There is no legal or regulatory restriction governing the agreement between the parties of how new rent may be calculated. The industry standard commonly used is that increases are in line with the consumer price index (CPI) or a pre-agreed percentage.

6.7 Payment of VAT

Under the VAT Act, leases are subject to the payment of VAT unless exempted.

The rental of a “dwelling” (meaning a building or premises intended to be used as a place of residence or abode of a natural person) is exempt from VAT. However, in the case of vacation home rentals that are rented or let for a continuous period not exceeding 45 days (the primary example being private residences on online marketplaces like Airbnb, HomeAway or VRBO), VAT is payable at a rate of 12%.

A long-term lease (ie, a lease of five or more years – whether commercial or residential) attracts VAT at a rate of 12%, and a lease-to-own contract attracts VAT on each stage or interim payment.

A short-term lease or tenancy agreement of five or less years of commercial property attracts VAT of 12%.

6.8 Costs Payable by Tenant at Start of Lease

At the start of a lease the tenant would customarily pay applicable VAT (see **6.7 Payment of VAT**) and a security deposit that is usually equivalent to one-month's rent. Registrar general recording fees (USD4.50 per page) are paid if the parties opt to record the agreement, but that practice tends to be quite rare.

6.9 Payment of Maintenance and Repair of Communal Areas

Areas of a commercial premises that are used by more than one tenant are generally maintained by the landlord or their property manager and the tenants pay a proportionate reimbursement of the cost incurred or pre-agreed common area maintenance charge.

A number of larger commercial or tourist developments have been structured as multi-use condominiums with residential and commercial elements, or have master declarations of restrictions covenants and conditions that contemplate mixed use, and common area costs in those cases would usually be apportioned and charged to tenants as condominium assessments or maintenance fees/charges.

6.10 Payment of Utilities and Telecommunications

Generally, utility charges would be paid by the landlord or their property manager and a tenant would reimburse the monthly charges incurred. Where a leased area is not separately metered from other spaces occupied or used by the landlord or other tenants, it is common for a tenant to contract to pay a fixed pre-agreed monthly amount or their pro rata share of common area maintenance charges. That said, it is also often possible for a tenant to set up a tenant service account in its own name and pay utility charges directly to the service provider.

6.11 Insuring the Real Estate that is Subject to the Lease

While subject to contract and the agreement of the parties, it is generally the industry standard that the landlord is responsible for insuring the building and common parts and that the tenant must insure the leased area. The risks that are typically insured against include fire, earthquake, hurricane, flood and civil commotion.

6.12 Restrictions on Use of Real Estate

It is common for a standard form of commercial lease to include various restrictions governing the use of the leased real estate. In addition, restrictive covenants and conditions to which the real estate is subject would also usually be acknowledged by and observed and performed by a tenant, as well as any property-specific town planning or zoning restrictions.

6.13 Tenant's Ability to Alter and Improve Real Estate

Unless the tenant is contractually obligated to complete certain works or improvements, it is industry standard that a tenant would be prohibited from making alterations or improvements to the leased real estate without the prior approval of the landlord.

6.14 Specific Regulations

In addition to the specific laws and regulations already mentioned, it is worth noting that it is a legal requirement that certain business leases or letting agreements by which a non-Bahamian acquires an interest in real estate in The Bahamas and which are beyond 21 years in duration, are required to be registered with the Investments Board and a Certificate of Registration obtained in accordance with the International Persons Landholding Act, 1993. A non-Bahamian tenant would also require a business licence issued by the Business Licence Department and all other immigration approvals and other regulatory permits or approvals that may be necessary in order to operate a commercial enterprise or undertaking on the leased commercial premises.

6.15 Effect of Tenant's Insolvency

It is a common feature of standard commercial leases that a landlord has the right to terminate the lease in the event of the insolvency of the tenant.

In the case of bankruptcy, a landlord or other person to whom any rent is due from a bankrupt tenant may at any time, either before or after the commencement of the bankruptcy, seize the goods or effects of the bankrupt tenant for the rent due to them. However, if such distress for rent is levied after the commencement of the bankruptcy, the landlord is only able to recover one year's rent accrued prior to the date of the order of adjudication. The landlord may apply under the bankruptcy for the balance due for which distraint may not have been available. A landlord is not permitted to seize goods or effects of a bankrupt tenant which are held in trust for any other person, nor is the landlord permitted to seize the tools of the bankrupt's trade and the necessary wearing apparel and bedding of the bankrupt, their spouse and children.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

It is standard in The Bahamas for a landlord to require that a security deposit be paid at the outset of a lease (usually equivalent to one-month's rent), and that the first and last month's rent be paid in advance. The lease agreement would provide that, in the event of default or damage, the security deposit may be forfeited. In addition, under the laws of The Bahamas, a landlord may distrain against the tenant's goods, chattels and effects to recover arrears of rent.

6.17 Right to Occupy After Termination or Expiry of a Lease

Hold-over provisions which speak to the continued occupation of a tenant on the expiration of the agreed term, with the consent of the landlord, are common in standard lease agreements. In the absence of such provisions and the landlord's consent,

the tenant has no security or right of occupation under Bahamian law. A tenant in continued occupation would be deemed to occupy the leased real estate with the consent of the landlord on a periodic tenancy under the same conditions as those of the expired lease (so far as applicable to a periodic tenancy).

6.18 Right to Assign Leasehold Interest

While the parties are able to freely negotiate their desired terms between themselves, it is unusual for a tenant to be permitted to assign its leasehold interest in the lease or sublet all or a portion of the leased premises. Where that is permitted, it is usually subject to the express and prior written consent of the landlord.

6.19 Right to Terminate Lease

Under a typical lease agreement, the parties would usually enter into covenants to be observed and performed by a landlord or tenant respectively and failure to observe or perform such covenant may entitle a party to terminate a lease. A lease may also typically be terminated by either the landlord or the tenant if the leased real estate is substantially destroyed or damaged and not repaired within a specified period.

6.20 Registration Requirements

As mentioned in 6.14 **Specific Regulations**, a non-Bahamian tenant may have an obligation to register long-term leases in excess of 21 years with the Investments Board under the International Persons Landholding Act, 1993. Except for such long-term leases, there is no requirement to obtain government approval to lease real estate or to record the lease in the Registry of Records. Parties predominantly elect not to record leases (whether commercial or residential) unless they represent or comprise part of a very significant investment and are long term in nature.

6.21 Forced Eviction

A standard lease would have provisions entitling the landlord to evict the tenant in certain instances. A tenant that alleges wrongful distress or eviction may commence an action to seek relief and defend their interest in the real estate and to right of possession. The tenant may often and additionally seek an interlocutory injunction to restrain the landlord's action in the interim, until the matter can be brought to trial. Given the steps involved in such applications and that a hearing is dependent on the court's calendar, the timeline of an eviction process can vary considerably.

6.22 Termination by Third Party

Save for the rights and powers of The Bahamas government mentioned in 2.9 **Condemnation, Expropriation or Compulsory Purchase**, which must be exercised in accordance with statute law and (in the case of compulsory acquisition) with suitable compensation being paid to a landowner or occupier,

The Bahamas government or any other third party cannot terminate a lease agreement between private parties.

7. Construction

7.1 Common Structures Used to Price Construction Projects

There is no commonly accepted market standard of contract and so parties are free to agree terms as they see fit, with the format and complexity of the contract often being driven by the sophistication of the parties and type of project, and the third-party consultants required by the customers (eg, independent certifying architects, quantity surveyors, or project managers).

Most larger construction contracts will, however, typically follow a US style (such as that of the American Institute of Architects), a UK style (such as that of the joint contracts tribunal), a combination of the two, or even the contractor's (or developer's) own standard terms.

7.2 Assigning Responsibility for the Design and Construction of a Project

See 7.1 **Common Structures Used to Price Construction Projects**.

7.3 Management of Construction Risk

See 7.1 **Common Structures Used to Price Construction Projects**.

7.4 Management of Schedule-Related Risk

See 7.1 **Common Structures Used to Price Construction Projects**.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

It is possible, but rarely the case, that owners will require formal guarantees or other additional forms of security as surety for a contractor's performance on a project. Where such matters do arise is predominantly in the case of pre-construction condominiums (particularly those being developed by a developer/owner that is the construction company or directly affiliated with it). In the case of such projects, letters of credit or performance bonds from a financial institution are generally relied upon, rather than other forms of security.

7.6 Liens or Encumbrances in the Event of Non-payment

Under Bahamian law contractors and/or designers are not permitted to lien or otherwise encumber a property in the event of non-payment. A contractor seeking to recover payment of a debt due would be required to enforce their contractual rights

by commencing an action against the owner/customer in the Supreme Court of The Bahamas (or such other jurisdiction contractually agreed between the parties to be the appropriate forum for disputes) and obtaining a judgment against that debtor party.

7.7 Requirements Before Use or Inhabitation

Before use or inhabitation, a Certificate of Occupancy must be issued under the Building Regulations Act, 1971. The certificate is issued by the building control officer upon being satisfied that a building operation has been completed in accordance with the building permit issued by the Ministry of Works and it certifies that the building is fit for occupation and use.

8. Tax

8.1 VAT

As mentioned in **2.10 Taxes Applicable to a Transaction**, all sales and transfers of land between third parties, whether direct or indirect, attract VAT payable to the Public Treasury under the VAT Act save for certain, specially exempted transactions.

It is customary for a buyer and seller to agree in a typical sale and purchase transaction to share the payment of the applicable tax equally, but this is a business decision for the parties and is not required by law. In the absence of an agreement to the contrary, the liability under the VAT Act to pay VAT falls jointly and severally on the supplier and recipient of the real estate.

It is important to note that unlike standard VAT, which is charged and paid on the supply of goods and services at a rate of 12%, the VAT payable on supplies/sale of real estate (charged at 10%) may not be accounted for as input tax deductions.

8.2 Mitigation of Tax Liability

As a matter of general good commercial practice by prudent buyers, and particularly in large purchase transactions, it is usually advantageous for a purchase transaction to be structured as a “net” sale rather than a “gross” sale, as this can help to mitigate the amount of tax payable in respect of the transaction and, for VAT registrants, the categorisation of the VAT which is paid.

8.3 Municipal Taxes

Municipal taxes are not payable in The Bahamas, but operating businesses are required to hold a business licence and pay annual business licence fees.

In addition, all real estate in The Bahamas is subject to real property tax, unless specifically exempted, and business premises are charged tax at a commercial rate.

8.4 Income Tax Withholding for Foreign Investors

The Bahamas does not tax income or capital gains. However, rental income from real estate is subject to VAT as outlined in **6.7 Payment of VAT**.

8.5 Tax Benefits

There are no local tax benefits from owning real estate in The Bahamas.

BAHAMAS LAW AND PRACTICE

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Graham Thompson has been one of the pre-eminent law firms in The Bahamas since 1950. The firm has more than 30 attorneys and operates four offices in The Bahamas and the Turks and Caicos Islands. As one of the leading and largest civil and commercial law firms in The Bahamas, Graham Thompson has an enviable reputation in the real property, resort development, banking and capital markets, and tax and regulatory sectors. The firm is also highly regarded for its expertise in trust and

estate planning, commercial matters, civil litigation, family law, securitisation, employment and immigration matters. The firm's commercial and property practice group excels at private client matters, but has also played a leading role in almost every major acquisition, sale or financing of hotel and resort properties in The Bahamas, and represents innumerable developers and financiers of mixed-use resorts, condominiums and second home development projects.

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