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HOMA BAY COUNTY ACTS, 2023

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**THE HOMA BAY COUNTY INFRASTRUCTURE FINANCING
FUND ACT, 2023**

No. 8 of 2023

Date of Assent: 20th December, 2023

Date of Commencement: See Section 1

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**THE HOMA BAY COUNTY INFRASTRUCTURE FINANCING
FUND ACT, 2023**

AN ACT of the County Assembly of Homa Bay to create a charge on the County Revenue Fund pursuant to Article 207(2)(a) of the Constitution and Section 109(6)(b) of the Public Finance Management Act; 2012 establish a fund for payment of investors and/or financiers of infrastructure projects approved under this Act; and for connected purposes

ENACTED by the County Assembly of Homa Bay as follows:

PART I—PRELIMINARY

Short title and commencement

1. This Act may be cited as the Homa Bay County Infrastructure Financing Fund Act, 2023 and shall come into operation upon publication in the *Kenya Gazette*.

Interpretation

Act. No. 18 of 2012

2. In this Act, unless the context otherwise requires—

“Auditor General” has the meaning assigned to it under Article 229 of the Constitution of Kenya

“Charge” has the meaning contemplated under the Land Act.

“Chief Officer” means the Chief Officer for the time being responsible for Finance.

“Constitution” means the Constitution of Kenya, 2010;

“Controller of Budget” has the meaning assigned to it under Article 228 of the Constitution of Kenya.

“County” means Homa Bay County;

“County Government” means the County Government of Homa Bay;

“County Assembly” means the County Assembly of Homa Bay;

“County Executive Committee” means the Homa Bay County Executive Committee;

“County Executive Committee Member” means the Homa Bay County Executive Committee Member for the time being responsible for finance;

“County Revenue Fund” has the meaning assigned to it under

Article 207(1) of the Constitution and Section 109 of the Public Finance Management Act, 2012;

“Financier” means a provider of investment funds for the eligible projects listed under Section 7;

“Fund” means the Fund established under Section 4;

“Fund administrator” means the person so designated by the County Executive Committee Member under Section 10;

“Lease” means a contract that gives the lessee the right to the use of property, plant or equipment for a fixed period of time with a fixed schedule of payments to the lessor, and “leasing” shall be construed accordingly;

“Lease to own” means an arrangement where regular payments are made towards ownership of an investment project;

“Investor” means a private or public entity contracted to finance, develop and/or maintain projects under the Programme in compliance with Section 19;

“Investment projects” means the projects contracted under Section 7;

“Payment schedule” or “scheduled payments” means payment instalments to be made by the County to the financier and/or investor as per the applicable project contract;

“Programmes” means the programmes listed under Section 7; and

“Special purpose account” means the account created under Section 12 for payment by the County of its contractual obligations to financiers and/or investors.

Objects and purpose

Act No. 18 of 2012

3. The objects and purpose of this Act shall be to—

- (a) create a charge on the County Revenue Fund in accordance with Article 207(2)(a) of the Constitution and Section 109(6)(b) of the Public Finance Management Act, 2012;
- (b) establish the Homa Bay County Infrastructure Financing Fund and provide for its operations and management;
- (c) establish a special purpose account for payment obligations contracted by the County under this Act;
- (d) provide for cashflow management to meet agreed scheduled

payments to investors and/or financiers;

- (e) ensure that upon completion of contracted payment obligations, ownership of the infrastructure projects vest in the County; and
- (f) provide for any other connected purposes.

PART II—CREATION OF A CHARGE

Creation of a Charge

Act. No. 18 of 2012

4. (1) There is created a charge on the County Revenue Fund in accordance with Article 207(2)(a) of the Constitution and Section 109(6)(b) of the Public Finance Management Act, 2012.

(2) Money withdrawn pursuant to the charge shall go to a Fund known as the Homa Bay County Infrastructure Financing Fund.

(3) The Fund shall not be used for any other purposes except for the objects and purposes of this Act.

Source of funding

5. The Fund shall be funded by —

- (a) Monies appropriated for purposes of the charge created under this Act;
- (b) appropriation in aid through the Appropriation Act;
- (c) designated user levies and fees approved in the County Finance Act;
- (d) investment income;
- (e) grants and donations; and
- (f) any monies accruing to or received by the Fund from any other lawful source.

Provision County planning documents

6. (1) The County Executive Committee Member shall ensure that—

- (a) the relevant programmes are incorporated in the following County planning and budget documents and approved by the County Assembly—
 - (i) the County Integrated Development Plan;
 - (ii) the Annual Development Plan;

- (iii) the County Budget Review and Outlook Paper;
- (iv) the County Fiscal Strategy Paper;
- (v) the approved budget estimates;
- (vi) the Homa Bay County Spatial Plan 2022-2027 and
- (vii) any other document as prescribed by the Public Finance Management Act, 2012; and

- (b) In every Financial year, adequate funds are always available in the Fund to meet the County's obligations in line with the County's scheduled payment obligations as set out in the relevant project contracts.
- (c) The earnings of, or accruals to, the Fund shall be retained in the Fund and shall be spent only for the purposes implementing projects approved for charge during any particular period.

(2) The County Assembly shall at the beginning of each financial year approve an amount equal to the approved expenditure requirements for the programmes in that financial year which shall be part of the money appropriated under section 5.

(3) Failure by the County to appropriate adequate amounts to the Fund shall constitute serious material breach for which an investor and/or financier shall be entitled to notify the Cabinet Secretary for National Treasury to enforce payments in line with Articles 190(3) and 225(3) of the Constitution or as otherwise prescribed under the Public Finance Management Act.

Eligible infrastructure projects

7. The following are eligible infrastructure investment programmes for purposes of this Act —

- (a) transportation infrastructure;
- (b) water and sanitation infrastructure;
- (c) power and energy infrastructure;
- (d) telecommunications infrastructure;
- (e) administrative infrastructure;
- (f) lakefront development;
- (g) climate resilience infrastructure;
- (h) industrial/business infrastructure;
- (i) agribusiness aggregation infrastructure;

- (j) educational infrastructure;
- (k) health infrastructure;
- (l) recreational infrastructure; and
- (m) any other programmes as may be approved by the County Executive Committee and the County Assembly and whose funds have been appropriated in accordance with the County planning and budget documents.

Eligibility criteria

8. (1) The County Executive Committee Member in charge of Transport, Roads, Public Works shall collate and present the projects to the County Executive Committee for approval.

(2) Expenditure of a project/program shall be eligible as a charge under this Act if the project —

- (a) requires multi-year budgetary allocation;
- (b) is contracted and funded by an investor and/or financier;
- (c) is procured in accordance with applicable procurement laws; and
- (d) is included in the estimates of revenue and expenditure approved by the County Assembly in accordance with Section 6.

Project financing

9. Eligible infrastructure projects may be financed through any of the following means—

- (a) Tenant purchase scheme;
- (b) Finance leases or operating leases or lease to own;
- (c) Annuities;
- (d) Fees and levies paid by users and beneficiaries as approved by the County Assembly;
- (e) Income share contracts; or
- (f) Any other lawful means that is not considered as borrowing under Kenyan law.

PART III—ADMINISTRATION OF THE FUND

Fund administration

10. (1) There shall be a Fund administrator who shall be designated in writing by the County Executive Committee Member, who shall be the County Chief Officer responsible for Finance.

- (2) The Fund Administrator shall —
- (a) report to the County Executive Committee; and
 - (b) be accountable to the County Assembly.

Responsibilities of the Fund administrator

- 11.** The Fund administrator shall be responsible for —
- (a) For the day to day management of the Fund;
 - (b) keeping the books of account of the Fund;
 - (c) presenting the financial statements of the Fund to the County Assembly;
 - (d) preparing annual revenue and expenditure of the Fund relating to the programmes obligations and operational expenses and submitting them to the County Executive Committee Member for approval;
 - (e) providing advice to the County Executive Committee on all matters relating to this Act;
 - (f) preparing and submitting quarterly reports on the implementation of the projects and schedule of payments to the County Executive Committee Member and the Controller of Budget;
 - (g) preparing and submitting bi-annual reports to the County Assembly;
 - (h) sharing necessary information and liaising with the National Treasury and the Controller of Budget as may be necessary; and
 - (i) performing any other functions that may be relevant to this Act.

PART IV—FINANCIAL PROVISIONS

Special purpose account

- 12.** (1) There shall be opened a special purpose account of the Fund to be kept at the Central Bank of Kenya.
- (2) The purpose of the Account shall be to —
- (a) receive the proceeds of the charge in accordance with section 4(2);
 - (b) disburse funds to contracted financiers and/or investors in accordance with the schedule of payment;
 - (c) disburse the approved annual operating budget of the Fund; and
 - (d) disburse any other approved expenditure incurred in

pursuance of the object and purpose for which the Fund is established.

(3) Priority of payments for the contracted projects shall be based on first-in first-out basis.

(4) The County Executive Committee Member and the County Treasury cause to be deposited sufficient funds into the account to fulfil all scheduled payment obligations, administrative costs, and other eligible expenditure.

(5) The administration fees of the Fund shall not exceed 3 percent of the approved annual budget of the Fund.

Applications for withdrawal of funds

13. (1) Application for withdrawal of funds from the County Revenue Fund to the Special Purpose Account shall be supported by:

- (a) The Appropriation Act;
- (b) The Act of the County Assembly creating a charge on the County Revenue Fund;
- (c) Planning and budget documents;
- (d) Disbursement schedule;
- (e) Any other relevant document as may be required by the Controller of Budget.

(2) An application for withdrawal of funds from the Special Purpose Account to the beneficiaries account shall be supported by—

- (a) the relevant project agreement;
- (b) the name and address of the payee;
- (c) the bank account details of the payee;
- (d) an invoice from the payee;
- (e) confirmation by the fund administrator that the payee has fulfilled obligations in the contract and have met their tax obligations;
- (f) latest bank statements indicating the availability of funds.
- (g) any other relevant documents as may be required by the Controller of Budget.

Oversight by Controller of Budget

14. (1) The Controller of Budget shall grant approval of withdrawal of funds at two levels as follows:

- (a) Withdrawal of funds from the County Revenue Fund to the

Homa Bay County Infrastructure Financing Fund (Special Purpose Account).

- (b) Withdrawal of funds from the Special Purpose Account to the respective beneficiaries accounts.

(2) The Controller of Budget shall, in the exercise of their mandate, ensure the following conditions are met when reviewing County budget documents and County Revenue Fund requisitions and withdrawal—

- (a) the contracted obligations, administrative costs and other eligible expenditure have been budgeted every financial year;
- (b) the monies approved are credited into the account; and
- (c) approval for withdrawal of funds from the Special Purpose Account to contracted financiers and/or investors are made in accordance with the contracted payment schedule.

Payment confirmations

15.(1) A financier and/or investor shall confirm receipt of the scheduled payment from the special purpose account of the Fund by issuing a payment confirmation certificate within seven days of receipt of payment to the County Executive Committee Member and a copy to the Controller of Budget.

(2) In case of failure by the County to make scheduled payments in accordance with its contractual obligations, the investor and/or financier shall issue a certificate of default to the County Executive Committee Member and a copy to the Controller of Budget.

(3) In case of default, the outstanding portion of the scheduled payments shall for the purposes of this Act be treated as debt in which case relevant provisions of the Public Finance Management Act shall apply.

Serious material breach

Act No 18 of 2012

16. (1) The County shall be in serious material breach if;

- (a) the County has failed to make payments as and when due under this Act; and
- (b) at least two certificates of default are issued by a financier and/or investor against the County and the County fails to pay the outstanding amount within thirty days from the date of issue of the second certificate of default. The second certificate of default shall be issued not less than thirty days

after issuance of the first certificate of default.

(2) In case of a serious material breach by the County, a financier and/or investor shall—

(a) notify the Cabinet Secretary for National Treasury to enforce payments in line with Articles 190(3) and 225(3) of the Constitution or as otherwise prescribed under the Public Finance Management Act; 2012 and

(b) notify the Controller of Budget of the default.

(3) The interest rate chargeable in case of default shall be an annual rate of four percent above the Central Bank of Kenya five-year bond and shall be recovered first in subsequent payments.

(4) In case of a serious material breach by the County, the investor and/or financier shall be entitled, at its option and to the extent permitted by applicable law, to:

(a) enter upon the premises constituting the relevant project and take immediate possession of the premises and/or the project/project facilities, wherein the right of the County or its tenants shall immediately be suspended or extinguished;

(b) proceed by appropriate court action or actions, either at law or in equity, to enforce performance by the County of the applicable covenants under the relevant project contract and to recover damages for the breach thereof;

(c) following a termination of the leasing of the relevant project/project facilities, hold, use, operate or lease to others, the project/project facilities, as the investor/financier may in its sole discretion determine, all free and clear of any rights of the County; and/or

(d) sell its interests in the project and/or the project facilities to third parties free and clear of any rights of the County.

Books of account and audit

Act No. 18 of 2012

Act No. 34 of 2015

17. The Fund administrator shall —

(a) cause to be kept books of accounts and other books and records in relation to all obligations financed through the Fund;

(b) Submit financial statements to County Executive Committee Member to transmit to the Auditor-General, in respect of

each financial year and within three months after the end thereof, a statement of account, and showing the expenditure incurred from the account, and such details as the Public Sector Accounting Standards Board may prescribe from time to time, in accordance with the provisions of the Public Finance Management Act and Public Audit Act; and

- (c) furnish such additional information as he or she may deem to be proper and sufficient for the purpose of examination and audit by the Auditor-General in accordance with the provisions of the Public Audit Act.
- (d) Prepare quarterly financial statements in accordance with section 168 of the Public Finance Management Act, 2012 within 15 days after every quarter and submit a copy to the Controller of Budget.

Financial year

18. The financial year in respect of the Fund shall be the period of twelve months ending on the 30th June in each year.

PART IV—MISCELLANEOUS PROVISIONS

Application of financial and procurement laws

19. Eligible infrastructure investment projects shall comply with the following —

- (a) procurement laws, regulations and guidelines;
- (b) labour laws;
- (c) land laws;
- (d) environmental and climate change laws; and
- (e) all other relevant laws.

Suspension of the County Government

Act No. 17 of 2012

20. In the event the County Government is suspended under Article 192 of the Constitution, the obligation of the County Government under this Act shall be honoured by the Interim County Management Board pursuant to Part XIII of the County Governments Act, 2012, without any delay or variation.

Winding up of the Fund

21.(1) The Fund may be wound up by the County Executive Committee Member at the expiry of ten years if—

- (a) the Fund is considered to have successfully completed its

objects and purposes; and

(b) all payment obligations under the Fund have been settled.

(2) Where the conditions in sub-section (1) are not met, the County Executive Committee Member may, until the conditions are met, renew the term of the Fund for a term of upto 10 years with the approval of the County Executive Committee and the County Assembly.

(3) Winding up of the Fund shall be subject to –

(a) confirmation by the investors and/or financiers that all obligations and commitments for payment have been met;

(b) verification by the Auditor-General of settlement of the Fund's obligations; and

(c) receipt of approval for winding up from the County Assembly.

(4) Upon winding up of the Fund—

(a) the Fund Administrator shall pay any amount remaining in the Fund into the County Revenue Fund;

(b) assets other than monies in the Fund shall be transferred to the County Treasury.

(5) The County Executive Committee Member shall submit a final statement of accounts to the County Assembly and the Auditor-General for audit within six months of the date of the winding up the Fund.

Regulations

22.(1) The County Executive Committee Member shall develop Regulations for the proper management of the account and for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the foregoing, the County Executive Committee Member may make guidelines on the following —

(a) project approval application templates;

(b) certificate of confirmation of payment;

(c) certificate of default;

(d) reporting formats; and

(e) any other guidelines as may be necessary.