

Overage - How an Anti-Embarrassment Clause can Protect all Parties during a Land Sale

If you're a landowner looking to sell off part of your portfolio, a little known legal term called 'overage' may have a big part to play in any future sale.

Every person involved in property disposals must consider the need for clauses which protect the seller's right to a share in the future value of the land or property, and this is where an overage agreement comes into play.

Put bluntly, overage means securing the rights to any uplift in future value, and is commonly referred to as an anti-embarrassment provision. In most cases the provisions allow for a seller to share in the uplift in land values attributable to circumstances such as the obtaining of planning permission or the use of the property and land for a use other than that which it was used for at the time of the original sale. Overage clauses tend not to apply merely to increase in property prices attributable to typical and expected market forces.

Almost every deal today could involve an element of overage. But in order for an overage payment to be made, a trigger event must occur first.

What are the trigger events?

A trigger event could be the granting of planning consent, or when a new development or use is implemented or completed. There are often problems when clarifying which events will trigger the need for an overage payment so it's best to seek the advice of a solicitor from the outset.

What are the best ways to secure overage?

Overage can be secured by one or more of the following: a charge over the title of the land, a restriction on the title, a requirement for a direct deed of covenant from successors, or obtaining a guarantee.

However secured, it's important that the overage period is long enough to enable the trigger to happen, because if it isn't, the buyer might be encouraged to delay planning, which would postpone the trigger event even further.

It is also important that the overage, where appropriate, is not personal to the initial purchaser, but binds successors too. Many an overage provision has failed by the bound party transferring its interest to a non bound party.

A charge is one of the better forms of security for the landowner, since this provides a more secure mechanism to recover the overage amount when the trigger occurs. This charge does not secure anything until the trigger happens though, but when it does, if the buyer fails to pay the overage, the original landowner may be able to take possession and/or force a sale of the land to recover their payment out of the proceeds.

A charge is however unlikely to be acceptable to a developer or its funder. A restriction is more likely to be the preferred option, provided it does not prevent the developer from actually redeveloping and selling the land.

How do you calculate overage?

In calculating the enhanced value of the land, the buyer will expect inflation to be ignored and will want to deduct any costs they've incurred when generating the increase in value, for example, the costs of obtaining planning permission or perhaps remediating the land to make it suitable for future development.

If the overage land forms part of a larger development, it can be complicated to value it particularly if planning consent was only applied for on part of the overage land.

For more information:

The provision of overage can be a complex area, though provided the legal provisions are drafted fairly and correctly, there should be little adverse affect. If they are drafted incorrectly, then they have been known to make properties or land unmarketable, perhaps a reminder why overage agreements are also known anti-embarrassment provisions.

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