

WHAT IS OVERAGE?

Overage is a term used to describe a sum of money which is due and payable in addition to the original sale price which a seller of land may be entitled to receive after completion if and when the buyer or any subsequent owner complies with specified conditions.

For example, the seller agrees to sell on the basis that he or she receives an extra sum of money if the buyer secures planning permission for the redevelopment of the land which enhances its value.

Overage agreements are notoriously difficult to enforce and for this reason care should always be taken to ensure that they are correctly drafted. They should be registered against the relevant title to the property in question so that subsequent buyers of the property are put on notice of the existence of an "overage" obligation.

When is the overage payment payable?

This depends on the terms of the overage agreement.

For example:-

Payment may be due on the increased value of the land on the grant of any planning permission for the redevelopment of the property within a specified period e.g. 10 years. Therefore buyers who secure a planning permission which does not increase the value of the land would subsequently still be bound to make an overage payment if a second or third application is lodged within the 10 year period which increases the value. It is important therefore to note that an overage payment should not be limited to the first planning permission obtained.

The payment may be linked to the completion of the development. It may be a specified sum. It may be based on the capital value of the land with the benefit of planning permission or it may be a figure calculated by reference to the profit from the redevelopment of the property (although this is notoriously difficult to calculate and draft).

Further considerations

1. The insistence on an overage provision in a sale agreement may jeopardise the sale of a property.
2. Buyers of property who agree to make an overage payment should be aware that any expenses involved in the securing of planning permission may not be deductible before an overage payment is calculated. Considerable care should therefore be taken to ensure that all costs associated with the enhancement of the value of the property should be taken into account.
3. An overage agreement takes the effect of a covenant preventing the development of the land without the payment to the seller of a sum of money. The seller can therefore secure a payment for release of that obligation irrespective of whether planning permission is subsequently granted.
4. It may be difficult to finance the acquisition of redevelopment land if an overage agreement is in place.

For more information please contact Tony Wilson.