



Notes on Overage and Options

‘Overage’ is a form of clawback; it gives the seller a right to get extra money from the buyer on the happening of some future event (eg the grant of planning permission). It may be combined with an “Option”. This is a right for a person to buy your property without the usual accompanying obligation to buy it. It has a value which is often underestimated. It is something that can cause enormous problems in drafting. This checklist highlights obvious points to consider:

1. Duration

How long is the overage agreement to last for?

2. Planning Application

- a. Insist on specifying the extent of the involvement, including financial, of each party in the planning application.
- b. Should there be specific time limits (or an obligation to use best endeavours which is a dangerously vague but sometimes unavoidable concept).
- c. Should there be provisions for progress reports and copy documents?
- d. Consider an obligation to maximise the value of the land (and to apply for the most valuable permission).
- e. Should there be an obligation to appeal (perhaps subject to the view of counsel on merits)?

3. Planning Permission

- a. This may well be defined as a trigger event.
- b. Are you referring to detailed or outline planning permission?
- c. What about onerous conditions including Section 106 obligations required by the Planning Authority?
- d. What if permission is obtained by a third party (not the contracting parties)?
- e. Who will own it and all the associated documents eg. if the permission is granted but

the buyer pulls out?

4. Trigger Events

- a. Apart from Planning, what other events might trigger payment?
- b. Disposal of the land (in which case define precisely what this means and ensure that there are provisions for any sale to be at arms length and not a collusive sale).

5. The Overage Amount

- a. It may be a fixed sum (should it be index-linked)?
- b. Should it be a share of the profits (consider an obligation to keep accounts and consider what happens if there will be more than single payment)?
- c. If there are references to 'market value' then consider provisions dealing with special purchasers:
 - (i). Vacant possession
 - (ii). Encumbrances
 - (iii). Costs of complying with planning obligations
 - (iv) Should there be disregard of other rights or land held that affect the planning position

6. Less Favourable Development

Should there be a clause to deal with the situation when there are unexpected problems (eg changes in legislation) with a reduce overage payment in these situations?

7. Arbitration Clauses to deal with disputes

8. Does the Seller need consents to grant the rights from eg. Lender, provider of grants.

9. Has Title been deduced? Restrictive Covenants?

10. Is the agreement personal to the buyer or to the seller? What if one party is advised to form a company or to transfer an interest to a spouse Eg. for tax saving reasons after the agreement has been made?

11. Does the contract affect the sellers' potential inheritance tax position?

12. Would either party want phased contract or completion dates, Eg. for Capital Gains Tax reasons?

13. Your accountants advice should be taken at an early stage

This is merely a taster of the problems that can arise. There are other issues to be considered, such as interest for late payment, drafting of positive covenants, (eg gifts, deaths, leases and charges to be dealt with), and what restrictions should be on the Title; what releases should be given, and should the unpaid sellers' lien be excluded?