

Overage Checklist

The following lists a number of the points that will need to be considered when preparing an overage arrangement:

- 1. Property – what area of land is to be covered?**
- 2. Duration – over what period is the provision to operate.**
- 3. Planning application – in most cases it will be expected that such an application will be made to result in overage being paid. The provisions could cover**
 - (i) Use class of planning permission to be sought;**
 - (ii) decide on the involvement of each side;**
 - (iii) impose time limits or a general obligation to use best endeavours;**
 - (iv) provide for co-operation, progress reports and the provision of documents;**
 - (v) impose obligation to maximise the value of the land and to apply for the most valuable permission;**
 - (vi) require appeals (possibly subject to the view of experienced counsel as to merits).**
- 4. Trigger event – what event or events will trigger the operation of the provisions. These could be (a) grant of planning permission, (b) disposal, (c) development – commencement or completion, (d) giving of notice; (e) combination of foregoing.**
- 5. Single or multiple triggers**
- 6. Triggers whether to include part or be limited to only whole of overage land**
- 7. Planning permission – if this is to be relevant to the definition of the trigger event or to valuation then what constitutes a planning permission for these purposes needs to be defined.**
 - (i) outline or detailed permission;**
 - (ii) include permitted development rights regime -**
 - (iii) onerous conditions which not satisfactory;**
 - (iv) effect of permissions obtained by third parties;**
 - (v) phased permissions**

- 8. Disposals –**
- (i) if this is to be a trigger event then the nature of the disposal caught needs to be defined and the estate dealt with;**
 - (ii) what disposals to be permitted?**
 - (iii) provision to ensure that it is an arm's length sale (to avoid collusive sales) or provision for open market valuation ;**
 - (iv) obligation to complete as soon as reasonably practical.**
- 9. Development – this needs to be defined and also what is meant by the commencement or completion needs to be spelt out.**
- 10. Overage sum – this may be a fixed sum or a share of profits from the development or an amount determined by reference to the market value at the relevant date.**

10.1 Fixed sum – does this need to be index-linked

10.2 Share of profits - there will need to be provisions for accounts to be kept and verified as well as obligation for all deals to be bona fide and for full consideration. Methods of determining the valuation may need to be included if there is likely to be transactions other than for a single payment.

10.3 Market valuation – basic statement of what constitutes open market value. This may need to be supplemented to deal with

- (a) Property to be valued;**
- (b) special purchasers;**
- (c) assumption that reasonable return will be required on development;**
- (d) vacant possession;**
- (e) land subject to incumbrances;**
- (f) costs relating to obtaining planning permission and land deducted – this should expressly deal with the costs of complying with planning obligations, any compensation payments;**
- (g) disregard any other rights or land held which affect the planning position;**
- (h) disposals at under value;**
- (i) value if lease involved;**
- (j) what easements and service rights to be assumed.**

10.4 Deductions – what expenses or values to be deducted when calculating overage

10.5 Car parking rights – whether to be included

11. Base value –

(i) in calculating the overage amount there may need to be a base value deducted which could be either the fixed sale price or the market value based on the current use at the original sale date.

(ii) Making disregard of any other planning permission effective

(iii) Special assumptions may be required to be taken into account – e.g. special purchasers.

12. Less favourable development – if there is an unexpected problem that impacts on the nature of the development that can be carried out this should reduce the overage payment. This should include changes in legislation.

13. Valuation procedure –

(i) who to appoint valuer;

(ii) time limit;

(iii) expert/arbitrator;

(iv) making written representations and counter-representations or oral submissions – time limits;

(v) costs;

(vi) finality subject to manifest error;

(vii) power to replace valuer;

(viii) power to pay other side's costs and recoup with interest;

(ix) written decision and time limits.

14. Payment date – should this be linked to receipt of monies by purchaser or successor.

15. Interest – for late payment.

16. Protection –

(i) Charge/chain of covenants/restrictive covenant/right of re-entry/lease provisions/ransom strip

(ii) Will need payment covenants.

17. Positive covenants – the main drafting point will be how the chain is to operate.

- (i) who is to give new covenants;**
- (ii) how are gifts, deaths, leases and charges to be dealt with;**
- (iii) restrictions on dealings to be placed on title, what evidence to allow registration of transfer, how release to be obtained;**
- (iv) part disposals – how to be dealt with and what liability to be taken on by transferee of part;**
- (v) release – automatic on new covenant being entered into?**
- (vi) Approval by covenantee of new covenantor?**

18. Release – general provisions will be needed in all cases but detailed provisions will be needed if there is either a restrictive covenant or charge. This will need to permit releases of part in specified circumstances with the necessary protection for the vendor.

19. Lien – exclude unpaid vendor's lien.

20. Section 78 LPA 1925 – exclude? Impose prohibition on assignment of benefit by vendor?

21. Occupation – vendor to remain in occupation and if so tenancy or licence?

22. Title – provisions for arrangement to appear on title and circumstances in which be removed.

23. Operation of overage in respect part or parts – this will need to be considered in the context of many of the above topics. How positive covenant dealt with? How determine what land subject to planning permission. How value part and how take into account relationship with remainder of land.

24. Surety?

25. Buy back provision or obligation to retransfer.

26. Restriction on disposals during overage period

27. Good faith and Prohibition on Circumvention clause

28. VAT

29. SDLT compliance

30. Land Registry –

- (i) applications for restriction;**
- (ii) other applications and entries; and**
- (iii) circumstances in which restriction to be removed and obligation to remove.**

31. Service of notice

32. Dispute resolution procedure – Expert or Arbitrator

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