

Are You Getting Full Value From Your Land? Overage - The Devil is in the Detail

Challenging economic times and the current uncertainty as to when sustained growth will return has prompted discussion amongst those selling land, as to how future increase in values can be captured.

Overage mechanisms included in the sale of both residential and commercial land, provide the best opportunity to share in future uplift in values.

Unfortunately, there is not a 'one stop' solution and there are various methods available to capture the increase in values. There are three primary areas on which overage can be negotiated. Planning overage, which relates to a change of use (or increases in density), revenue based overage, which relates to positive shifts in rents and yields, and a cost based overage, which is linked to savings on predicted development costs.

The key to successful overage negotiations is firstly, to make sure that they are relevant to the nuances of each transaction, secondly, that it is absolutely clear as to what the overage is intending to capture and most importantly, that the calculation and application is transparent and workable — often, including a worked example within the contract avoids confusion in the future.

However, as is often the case, 'the devil is in the drafting'. It is all too common that clauses are overly complex in their wording and poorly drafted. This was recently highlighted in Charterbrook v Persimmon 2009 in which, the House of Lords ruled that the intention of the parties, as negotiated, should prevail, rather than the strict interpretation of the wording in the contract. The subsequent litigation in this case resulted from the ambiguous nature of the drafting.

Overage remains one of the best tools to capture future value, however, there are numerous ways in which it can be applied and therefore, it is recommended that professional advice is sought so that all angles, options and methods of calculation are fully understood.

Rapleys have extensive experience advising both Vendors and Purchasers on the optimum solution available to them and, in addition, assist in ensuring that client's solicitors fully understand what has actually been agreed.

For further information, please do not hesitate to call 0870 777 6292 or contact one of our nationwide specialists directly, as below:

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