

## Overage agreements in property transactions: A quick guide to “what, why, when and how?”



Jane Bowden, Partner in our real estate team, discusses how an overage agreement is a useful mechanism for you to buy and sell while factoring in future changes in the market, protecting sellers ahead of a likely rise in market value and providing opportunities for buyers to reduce their risk.

### What is overage?

In simple terms overage, or as it is sometimes called a “clawback”, an “uplift” or an “anti-embarrassment” payment is an additional sum of money that may be paid to the Seller of land over and above the money received on completion of that sale. Sounds good?...read on.

There are various types of overage arrangements. For example, it could apply where the land is sold on by the initial buyer within a specified period of time for a profit; where planning permission – or an enhanced planning permission – for development is obtained in the future; or where the sale price has been calculated (in part) by reference to the value of anticipated sales receipts and the actual receipts are higher than anticipated.

### Why enter into an overage agreement?

From the landowner’s perspective, to try to future proof the transaction and ensure that if the value of the land increases, you also benefit. From a buyer/developer’s perspective, overage agreements can be a useful mechanism in ensuring that the price paid on completion is not over inflated should market conditions change and the anticipated development costs rise or anticipated revenue figures fall.



## When is an overage agreement appropriate?

If the land you are selling has development potential, its value may increase significantly in the future and you will wish to share in this if possible. As a landowner, having an overage agreement in place can also provide peace of mind that you have not undersold the land, or it can help you to dispose of land quickly, if necessary, at a lower than market value rate but protect the true value in the longer term.

As a buyer/prospective developer, there are perhaps many more considerations as to why you might wish to offer an overage to a seller, and these will be determined by the immediacy (or otherwise) of the land's potential for development, the costs of obtaining a planning consent, whether you intend to "turn" the site or build it out yourself and whether you anticipate you will actually end up having to pay it!

## How to negotiate an overage arrangement

Raise it as a possibility early in any sales negotiations. Developers don't generally like surprises and as a seller you stand a better chance of succeeding if it is discussed as an option early in the process.

Seek offers that include an overage as an option and take advice on the relative merits of different offers from a professional land agent.

## How to secure an overage payment

It is all very well having an overage arrangement in place, but what guarantee do you have as a seller that the buyer will actually pay you if a payment becomes due? You need to ensure that you have robust legal advice from an expert in overage arrangements to limit the "wriggle-room"/avoidance techniques that can sometimes be employed to escape liability.

You need to ensure that you have good security in place to prevent or limit the buyer's ability to dispose of the land (or parts of the land) without your consent or notice or, if applicable at that time, without payment of the overage sum to you.

## Find out more

We are well versed in all forms of overage arrangements and act for both landowners and developers dealing with this complex and tricky area in property transactions.

If we can help you in connection with your sale or purchase of residential development land whether or not this includes an overage arrangement then please contact our [real estate team](#) for an initial discussion.



[Jane Bowden](#)



Partner



[James Clewlow](#)

Partner and Head of Horsham