Overage Agreements

Overage agreements are typically entered into when land changes hands, as a way of allowing sellers to benefit from an increase in the land's value after they have sold. Overage Agreements are sometimes known as uplift or clawback agreements.

The Agreement will specify for how long the seller could potentially benefit e.g. 5, 10, 20 years after completion of the sale to the buyer.

It will also specify what "triggers" will allow the seller to benefit e.g. the granting of planning permission for the development of the land being sold.

The agreement will also stipulate the amount by which the seller can benefit. This will normally be expressed as a percentage of the future value.

There are advantages for both seller and buyer in Overage Agreements. The seller can realise the current value of the land but still retain a chance of future payments if the value increases. The buyer can buy the land at the current (lower) value and then investigate the potential for increasing the value and the best timing for this afterwards.

It is important to be clear about exactly what has been agreed to avoid arguments over detail later on.

For instance, if the trigger is stated to be the obtaining of planning permission for development, should this be defined simply as the granting of the planning permission? This might be hard on the buyer as the grant of planning permission in itself will not create the value. It is the actual development which will do that. It could be that the trigger is better expressed as "implementation of the planning permission". Again, this might not give the buyer the ready cash to pay the seller and claw his back, unless the buyer can re-sell the land. Should the trigger then be the sale resulting from the planning permission? However it may be that the buyer chooses not to sell and then it would seem unfair to the seller to have the value locked up for extra time before he can benefit.

There may be negotiations on what counts as planning permission. Is outline planning permission going to be sufficient as a trigger or should it be full planning permission or should any Section 106 Planning Agreements for Roads and Infrastructure also be included.

It is also important to be clear on exactly what has to happen within the stipulated time period to avoid either party being able to manipulate the wording in his or her own favour.

The exact terms agreed will depend on many factors including the size and the kind of land (e.g. agricultural or commercial), the development potential (is a simple barn conversion the only likely development or could it be a large development of housing and infrastructure) and the relative bargaining positions of the parties. It will also be advisable for parties to consider any VAT implications, other tax considerations.

For more information on Overage Agreements, please feel free to contact us: 01285 653261 alison@alisonfielden.co.uk, or speak to your usual solicitor.