

How to land a better deal

Owners of land often find themselves in a dilemma. They need to sell now, but know that if they were able to hang on, the land is likely to increase in value in years to come. It may be that a future intended road would unlock the opportunity for building houses on it or that the potential development is being prevented by an inadequate public drainage system which, if updated in the future, would permit development. It may be that the local planning authority has intimated that it may be zoned for development in the future – but not yet.

There are a number of ways of selling now and protecting the future uplift in value. Until relatively recently the potential has been protected by creating a landlord and tenant relationship between seller and purchaser restricting the use of the land, or by creating a debt and a mortgage situation. Alternatively, the potential has been protected by clauses restricting the future use of the property intimating but not stating that it may be lifted for a payment. Unfortunately, such methods have difficulties. A landlord/tenant relationship is fettered by statutory requirements and rights. The mortgage may succumb to overriding or higher interests. A restrictive covenant, although enforceable against subsequent purchasers if drafted properly, can get weaker as time goes on. For instance, it is possible to apply to the Land Tribunal in circumstances for the restriction to be lifted.

Additionally, a restrictive covenant needs the seller to retain land capable of benefiting from the covenant and if the development takes place in contravention of it, any damages are likely to bear no resemblance to the value of the development land.

Another way of preventing future development is by retaining a 'ransom strip' thus preventing development on the land being sold from a practical point of view unless the strip is purchased. The ransom strip does tend to protect no more than about a third of the value of the uplift and in any event it may be got round by purchasing other land – for instance for an access.

Over the years, rather than such devices to protect the future uplift in the value, it has become more usual to use overage or clawback agreements. In an overage agreement, the occurrence of a certain event (usually planning permission) within a certain time will trigger an agreed payment or percentage of value to be paid to the land owner. There are numerous variations to the formula. Does the payment become due on the grant of planning permission or the implementation of the planning permission or a subsequent sale? Does the time limit relate to the obtaining of the planning permission or the implementation of the planning permission? Does the overage apply only to one planning permission or subsequent ones? Does full or outline planning permission trigger the permission? (That may well alter the valuation for instance an outline permission may be less valuable than a full one.) How do you value the uplift if the land is part of a larger development where, for instance, the density of housing is greater or lesser on other parts of the development or where one part holds the key to the access? Does the overage ensure that the developer will maximize the value of the land? How far can the seller influence a planning application to protect his position?

An overage is an interest in land and must be protected by entering it on the title with the Land Registry. Its benefit can be transferred to others. It is an asset and part of a deceased's estate on which Inheritance Tax may be payable. Capital Gains Tax may apply on its transfer or ultimate release.

Protecting the future value of a property that you are selling is no easy matter. How it is done depends upon many factors including the likelihood of the development occurring, the owner's personal circumstances, the need to balance seller and buyers commercial interests, taxation consequences, the type of development that may occur. As with all crystal ball gazing the future can be very uncertain without care and attention.

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This briefing is for general guidance only. It represents our understanding of English law and practice as at January 2008, but is not intended to be a comprehensive statement of the law. Readers are advised to seek specific guidance from Ward Hadaway.