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Overage & Clawback

Overage clauses and clawback provisions are designed to enable a seller to achieve full value in relation to land being sold, where additional value is added by the purchaser subsequent to the sale. Such provisions are quite topical at present, primarily because of the government white paper to allow permitted development rights between business use and residential. But for local authorities they have been a touchpaper subject for significantly longer.

Government bodies often find themselves between and rock and a hard place when it comes to the disposal of land because they are subject to two conflicting duties: first, the requirement to dispose of property immediately when they no longer have a need for it; and second, the requirement to achieve best value on any land disposed of. Things came to a head in 1986 when the local authority (LA) sold Herstmonceux – a grade I listed building and the old site of the Royal Observatory before it was moved to Cambridgeshire. The LA sold the site without the benefit of planning and were heavily criticised for it, on the basis that they had not achieved best value. As a result of this case Treasury guidelines and Annex 32 of Government Accounting now provide that government land should normally be sold with planning permission. But the grant of planning can take time – especially in the case of a Grade I listed building. So how does an LA, tasked with immediate disposal of surplus property, deal with this?

The answer, of course, is to sell the property with the benefit of an overage clause or clawback provisions.

Note: *Such clauses cannot be used by LAs in Right to Buy cases. This was confirmed in* ***R v. Braintree District Council ex parte Halls [2000] 36 EG 164****, in which the CA held that a local authority cannot benefit from an increase in value of a council house bought by the tenant. To do so would be ultra vires under Schedule 6 Housing Act 1985.*

Drafting overage and clawback provisions

Duration

The duration of the overage clause will depend very much on its facts. Clauses are often drafted for 80 years, referring to the old statutory perpetuity period but, except in exceptional circumstances, it is suggested that this is excessive. Perhaps 30 years for an airfield, or 5-10 years for a residential property, would be more appropriate.

The trigger event

Typically, the event that triggers payment is the grant of a planning consent. The main advantage of this approach is certainty: the grant of planning permission is a publicly ascertainable event. But the grant of consent does not in itself give the purchaser the money with which to pay the uplift. There may be a considerable time gap between getting planning and implementing it.

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From the LA's point of view, the meaning of 'grant of planning' needs to be considered. A major development will normally go ahead by initially obtaining outline consent subject to subsequent approval of a number of reserved matters by the local authority. When these have been approved, the detailed consent will be granted. But which triggers overage? The outline consent or the detailed consent? It is important to be clear at the drafting stage: a detailed consent is often easier to value than an outline consent and it may be preferable to link the overage to that. See ***Loxleigh v Dartford Borough Council [2019] EWHC 2063*** in which overage was triggered by the obtaining of detailed planning permission. The Court decided this meant when reserved matters in relation to outline planning permission were agreed.

For these reasons, overage may be better linked to the implementation, rather than the grant, of any planning consent. But what about development that is exempt from planning consent?

Under **S.55(2)** of the Town and Country Planning Act 1990, certain integral works, the use of land for agriculture, forestry and certain types of demolition do not constitute development at all. Of more concern is the evolving status of permitted development rights in this country. Certain developments do not require planning permission, for example, under the Town and Country Planning Act (Permitted Developments) Order 1995 as amended in 2008, 2013 and under the Town and Country Planning Act (Consequential Provisions) Regulations 2014 in England, and in 2013 and 2014 in Wales. In addition, as of 1 August 2020, purpose-built blocks of flats will be able to build two additional stories of no more than 7 metres in extent and the new building must be no more than 30 metres without planning. Mixed use premises can also add further flats as long as the premises currently have at least three stories and the additions will not amount to more than 30 metres in height. Offices, with exceptions, can also be converted into flats. All of this is subject to prior approval which can be refused because of flooding, external appearance, natural light, traffic and highway impact or defence assets.

There is also a massive change of use classes going on in England right now. On 1 September 2020 (with exceptions, the major ones being drinking establishments, hot food takeaways, theatres and cinemas which all require planning permission for change of use), Class A1 2 and 3 and Class B were subsumed within a new Class E. Changes of use within the new Class E are exempt from planning, subject to prior approval. Furthermore, on 4 December 2020 the Government published its proposals for permitted development between Class E and Class C3 (residential). This will be disastrous for overage.

From the developer's viewpoint, there may also be difficulties in relation to building regulations post Grenfell: see ***London & Ilford Ltd v Sovereign Property Holdings Ltd [2018] EWCA Civ 1618***. Here overage was triggered on prior approval of permitted development. This was given for the conversion of an office block into 60 flats, but the development could not go ahead because building regulations approval was not given, mainly because of fire safety (this had been one of the knock-on effects of Grenfell). The overage was nevertheless payable because prior approval had been given and this was the trigger. This is a harsh decision but serves to underline the need to think carefully about the trigger event during the drafting proves. In this case, the overage should have been made payable on completion of the development.

Quite apart from all of this is the situation in which a landowner carries out unauthorised development without the grant of planning consent or prior approval. If operational development is started, it is exempt from an enforcement notice after 4 years and, if there is a change of use or breach of planning condition, it is exempt after 10 years. In such cases there will be no formal grant of planning consent, but it may still be possible for the landowner to realise the value if the local authority decides not to serve an enforcement notice or is simply not aware that the development has taken place.

The alternative approach is to provide that a straightforward resale at an increased price for whatever reason will trigger a payment to the recipient. But, again, care must be taken to express clearly what constitutes resale: sale of the whole or of part only? In the case of a housing development, it is easy to fall foul of a provision that hangs payment of an uplift on the sale of the property. In ***Renewal Leeds v Lowry Properties [2010] EWHC 2902*** the overage clause stated that no uplift was payable until the last house was sold. A development of 80 houses was built but the developer deliberately left the last 4 houses unsold. Renewal Leeds tried to buy the houses at market value but the developer refused to sell. The court implied a term that the developer should take all reasonable steps to sell and therefore the overage was payable, but it is suggested that this shouldn't have been left to implication. It is always better to deal with such matters expressly. See also ***Sparks v Biden [2017] EWHC 1994 (Ch).***

One final point to mention is in relation to the interpretation of the type of event that will trigger the uplift. In Walker v Kenley [2008] EWHC overage was stated to be payable if 'residential flats' were built on the land. The buyer of the land wanted to build holiday flats. The question for the High Court was whether holiday flats fell within the meaning of residential flats, thus triggering the overage payment. Quite surprisingly, it was held that the term 'residential flats' suggested a degree of permanence, i.e., residence as a dwelling, and that this did not include holiday homes. No money was, therefore, payable. With the benefit of hindsight, it would have been much better to merely refer to 'flats' without the prefix of residential. It is suggested this was not an obvious outcome, but one to be heeded for the future.

Enforcement

Between the original parties there will be a contract and the covenantor will be able to fully enforce. The problem lies in relation to the burden passing to subsequent purchasers as this cannot be contractually assigned. In the case of ***Akasus v Farmar & Shirreff [2003] EWHC 1275,*** a firm of solicitors who failed to include provisions allowing enforcement against third party purchasers was held to be negligent, so it is important this is dealt with carefully. Some form of property rights which is binding on the purchaser will therefore need to be created. The three most common ways of achieving this are: -

1. Direct covenants and restrictions

Here each new purchaser is required to enter into a direct covenant with the original seller or their successor. They are therefore contractually bound. This is secured by a restriction placed on the register to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

2. Overage charges

Here a charge is taken out against the property to secure the amount of overage payment. When the trigger event occurs, the charge automatically secures payment. If the landowner does not pay, the holder of the charge will have the same rights and remedies as any other mortgagee, including the ability to sell the land and take payment out of the proceeds.

The only problem with overage charges is that the mortgagee will require priority of payment over other charges, and subsequent mortgagees may be reluctant to accept an overage charge with priority. Overage charges are therefore of less use in relation to residential properties and properties where financing is required.

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3. Restrictive covenants

Restrictive covenants are of dubious value for various reasons. In the long term in particular they may be discharged under section 84 Law of Property Act 1925 if they become obsolete or if they prevent reasonable use and enjoyment of land. In event of discharge by the Land Tribunal damages may be awarded but may be limited. Moreover, in any court proceedings an injunction will not necessarily be awarded to prevent breach and again damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no enforceability. See ***Wrotham Park Estates v Parkside Homes [1973]*** and also ***Stockport Borough Council v Alwiyah [1983] 52 P & CR 278***, in which compensation was based on the reduced value of the neighbouring land, not the increase in value of the land that got the planning. Compensation was therefore negligible.

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