

## Overage Agreement Template [Seller's Version]

This agreement is dated: [date]  
It is made between [Company name]  
of [address] (the "Seller")  
and [name]  
of [address] (the "Buyer")

These are the terms of the agreement

### 1. Definitions

These definitions apply unless the context requires a different interpretation:

"Assessment Date" means the date when payment is due by the Buyer to the Seller as a result of each Trigger Event.

"Base Value" means the Market Value of the Land and any building on its immediately before Permission is granted on the assumption that there is no expectation of further Development, OR the Original Purchase Price of the Land.

"Deed of Covenant" means a deed of covenant with the prospective transferee containing covenants in the same terms as those given by the Buyer in this agreement with such minor modifications as the Seller may agree.

"Development" means any development of the whole or any part of the Land, that increases the value of the Land or any part of it.

"Expenditure" means any fees and charges reasonably and properly incurred by the Buyer to secure the Permission.

"Increased Value" means the Market Value of the Land as at the date of, and with the benefit of, a Permission, assuming that the Land has the benefit of whatever rights are necessary for the permitted Development, but ignoring the restriction imposed on a buyer by this agreement.

“Land”	means [full address and description]
“Market Value”	means the estimated price which should be agreed between a willing buyer and a willing seller, dealing at arm’s length, when both have full knowledge and information of all matters relevant to the value and the open market value as defined by the Statements of Asset Valuation Practice issued from time to time by the Royal Institution of Chartered Surveyors.
“Original Purchase Price”	means the sum [in pounds Sterling] paid by Buyer to the Seller as price of the Land.
“Overage Payment”	means the sum due on the Assessment Date and shall be calculated as: $(A - B) \times [50]\%$ , where A = Increased Value and B = Base Value
“Overage Period”	means [ ] years from and including the date of this agreement.
“Permission”	means outline OR detailed Planning Permission for Development granted by a local planning authority. It includes the Permission whether granted at first instance or on appeal.
“Surveyor”	means an associate or fellow of the Royal Institution of Chartered Surveyors with at least 5 years’ experience in valuing properties similar to the Land.
“Transfer”	means a disposition of the Land as defined in section 205 of the Law of Property Act 1925 or section 27(2) of the Land Registration Act 2002.
“Trigger Event”	means either the grant of Permission during the Overage Period or the Transfer of the Land or part of it.

## 2. Interpretation

Unless the context clearly requires otherwise, the interpretation of this agreement shall be subject to the matters listed below.

2.1. A reference to one gender shall include any or all genders and a reference to the singular may be interpreted where appropriate as a reference to the plural and vice versa.

- 2.2. A reference to a person includes a human individual, a corporate entity and any organisation which is managed or controlled as a unit.
- 2.3. A reference to a person includes reference to that person's successors, legal representatives, permitted assigns and any person to whom rights and obligations are transferred or pass as a result of a merger, division, reconstruction or other re-organisation involving that person.
- 2.4. Any agreement by either party not to do or omit to do something includes an obligation not to allow some other person to do or omit to do that same thing.
- 2.5. In this agreement Permission, Development and material operations (if any) shall have the same meaning as given to them in the Town and Country Planning Act 1990.
- 2.6. A reference to an act or regulation includes subordinate legislation and new law of substantially the same intent as the act or regulation referred to.
- 2.7. All money sums mentioned in this agreement are calculated net of Value Added Tax ("VAT"), which will be charged when payment is due.

### 3. The basic contract

- 3.1. After entering into this agreement the Buyer must:
  - 3.1.1 upon each Assessment Date, pay the Overage Payment to the Seller;
  - 3.1.2 inform the Seller about each Trigger Event;
  - 3.1.3 not Transfer the Land without having made the Overage Payment;
  - 3.1.4 upon written request by the Seller, he/she shall certify in writing whether or not during the period since either the date of the last certificate or the date of this agreement there has occurred any Trigger Event;
  - 3.1.5 If the Buyer makes any default as required in last previous sub-paragraph then the Seller has a right to increase the period of such notice [pre-agreed time period].
- 3.2. The Buyer undertakes to provide to the Seller all information coming into his/her knowledge or possession, immediately it does so, which information may be relevant in determining whether an Overage Payment is or may be payable and if so, in what sum.
- 3.3. The Buyer shall permit the Seller and its authorised agents upon reasonable notice to enter upon and inspect the Land for any purposes in connection with this agreement.

## 4. Overage Payment: payment terms

- 4.1. Upon happening of any Trigger Event at any time during the Overage Period, an Overage Payment shall immediately become due.
- 4.2. The Assessment Date shall be the later of:
  - 4.2.1  days after the date of grant of the Permission; or
  - 4.2.2  days after the amount of Overage Payment is agreed in the way provided in this agreement.
- 4.3. [An Overage Payment shall be due in respect of every Permission, if more than one, granted during the Overage Period].
- 4.4. In calculation the Overage Payment, the Buyer shall be entitled to deduct all sums incurred by him as Expenditure.
- 4.5. Insofar as an Overage Payment has been paid in respect of Permission on all or part of the Land, for the purpose of calculating the second and subsequent Overage Payment, the Base Value shall be increased to the Increased Value at the date of grant of the previous Permission.
- 4.6. If an Overage Payment is due on a second or subsequent grant of Permission, and the land over which that Permission is granted is not co-extensive with the Land area over which the first Permission was granted, the Overage Payment shall be calculated pro rata with the area of land on which second or subsequent permission is granted.
- 4.7. The Buyer covenants with the Seller that he/she shall pay to the Seller interest at the base rate from time to time of the Bank of England plus % on each Overage Payment. Interest shall be calculated from the Assessment Date to the date of actual payment.
- 4.8. The Buyer covenants that he/she will:
  - 4.8.1 supply the Seller with a copy of any planning application and supporting documents submitted by or on behalf of the Buyer during the Overage Period within 7 days of its submission to the local planning authority: and
  - 4.8.2 supply the Seller with a copy of any Permission granted during the Overage Period within 7 days of the date of grant.
- 4.9. The benefit of the Buyer's covenant in relation to the Overage Payment(s) is assignable by the Seller.

## 5. The Overage Payment: Surveyor's valuation

- 5.1. If the Buyer and the Seller fail to agree on the amount of an Overage Payment within [ ] days after the date of grant of Permission, the following procedure shall apply.
- 5.2. The Seller shall provide to the Buyer the names of three Surveyors, none of whom practices with either of the other two.
- 5.3. The Buyer shall select any one of them to assess and report the sum to be paid as the Overage Payment, under the terms of this agreement.
- 5.4. The instructions to the Surveyor shall provide for each party to be able to submit a case argument in writing, supported by what documents he/she wishes. Each party shall be obliged to provide whatever information and assistance the Surveyor might reasonably require.
- 5.5. The instruction to the Surveyor shall provide that he/she shall act as an expert and not as an arbitrator. In the absence of obvious error, the Surveyor's written decision shall be final and binding on the parties.
- 5.6. Before the Surveyor submits his/her report, either party may make an offer to the other "without prejudice except as to costs".
- 5.7. The Buyer and the Seller shall be jointly and severally liable to pay the Surveyor's fees in the proportions that he/she shall decide. The Surveyor shall take account of any offer made by either party in assessing the proportion of costs payable by each.
- 5.8. If the Buyer or the Seller pays the whole sum due by both parties, he/she may recover by way of indemnity, the share of the other, together with all costs and expenses, reasonably incurred in obtaining re-payment.

## 6. Registration of restriction

- 6.1. The restriction on disposal of the Land, as provided in this agreement, shall run with the Land until expiry of the Overage Period.
- 6.2. At the same time as the Buyer applies for registration of his/her title at HM Land Registry to the Land, he/she shall apply for registration of a restriction in the following terms:

"No disposition by the proprietor of the registered estate or by any person who has registered any interest after the date of this agreement, shall be registered without the written consent of [the current seller] or his/her successor in title to the rights set out in this agreement."

## 7. Buyer's obligations to preserve Seller's rights

7.1. The Buyer shall not during the Overage Period Transfer the Land or any part thereof to any person without:

7.1.1 having first procured that his/her prospective transferee has executed a deed of covenant in terms which bind that transferee in the same way as the Buyer is bound by this agreement, including this provision to bind subsequent transferees.

7.1.2 ensuring that such prospective transferee procures that the restriction contained in sub paragraph 6.2 above remains on the Proprietorship Register of the Land Transferred.

## 8. Release to enable Transfer

8.1. Upon any Transfer by the Buyer or by any other person entitled to Transfer the Land, the Seller agrees that he/she will procure that any notice, restriction or registration against the title to the Land is dealt with in such a way as to permit the registered proprietor or other person entitled, to Transfer the Land free of this restriction;

8.2. The above promise is conditional on:

8.2.1 the Buyer having made any Overage Payment due under this agreement;

8.2.2 the Buyer having delivered to the Seller a Deed of Covenant executed by the person to whom the Land has been Transferred, in the terms required by this agreement, so as to bind his/her subsequent transferee(s) to the provisions of this agreement.

## 9. Seller's costs

The Buyer, and each future buyer, will pay the Seller's reasonable legal and Surveyor's costs and disbursements [on a full indemnity basis] [including any irrecoverable VAT] incurred in connection with:

9.1. each Deed of Covenant;

9.2. the withdrawal of each restriction against the title to the Land and or replacement with a comparable new restriction;

9.3. the Seller granting written consent to each Transfer.

9.4. VAT shall be charged. if due, on every sum mentioned in this agreement.

- 9.5. If the Seller incurs a charge to VAT on any chargeable supply in connection with this agreement, he/she may reclaim a sum equal to that charged, from the Buyer. If the chargeable supply is not charged onward to the Buyer, the Buyer shall nevertheless pay the same sum to the Seller on demand.

## 10. Indemnity

The Buyer agrees to indemnify the Seller against all costs, claims and expense arising directly or indirectly from:

- 10.1. the Buyer's breach of this agreement;
- 10.2. the Buyer's failure to bind the subsequent transferees by Deed of Covenants;
- 10.3. a contractual claim arising from the Buyer's non payment of Seller's cost or Overage Payment.

## 11. Miscellaneous matters

- 11.1. No amendment or variation to this agreement is valid unless in writing, signed by each party or his/her authorised representative.
- 11.2. The parties acknowledge and agree that this agreement has been jointly drawn by them and accordingly it should not be construed strictly against either party.
- 11.3. So far as any time, date or period is mentioned in, or applied to, this agreement, time shall be of the essence.
- 11.4. If any term or provision of this agreement is at any time held by any jurisdiction to be void, invalid or unenforceable, then it shall be treated as changed or reduced, only to the extent minimally necessary to bring it within the laws of that jurisdiction and to prevent it from being void and it shall be binding in that changed or reduced form. Subject to that, each provision shall be interpreted as severable and shall not in any way affect any other of these terms.
- 11.5. The rights and obligations of the parties set out in this agreement shall pass to any permitted successor in title.
- 11.6. This agreement does not give any right to any third party under the Contracts (Rights of Third Parties) Act 1999 or otherwise.
- 11.7. Any obligation in this agreement intended to continue to have effect after termination or completion shall so continue.
- 11.8. No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it nor indicate any intention to reduce that or any other right in the future.

11.9. The parties agree that electronic communications satisfy any legal requirement that such communications be in writing.

11.10. Any communication to be served on either party by the other shall be delivered by hand or sent by first class post or recorded delivery or by e-mail.

It shall be deemed to have been delivered:

if delivered by hand: on the day of delivery;

if sent by post to the correct address: within 72 hours of posting;

if sent by e-mail to the address from which the receiving party has last sent e-mail: within 24 hours if no notice of non-receipt has been received by the sender.

11.11. In the event of a dispute between the parties to this agreement, then they undertake to attempt to settle the dispute by engaging in good faith with the other in a process of mediation before commencing arbitration or litigation.

11.12. In the event of any conflict between any term of this agreement and the provisions of the articles of a limited company or any comparable document intended to regulate any other corporate or collective body, then the terms of this agreement shall prevail.

11.13. This agreement may be executed in duplicate counterparts each of which shall be considered an original and all or any one of which constitute one and the same instrument.

11.14. Each party shall bear its own legal costs and other costs and expenses arising in connection with the negotiation and drafting of this agreement.

11.15. The validity, construction and performance of this agreement shall be governed by the laws of England and Wales and the parties agree that any dispute arising from it shall be litigated only in England and Wales.

Signed by Seller [name]

Signed by the Buyer [name]

OR

Signed by [personal name] on behalf of [the Seller] as its / his / her representative who personally accepts liability for the proper authorisation by [named Seller] to enter into this agreement.

Signed by [personal name] on behalf of [the Buyer] as its / his / her representative who personally accepts liability for the proper authorisation by [the Buyer] to enter into this agreement.





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## Explanatory notes:

Overage agreement: seller version

### General notes:

#### 1. Powerful terms favour the seller.

This agreement is extremely favourable to the seller. If you are the seller, do not be surprised if the buyer seeks to edit it. We mention this because you may decide that you do not need some of the stronger provisions. It is sensible to avoid a final agreement which provides a strong disincentive to the buyer to maximise the value of the land.

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## Paragraph specific notes:

Notes numbering refers to paragraph numbers.

#### 1. Definitions

You should first decide on the contents of the document, then return to check what definitions are needed and whether they really fit the text you have left in place.

By all means use the find /replace function in your word processor to change the

defined terms. If you do change a defined term, make sure it applies to every use of it in the document.

Remember too, that when a word or phrase is defined, the defined meaning capitalised, takes precedence over the common meaning of that word or phrase. It is essential that the land is described by reference to a perfect plan.

## 2. Interpretation

Leave these items in place unless there is a good reason to edit or remove. Each of these items has been carefully considered in the context of this agreement and has been included for a purpose. Many of them strengthen the framework within which the agreement operates.

## 3. The basic contract

This is the basic agreement. Edit as you require.

## 4. Overage Payment: payment terms

This is the essence of the agreement. Note that the definition of base value gives no credit for any expense by the buyer in achieving the increased value. As a result, the buyer could make a loss if the cost of increasing the value exceeds his/her share of the uplifted value.

## 5. The Overage Payment: Surveyor's valuation

We provide here a sensible and precise procedure for calculation of the overage payment. Of course, this will be an area of possible dispute. If you edit this paragraph, be sure your final version is equally precise.

## 6. Registration of restriction

Registration is important for the seller. he/she should attempt to register this document. If the agreement is registered, a later buyer of the land will buy subject to it. However, depending on the final wording it is possible that the Land Registry may refuse to register. In very simple terms, that is because the agreement does not affect the land itself. It is merely a contract relating to money.

If the agreement is not registered it will be far more difficult for the seller to control future entitlement to overage. If a future buyer failed to inform the present seller of a successful application, there would be no mechanism whereby he/she could discover that money was due to him. To take that a step further, if the land was transferred to a limited company with no assets and that company sold it on with planning permission, at a profit, that profit could be used to pay off other liabilities, leaving the present seller with no chance to obtain his/her overage.

## 7. Buyer's obligations to preserve Seller's rights

We have set up the present buyer to be responsible for registration. The effect of this is that if the LR refuses to register, the buyer will be in breach of this provision. Of course, he/she cannot do anything to improve his/her position.

However, if the buyer's buyer fails in future to pay overage, the present seller is likely to be successful in a claim against him. Why? Because his/her failure to obtain registration is the reason why the subsequent buyer has been able to buy a clean title with no overage paid on that deal. he/she may be said to "stand in the shoes" of his/her transferee and accordingly be liable for any overage due by the transferee on his/her sale, until the land is eventually transferred to a buyer willing to make this deed of covenant.

If we assess this point practically, we have drawn the agreement in the strongest terms, but that does not mean a present seller can count on a flow of inflation induced cash. There are ways that future sellers could construct agreements to circumvent this one. The present buyer is the only person certainly bound by his/her signing this agreement.

## 8. Release to enable Transfer

See previous note. We have no other comment.

## 9. Seller's costs

There is no provision for the buyer to question the amount of any such costs.

## 10. Indemnity

We suggest no edits.

## 11. Miscellaneous matters

A number of special points. We have identified each of these as important to protect you. Some are relevant to particular paragraphs in the document, some apply more generally. Some are included to strengthen your position, some to minimise disruption and expense. Do not delete unless you are quite positive of the legal effect of doing so.

**End**