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# Myerson **Real Estate**

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**Our guide to Overage**

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# Welcome

## Why Myerson?

At Myerson, we are experts in dealing with residential property. Putting our clients and their families at the heart of everything we do means we establish long term relationships across generations and act as trusted advisers.

As a Top 200 UK Law Firm, we are also proud to be ranked in many legal disciplines as '**Top Tier**' in the prestigious international directory **The Legal 500**, providing a truly bespoke and personal service.

Our specialist Commercial Property solicitors handle the full range of property-related assignments. We have particular experience in sales and purchases of real estate for business owners and investors, landlord and tenant work and commercial property development.

Our service to you is prestige. We have a small, close-knit, team of qualified solicitors who have the knowledge and experience to advise and assist on a wide variety of commercial property matters.



# Guide To Overage

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## What is overage?

The term “overage”, otherwise known as “claw-back” “uplift” “anti-embarrassment” or even “deferred consideration”, describes a covenant or agreement by a buyer of property to make an additional payment to a seller in the event that an agreed or specified future event (also known as the “trigger”) arises. Often this will mean that a seller will share in any increase in the value of a property after the seller has sold that property to the buyer; some refer to this as a “second bite of the cherry”.

## First things first...

Instructing property professionals (land agents, surveyors, and solicitors) to negotiate and agree an overage agreement can be a rather time consuming and expensive exercise. Overage agreements are commonly complicated documents. At the outset, it is therefore important to ask yourself “is overage appropriate for the transaction?”

The answer to this will frequently depend on the likelihood that the trigger event will occur. If it is close to certain, then overage is likely to be inappropriate, and a seller’s interests may be better served by agreeing on a conditional contract for the sale rather than an outright sale with overage. Likewise, if the overage is purely to cover a speculative “what if” scenario, then you should consider whether it is prudent to spend the time and money in negotiating a complicated overage agreement. Overage agreements are most suitable where there is a reasonable expectation that the trigger event will occur.

Sellers should be aware that the presence of an overage requirement may have the effect of reducing the purchase price that a buyer may be willing to pay at the outset. A well-advised seller will also be aware that it is likely that the buyer will seek to take advantage of any opportunity to avoid making an overage payment.



An overage agreement can only go so far in protecting the seller's entitlement to the overage payment, and sellers must accept their limitations

## Common Triggers

Several different events could be used by a seller to trigger an overage payment from a buyer. Here are the most frequently used triggers:

- the grant of a planning permission for development or change of use;
- implementation of a planning permission for development or change of use;
- sale of the property with the benefit of a planning permission;
- sale of the property at a higher price within a fixed time period;
- sale of the completed development.

## Other things to think about

Once a decision has been made that overage is appropriate for the transaction, and the relevant trigger event has been agreed, there are a plethora of items that will need to be agreed between the seller and the buyer. Many of those items will be “trigger specific”, but here are a few of the basic things to think about as a starter that are not “trigger specific”:

### Overage Period

Over what period is overage to affect the land; for example, it could be 5 years, 10 years, or even 25 years. Likewise, should it be possible for the overage period to be extended for any reason?

### Overage Amount

This may range from a fixed sum (i.e. £X) to a fixed percentage of profit (i.e. a profit share). By way of example, where the trigger event is the grant of planning permission, it is common for the overage amount to be X% of the increase in the market value (less the buyer's costs in obtaining the planning permission). Alternatively, where the trigger event is the sale of the property with the benefit of planning permission, it is common for the overage amount to be X% of the difference between the price the buyer paid for the property at the outset and the price it then sells the property for with the benefit of the planning permission (again, less the buyer's costs in obtaining the planning permission).



## Payment Date

Both the seller and buyer should understand clearly when the overage payment will become payable. For example, if the grant of planning permission is the relevant trigger event, one would expect that the payment date will be the date “X” days after the grant of the planning permission.

## Single or multiple trigger(s)

Can the overage be triggered on more than one occasion during the overage period? Take the example of where the trigger event is the grant of planning permission for development, and the overage period is 25 years. Will the overage agreement fall away following the first grant of planning permission (known as “once and for all” overage; i.e. single trigger), or will the agreement terminate only at the expiry of 25 years, thereby allowing overage to be recovered on each and every grant of planning permission during the overage period (i.e. multiple trigger). Likewise, an overage agreement can include more than one “trigger event”.

## Method to be used to “protect” the overage

There are a plethora of methods that can be used to ensure the overage is paid, many of which are particularly focused in ensuring that a buyer’s successors are bound by the overage agreement (where appropriate). A solicitor will discuss the advantages and disadvantages of each method with you and will explain how each method will operate.

## Tax Implications

This is of particular concern to buyers. A buyer may be liable to pay Stamp Duty Land Tax (SDLT) on both the overage sum and the original purchase price. A buyer must make a sensible estimate of the amount of SDLT due on the overage sum at the point of completion of its original purchase of the property. Additional SDLT may be payable once the overage sum is determined. Alternatively, it may be possible for a buyer to apply to HMRC to defer payment of SDLT if the trigger event is likely to be more than 6 months after the effective date.



# You're in safe hands!

If you would like further information about how we can help you with **Overage**, or if you have any questions, please don't hesitate to contact a member of our **Commercial Property** team today.

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