Overage agreement: buyer side; simple

**This agreement is dated:** [date]

**It is made between**  [name]

**of**  [address] (the “Buyer”)

**and**  [name]

**of**  [address] (the “Seller”)

These are the terms of the agreement

# Definitions

In this document, the following words have the meanings stated.

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| “Base Value”  | means the Market Value of the Land alone, on the assumption that there is no expectation of further Development, at the moment immediately before Permission is granted. |
| “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, by more than $ [500,000]. |
| “Land”  | means [full address and description]. |
| “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. |
| “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. |
| “Overage Payment” | means (A- B) x [20] %, where A = Increased Value and B = Base Value or Last Base Value. |
| “Overage Period” | means [10] years from and including the date of this agreement. |
| “Permission” | means outline or detailed planning permission for Development granted by a local planning authority. |
| “Qualifying permission” | means a Permission which has the effect of increasing the Base Value by more than $ [sum] or [number] %, whichever is the greater. |
| “Surveyor” | means an associate or fellow of the Australian Property Institute with at least [5] years' experience in valuing properties similar to the Land. |
| “Transfer” | means a disposition of the Land as defined in the property laws. |

# Interpretation

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

* 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. A reference to a person includes a human individual, a corporate entity and any organisation which is managed or controlled as a unit.
	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 passed as a result of a merger, division, reconstruction or other re-organisation involving that person.
	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.
	5. 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.
	6. All money sums mentioned in this agreement are calculated net of GST, which will be charged when payment is due.

# Overage Payment: payment terms

* 1. If a Qualifying Permission is granted at any time during the Overage Period, an Overage Payment shall immediately become due from the Buyer to the Seller. The Buyer will pay the Overage Payment to the Seller on the later of:
		1. [60] days after the date of grant of the Permission; or
		2. [30] days after the amount of Overage Payment is agreed in the way provided in this agreement.
	2. The Buyer covenants that he will:
		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 [14] days of its submission to the local planning authority; and
		2. supply the Seller with a copy of any Permission granted during the Overage Period within [14] days of the date of grant.
	3. The benefit of the Buyer's covenant in relation to the Overage Payment(s) is assignable by the Seller.
	4. Nothing in this agreement shall prevent the Seller from applying to register this agreement at the Land Title Office.

# The Overage Payment: Surveyor’s valuation

* 1. If the Buyer and the Seller fail to agree whether an Overage payment is due, or on the amount of it, within [30] days after the date of grant of Permission, the following procedure shall apply.
	2. The Seller shall provide to the Buyer the names of three Surveyors, none of whom practices with either of the other two.
	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.
	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 wishes. Each party shall be obliged to provide whatever information and assistance the Surveyor might reasonably require.
	5. The instruction to the Surveyor shall provide that he 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.
	6. Before the Surveyor submits his report, either party may make an offer to the other “without prejudice except as to costs”.
	7. The Buyer and the Seller shall be jointly and severally liable to pay the Surveyor's fees in the proportions that he shall decide. The Surveyor shall take account of any offer made by either party in assessing the proportion of costs payable by each.
	8. If the Buyer or the Seller pays the whole sum due by both parties, he may recover by way of indemnity, the share of the other, together with all costs and expenses, reasonably incurred in obtaining re-payment.

# Release to enable Transfer

* 1. Upon any Transfer by the Buyer or by any other person entitled to transfer the Land, the Seller agrees that he 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;
	2. The above promise is conditional on the Buyer having made any Overage Payment due under this agreement.

# Miscellaneous matters

* 1. No amendment or variation to this agreement is valid unless in writing, signed by each party or his authorised representative.
	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.
	3. So far as any time, date or period is mentioned in, or applied to, this agreement, time shall be of the essence.
	4. The parties acknowledge and agree that this agreement has been jointly drawn by them and accordingly it shall not be construed strictly against either party.
	5. 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.
	6. The rights and obligations of the parties set out in this agreement shall pass to any permitted successor in title.
	7. This agreement does not give any right to any third party.
	8. Any obligation in this agreement intended to continue to have effect after termination or completion shall so continue.
	9. 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.
	10. The parties agree that electronic communications satisfy any legal requirement that such communications be in writing.
	11. 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.

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| --- |
| 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. [Take care before agreeing to accept service by e-mail. It may be convenient, but you or your counter party (the other side) could miss or accidentally delete the message]. |

* 1. 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.
	2. Each party shall bear its own legal costs and other costs and expenses arising in connection with the negotiation and drafting of this agreement.
	3. The validity, construction and performance of this agreement shall be governed by the laws of the State of [State] and the parties agree that any dispute arising from it shall be litigated only in the State of [State].

Signed by the Buyer [name]

Signed by Seller [name]

Explanatory notes:

Overage agreement: buyer side; simple

Paragraph specific drafting notes:

Drafting notes, using the document 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 search/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.

1. **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.

1. **Overage Payment: payment terms**

This is the essence of the agreement. By all means edit, but be very careful to check what you have changed.

1. **The Overage Payment: Surveyor’s valuation**

We provide here a sensible and precise procedure for calculation of the overage payment.

In other situations, you may have seen the more formal procedure whereby a valuer is provided by an officer of the API. However, that is very tedious and may take many months. If the parties here are in charge of the instruction, the surveyors report is likely to be available far sooner.

1. **Release to enable Transfer**

Obviously essential. We suggest no change.

1. **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 of notes