

Changes of Use and Overage



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Overview

1. Overage
2. Planning permission v permitted development?
3. Prior approval v planning permission?
4. Problem
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Overage

Ruoff and Roper at paragraph 50.030:

“A vendor [of land] may impose a covenant or provision [in the transaction document] under which the purchaser is required to pay a further sum or sums. This is sometimes referred to as “overage”. A common example is where a vendor of undeveloped land is to be paid further sums if planning permission is granted in the future. Another example is where a payment will become due if the use of the land is changed in the future.”

Cantor Fitzgerald & Co v Yes Bank Limited [2024] EWCA Civ 695 at paragraph 33.



Planning permission and permitted development

Town and Country Planning Act 1990, s.57 to 61 - s.57 – the basis of control on development.

Town and County Planning (General Permitted Development) (England) Order 2015/596 (“GDPO”), article 3(1) and schedule 2 - Article 3(1) “...planning permission is hereby granted for the classes of development described as permitted development in Schedule 2...”



Applications for prior approval and planning permission

Does an application for, and or grant of, planning permission (detailed or outlined) differ from an application, and or grant of, prior approval pursuant to permitted development rights? Short answer, yes.

R(on the application of Paul Smolas) v Herefordshire Council [2021] EWHC 1663 (Admin) at paragraph 29.

Murrell v Secretary of State for Communities and Local Government, Broadland District Council [2010] EWCA Civ 1367 at paragraphs 45 to 47.

CAB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities and another [2023] EWCA Civ 194.



Problem

Trigger for overage defined as “on the grant of outline or detailed planning permission” or words to similar effect.

Express drafting and contractual construction.

London & Ilford Limited v Sovereign Property Holdings Limited [2018] EWCA Civ 1618.



Arguments

For:

- a. Contractual construction – natural and ordinary meaning of words used.
- b. Application of basic planning principles.

Against:

- a. *Loxleigh Investments Limited v Dartford Borough Council* [2019] EWHC 1274.
- b. Broad construction of “detailed planning permission”.



Conclusion





1. The starting point, and sometimes the finishing point, is the contractual words used in whatever document contains the overage provision.
2. The grant of planning permission following an application to the local planning authority, is something very different to the grant of prior approval, in respect of permitted development rights under the GDPO.



Thank you

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