

## OVERAGE AGREEMENT

### **PARTIES**

*Dated this 20<sup>th</sup> August 2008*

(1) **ELIZABETH JOAN SMITH** of School Cottage Thornbury Bromyard Herefordshire HR7 4NQ ("the Seller")

and

(2) **ANTHONY LACEY ASKEW** and **DUNCAN STUART** as Trustees of the S.Weigall Number 5 Settlement respectively of Bolton Close Winslow Bromyard Herefordshire HR7 4LR and 50 St Germans Place London SE3 0NH ("the Buyers")

### **RECITALS**

(A) By an agreement dated the *20<sup>th</sup>* day of *August* 2008 and made between the Seller (1) and the Buyer (2) the Seller agreed to sell and the Buyer agreed to purchase the Property (as defined in this Deed)

(B) At the time of the agreement the Seller and the Buyer were unable to quantify the full value of the Seller's interest in the Property and therefore it was agreed that the Seller and the Buyer would enter into this Deed relating to the calculation and payment of the Overage Payment (as defined in this Deed)

(C) By a Transfer bearing the date of this Deed and made between the Seller (1) and the Buyer (2) the Seller has transferred the Property to the Buyer

### **1. DEFINITIONS**

In this Deed the following words and expressions will (unless the context otherwise requires) have the meanings assigned to them below:

#### **Base Value**

Means the Open Market Value of the Overage Property at the Trigger Date but on the assumption (if not the facts) that:

- (a) the actual and permitted physical condition of
- (b) the actual and permitted uses of
- (c) the position relating to planning in respect of
- (d) the rights benefiting
- (e) the encumbrances affecting

(f) and all other circumstances (whether or not similar to those mentioned above) (other than land values generally) affecting the Overage Property on the Trigger Date were the same as at the date of this Deed

**Disposal**

Means in respect of the Overage Property; a transfer of the freehold; or a lease for more than 15 years; or a charge

**Enhanced value**

Means the Open Market Value of the Overage Property with vacant possession at the Trigger Date disregarding any encumbrances affecting the Overage Property save for those in existence at the date of this Deed

**Enhancement Costs**

Means in relation to the Overage Property the fees costs and other expenses reasonably and properly incurred by or on behalf of the Buyer insofar as they consist of the following items:

- (a) expenditure incurred in enhancing the value of the Overage Property insofar as it is reflected in the value of the Overage Property at the Trigger Date excluding any expenditure on the acquisition of an estate or interest which forms part of the Overage Property
- (b) expenditure incurred in consequence of any planning requirements relating wholly or partly to the Overage Property save to the extent that it falls within (a) above
- (c) lawyers, architects and other professional fees incurred in connection with seeking Planning Permission in respect of Overage Property whether or not such Planning Permission is or has been obtained
- (d) the out of pocket proper and reasonable costs of the Buyer in obtaining any independent valuations required by this Deed in respect of the Overage Property
- (e) an amount equal to interest at the Interest Rate on any amounts falling within (a) – (d) above from the date on which such amounts were paid on the Trigger Date
- (f) the stamp duty land tax payable by the Buyer in respect of the Overage Payment

The Enhancement Costs shall not include:

- (a) any amount in respect of VAT incurred by the Buyer which it (or any representative member of the VAT group of which it is a member if relevant) is entitled to credit for (or is otherwise able to recover)

(b) any costs or expenses incurred by the Buyer in acquiring the Overage Property or another estate or interest or stamp duty land tax or Land Registry fees or rates incurred in connection with the Overage Property except for stamp duty land tax referred to in paragraph (f) above

**Interest Rate**

Means 3% above the base rate from time to time of Barclays Bank Plc

**Open Market Value**

Means the best price at which the sale of the Overage Property might reasonably be expected to be effected by private treaty assuming:

- (a) a willing seller and a willing buyer;
- (b) a reasonable period in which to negotiate the sale;
- (c) values remaining static throughout the period referred to in (b) above;
- (d) the property concerned being freely exposed to the open market;
- (e) no account being taken of any additional bid by a Buyer with a specialist interest;
- (f) both parties to the transaction acting knowledgeably prudently and without compulsion

**Overage Payment**

Means a sum equal to 33% of the Enhanced Value less the Base Value and less the Enhancement Costs

**Overage Period**

Means the period expiring on the 15<sup>th</sup> anniversary of this Deed following the Trigger Date if earlier

**Overage Property**

Means all that freehold land registered at Her Majesty's Land Registry under Title Number HE37796 shown edged red on the plan annexed hereto

**Planning Permission**

Means a permission to carry out a development required by reason of s57 of the Town and Country Planning Act 1990 or any legislation from time to time replacing or amending the same but excluding stabling and agricultural development.

**Trigger Date**

Means the date of grant of a Planning Permission occurring during the Overage Period

**2. OVERAGE PAYMENT**

2.1 The Buyer will pay to the Seller the Overage Payment within 5 working days of the Overage Payment being agreed or determined

2.2 As soon as possible after the Trigger Date the parties shall seek to agree the amount of the Overage Payment and if such agreement has not been reached 5 Working Days after the Trigger Date that at any time afterwards either the Seller or the Buyer may refer any disagreement to independent determination, and in that case:

2.2.1 The disagreement will be referred to an independent value (the "Independent Valuer") who shall be a suitable qualified Chartered Surveyor having relevant experience of similar properties in Powys as the parties shall agree to appoint to determine the issue in dispute or (if the parties fail to agree upon an appointee within 10 Working Days of a proposal being made by either party) as shall be nominated at the instigation of either party by the President or Vice President for the time being of the Royal Institution of Chartered Surveyors:

2.2.2 Upon a disagreement being referred to the Independent Valuer the parties shall disclose to the Independent Valuer all information in their possession which may be relevant to this determination;

2.2.3 Any person appointed as an Independent Valuer shall act as an expert and;

2.2.4 He shall fully consider all written representations made by or on behalf of the parties which shall be delivered to him within 10 Working Days of notice of his appointment;

2.2.5 He shall be given instructions to use all reasonable endeavours to give his decision within 20 Working Days of his appointment;

2.2.6 His decision shall (save in the case of manifest error) be final and binding on the parties;

2.2.7 His costs shall be payable in such proportions as he shall determine or in default of such determination equally between the parties;

2.2.8 If he shall die or become unwilling or incapable of acting or if for any other reason he is unable to act then either of the parties may request the President or Vice President of the Royal Institution of Chartered Surveyors to discharge such person and appoint another in his place which procedure may be repeated as many time as necessary

2.3 The Buyer shall pay to the Seller interest on the Overage Payment at the Interest Rate from the Trigger Date until actual payment

### **3. EFFECT OF DISPOSALS**

3.1 Unless the Buyer has already been released under clause 3.2 from their obligations under this Deed the Buyer shall on any Disposal during the Overage Period of the whole or any part of the Overage Property ensure that the disponee of the same enters into a Deed with the Seller in a form substantially in the form of this Deed with such variations as the Seller may reasonably require and deliver it to the Seller

3.2 Except in the circumstances set out in clause 4.3, upon a disponee of a Disposal entering into and delivering to the Seller a deed complying with the requirements of clause 3.1 the disponent of such Disposal will become released from their obligations to the Seller but without prejudice to any antecedent rights or claims which the Seller may have against the disponent

### **4. TITLE RESTRICTIONS**

4.1 The Seller and the Buyer apply to the Chief Land Registrar to enter in the Proprietorship Register of the title of the Overage Property a restriction in the following terms:

“No disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed by Elizabeth Joan Smith of School Cottage Thornbury Bromyard Herefordshire HR7 4NQ or her personal representative or her conveyancer confirming that the provisions of an Agreement dated the       day of                      2008 between (1) Elizabeth Joan Smith and (2) Anthony Lacey Askew and Duncan Stuart have been complied with”

4.2 The Seller undertakes that she will not withhold her consent to the registration of a disposition of any and within the Overage Property if:

4.2.1 Where an Overage Payment has not yet become due in respect of the land concerned and in respect of the interest of the disponent, the disponee of the same shall have entered into the Deed with the Seller in accordance with the requirements of clause 3 and the Seller is satisfied that a new restriction will be placed on the register in accordance with clause 4.1

4.2.2 Where an Overage Payment has become due in respect of the land concerned and in respect of the interest of the disponent then that Overage Payment has been received by the Seller

4.3 Where the Seller gives consent to the registration of a disposition in the circumstances of clause 4.2.1 then at the same it will give consent to the removal of the relevant restriction

## **5. NO PARTNERSHIP OR AGENCY**

This Deed is not a partnership or joint venture between the parties. The Buyer shall not hold themselves out to be an agent of the Seller for any purpose and has no authority to bind the Seller. The Seller shall not hold herself out to be an agent of the Buyer for any purpose and has no authority to bind the Buyer.

## **6. PROPER LAW**

This Deed shall be governed by the Law of England and Wales and the Courts of England and Wales shall have exclusive jurisdiction in relation to matters arising under this Deed and the parties submit to that jurisdiction

## **7. SELLER'S INTEREST**

For the avoidance of doubt nothing contained in this Deed shall inhibit or restrict the Seller from assigning or transferring the interest of the Seller under this Deed to a third party

## **8. GOOD FAITH**

The Seller and the Buyer shall act towards each other in good faith in a manner wholly consistent with the observance and performance of their respective obligations to each other

## **9. VAT**

Where an Overage Payment is payable under this Deed such Overage Payment shall be regarded as being exclusive of all VAT which may from time to time be payable upon it and such VAT Shall be payable on the due date for payment of the relevant Overage Payment against presentation of a value added tax invoice

## **10. NOTICES**

10.1 Any notices given under this Deed shall be in writing and are to be sent to the parties as follows:



10.1.1 In the case of the Seller to the address of the Seller set out in this Deed or to be such other address in substitution as is notified in writing by the Seller to the Buyer from time to time

10.1.2 In the case of the Buyer to the address for the Buyer set out in this Deed or to such other address in substitution as is notified in writing by the Buyer to the Seller from time to time

10.1.3 Any such notice shall be delivered by hand or sent by courier, fax or recorded delivery post. If sent by courier or fax such notice or communication shall conclusively be deemed to have been given or served at the time of despatch. If sent by recorded delivery post such notice shall conclusively be deemed to have been received 2 Working Days after the time of posting

IN WITNESS this Deed has been executed and delivered as a deed on the date of this Deed written above

Executed as a Deed by  
**ELIZABETH JOAN SMITH**  
in the presence of

*E J Smith*

*CA*

26a Broad Street  
Leominster  
Herefordshire  
HR6 8BS  
Solicitor

Executed as a Deed by  
**ANTHONY LACEY ASKEW**  
in the presence of

*Anthony Askew*

*Mr. E. Petrie*

ME, PETRIE

*20 Old Forge*

*Whitbourne WR6 5SB*

*WIDOW*

*James Stuart*

Executed as a Deed by  
**DUNCAN STUART**  
in the presence of

*Gillian Bennett*

GILLIAN BENNETT  
47 CROFTON ROAD  
LONDON SE5 8LY

RETIRED CIVIL SERVANT