

# BUYING A DEVELOPMENT SITE – WHAT'S THE DEAL?

by Tim Hart

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The completion of a new housing development marks the culmination of a complex process in which a host of people with different roles will have been involved. Architects, engineers, building contractors, bankers, lawyers, States officials, all will have played their distinctive and necessary roles. However, virtually all developments start with a deal struck between two parties, the landowner and the developer. Every deal is different, depending on the property and parties concerned, but there are a number of principal ways in which the contractual arrangements are structured.

First, the transaction may proceed straight to completion. There may be an existing planning permission in place for the site or the purchaser may otherwise be confident of being able to develop as it wishes. This, of course, is the simplest form of transaction and the one which is likely to be most favoured by vendors, with the prospect of realising the value of the site in a short timescale following the purchaser's usual due diligence process.

Secondly, the parties may enter into an unconditional agreement but with a deferred completion date. This may be appropriate if the vendor cannot provide immediate vacant possession, for example if at the time the sale is agreed the property comprises a hotel which is to remain open for a final season.

The third possibility is a conditional purchase agreement. Typically in such a case the parties' agreement to complete the sale and purchase of the property will be subject to planning permission being obtained by the purchaser within a stipulated timescale. A number of issues will arise for consideration and inclusion as appropriate in the agreement, including:

- **The definition of planning permission.** In the context of a residential development, a common approach is to define the planning condition which is to be the trigger for completion by reference to a minimum number of dwellings of a minimum size.
- **The possibility of a third party appeal.** In order to ensure that the purchaser does not become bound to complete the purchase only to find that its planning permission is set aside on a third party appeal, the planning condition should be expressed in terms of a planning permission which is not susceptible to third party appeal. In other words, either the period for third parties to appeal has passed without any appeal having been brought or an appeal has been brought but the planning permission has survived the appeal.
- **Conditions other than planning permission.** These will depend upon the particular circumstances of the transaction. An example would be the rectification of a boundary irregularity by the vendor passing contract with the relevant neighbour.
- **Target and backstop dates.** The agreement should provide a target date for discharging the conditions and also a backstop date; if the conditions to completion have not been discharged by the backstop date, the agreement will fall away, leaving the vendor free to explore other options for the property. It may be appropriate to provide for the backstop date to be extended if at the stipulated date there is a planning permission in place but it is subject to a pending appeal.
- **Liquidated damages.** In Jersey law a party cannot be compelled to pass contract for the conveyance of immovable property. It is therefore necessary and usual to include provision for substantial liquidated damages to be payable by a party if it fails to complete the transaction once all conditions have been discharged.
- **Deposit arrangements.** If a deposit is payable by the purchaser, it is typically held by the vendor's lawyers as stakeholder on the basis that it is (a) set off against the price if the transaction completes, (b) paid to the vendor in part satisfaction of the liquidated damages if the purchaser fails to complete and (c) returned to the purchaser if the vendor fails to complete.

Fourthly, the transaction can be structured by the use of an option agreement. Option agreements are in many ways similar to conditional purchase agreements but the crucial difference is that parties are only bound to complete if the purchaser exercises its option in a stipulated timescale. Rather than paying a deposit, the purchaser pays an option fee as the price for this flexibility. The option fee is offset against the price if transaction completes but otherwise is retained by the vendor.

As well as the basic contractual shape of the transaction, there are other factors that will influence the form and content of the transaction documents. For example, the deal may be structured as the sale and purchase of a holding company rather than of the underlying freehold property. There are also various possibilities in relation to the payment arrangements – instead of the 'vanilla' option of a fixed price payable at completion, there may be, for example, a base price plus additional amounts (known as 'overage') dependent on factors such as the amount of accommodation permitted by the planning permission or the sale value of the completed units.

Whatever the terms of the transaction, the important thing is for the transaction documentation to be clear and workable, so that the vendor and the purchaser each know what they need to do in order to bring the deal to fruition and enable the construction of the development to begin.

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