



Landowners concerned about future developments when selling land have various options

## Restrictive covenants vs overage (aka clawback)

If you are selling part of your garden or adjoining field and are concerned that the buyer could seek planning permission to build on it, there are various options for you to seek to control future use of that land - including restricted covenants and overage.

But what is the difference between the two, and does it matter?

### **Restrictive Covenants (RCs):**

In essence, a promise made in a deed by the person acquiring the land not to do something e.g. not to build on the land. Usually a RC has no time limit. Conditions have to be met to be enforceable:

- a. There must be a legal estate in land which has the burden of the covenant.

- b. The seller must have a legal estate in land which benefits from the covenant - and the benefit must be actual.

So, it is unlikely to be sufficient for a seller owning two parcels of land at opposite ends of a village to sell one parcel and try to impose a RC not to build on it for the benefit of land at the other end of the village i.e. unlikely to be a genuine benefit.

A RC gives the owner of the benefitting land an absolute veto over whether or not they wish to agree to future development. There is nothing in principle to prevent the owner of the burdened land coming to the owner of the benefitting land and asking for the RC to be removed, although there is usually a price to be paid to remove the RC.

If the benefitting land has been sub-divided into separate ownerships after the RC was created, the owner of the burdened land may have to negotiate with several different owners - time consuming, frustrating and probably expensive.

# Welcome



Andrew Holden

## In the latest edition of Rural Law we have some staff announcements to make.

First of all, congratulations to Melissa Taylor who is now on maternity leave. While Melissa is away we have details of your new contacts for day-to-day matters.

We'd also like to welcome Lorna Kelly to the team, and we give her the chance to introduce herself in our regular 'Meet the Team' feature.

Meanwhile, we have devoted a feature to the difference between restrictive covenants and overage. This topic is an important one for landowners looking to sell some land, but are concerned that the buyer could seek planning permission to build on it.

We have devoted space to this topic because it is one we are approached about regularly by clients, and I hope this can offer reassurance that with the right advice it is possible to reduce risk.

We also meet one of our region's rural success stories, Fylde Fresh and Fabulous, and find out how it has become one of the nation's top potato growers and processors.

Do let us know what you think about these articles – any feedback is welcomed.

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Adjoining land can be protected following a sale using a number of legal options

### Overage (or clawback):

Generally, obtaining planning permission to develop land from, say, agricultural use to residential development will increase land value dramatically. Overage is an agreement between seller and buyer that, in the event the buyer obtains planning permission within a given period (overage period) the seller will be entitled to a share of the increase in value from the grant of planning permission.

There are four main elements to consider (all subjects for negotiation):

- a. What change in use will trigger the obligation for overage payment? E.g. from agricultural land to equine use? Or solar farm? Most alternatives will require planning permission, so the grant of planning permission within the overage period will usually trigger the liability to pay overage.
- b. When does the payment become due? The grant of planning permission, although it alters land value, does not of itself, generate cash. Usually the sale of the land with the benefit of planning permission, or the implementation of the planning permission, will be the event

which obliges the buyer to make the payment.

- c. How long should the overage period last? Varies widely - I have seen 80 years and 50 years proposed, although 25 or 15 years are more commonly accepted.
- d. What percentage of the uplift in value should the seller be entitled to? Again, varies – 50 per cent is common, as is 25 per cent. It is really a matter of negotiation.

Other questions need to be agreed at the start e.g:

- What is the agreed basis for valuing the land before planning obtained and how is it to be determined?
- Should the costs of obtaining planning permission be added to the base value before the uplift is calculated?

### Conclusion

Subject to certain conditions being met (including that the provision is recorded at the Land Registry), both RCs and overage bind and benefit successors in title to the original buyer and seller respectively. A RC is simpler to

create, not least because it is usually imposed by the seller and there is often little scope for negotiation, also because a RC is simply a prohibition on doing something - often a single clause in a transfer is all that is required.

In contrast, an overage agreement is more complex and consequently more expensive to draft. The seller's solicitor will be mindful that the buyer is often not the person who will carry out any development. This is commonly passed to a developer who will have every incentive to find ways of getting out of the obligations contained in the overage clause.

It is possible to mix RCs and overage on the land being sold e.g. a RC preventing building on the land immediately adjoining the seller's retained land, with overage over the whole site.

Whichever is adopted, provisions in documentation must be carefully drafted. If not done correctly or not registered appropriately, the seller risks losing the benefit – which could be costly.

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# Business 'fresh and fabulous'

With 1,000 acres of farmland around the Fylde Coast, chances are you've eaten a potato or chip grown and supplied by Fylde Fresh and Fabulous.

In just over 10 years, the business has grown from nothing into one of the UK's leading peeled potato and chip suppliers – supplying chip shops and supermarkets with its well-known 'Triple F' brand of chips.

Led by local farmer Colin Bradley and former banking executive David Linton, the business was founded in 2005 with the opening of a £1.25million peeling factory

at Back Lane near Weeton, and began with a modest production of 10 tons in the first week.

Sales of potatoes and chips quickly grew, with the business finding its USP – a deep understanding of the market and its customers, and being able to look at the whole supply chain.

Colin explained: "We are very proud of our understanding of not

just our direct customers, but their customers too. Our customers' customers.

"Because we take time to understand this requirement, one step removed from how many other suppliers operate, we are able to quickly respond and supply what the market is demanding.

"A lot of effort is spent traditionally on the production side of things, and who is buying the product – and rightly so. However, we also take time to look at it from the other end too – making sure you're an integrated part of the supply chain and one your customers can rely on to deliver."

Growth followed, with an increase in sales and customers coming on board from across the country. A recent phase of development within the business has seen the team invest in an on-site bio-gas plant facility which produces gas from waste potato peelings, converting it to electricity for the factory and the local community.

Now boasting a staff of 50 people within the Fylde Fresh and Fabulous business including

agency and full-time staff, Colin is also at the head of his own farming business which also employs five staff and grows potatoes, cereals and forage crops.

The business is always looking ahead to the next opportunity. Colin said: "It's all about surrounding yourself with the best possible team.

"If you can actually position yourself out of a job and have other people doing it that's a good way to be. You've got to have the next generation and next people in place, so if you're away from the business for any reason you've got the best people there.

"Growth has been a natural result for the business. There are certainly a lot of opportunities out there for expansion.

"As the business has developed over the years, the skillsets we have needed have also grown. We've always been quick to bring good people in to help manage that growth."

[www.fyldefreshandfabulous.com](http://www.fyldefreshandfabulous.com)



Fylde Fresh and Fabulous: leading potato grower

## Showtime

The Naphthens Rural team will be attending the following events:

**Chipping Show - August 26**

**Westmorland Show - September 14**

We are also putting the finishing touches to a number of seminars giving tips on business protection – planned for late 2017 and early 2018. These will take place in Carlisle and Kendal and we will be confirming the date and location closer to the time.

# Meet the team: Lorna Kelly

## Legal assistant

I have recently joined Napthens as a legal assistant in the rural department, providing support to Andrew Holden and the rural team. This includes secretarial and general administrative support as well as organising events and assisting with administration on our day to day work with the NFU.

In addition to general administration I am a central point of contact for our clients – an aspect of my new job that I really enjoy.

I am based in Napthens' East Lancashire office in Blackburn,

although I support the rural team operating across all our office locations in Lancashire and Cumbria.

I joined Napthens in July, having graduated from the University of Manchester in 2013 with a first class honours degree in law, before taking some time out to have my children.

Although I do not come from a farming background, I enjoy the countryside having attended school in the Lake District and spending time horse riding. In my

free time, I enjoy spending time with my five children, running, and I am half way through a part time Masters Degree in International Law and Security.

I will also be the NFU administrator for the Legal Assistance Scheme portal. This will involve updating the NFU group secretaries and also the legal advisors at Stoneleigh and working closely with all our NFU group offices and their members.

I am excited about my new role and to learn more about the legal

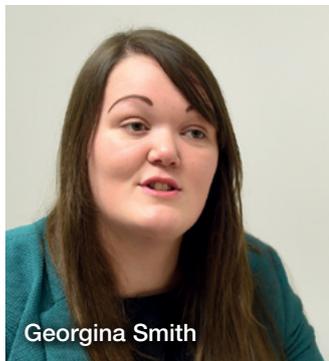
issues affecting the rural sector and I look forward to getting to know our clients over the coming weeks and months.



Lorna Kelly

# Announcing maternity cover

As most of you will know, associate solicitor Melissa Taylor, our Rural team specialist in Wills and estate planning, is currently on maternity leave.



Georgina Smith

Whilst Melissa is away, any advice required on making or reviewing wills, inheritance tax planning and general succession

planning issues, will be covered by colleagues from our Wills and Estate Planning department.

Solicitor Georgina Smith, based in our Kendal office, will cover Cumbria and North Lancs, whilst East Lancashire-based solicitor Laura Jackson, is looking after our clients across the rest of Lancashire and the region. Both specialists in estate planning, our Rural team works closely with them day-to-day and they have a real understanding of our rural and farming clients.

If you have any questions or would like to arrange a meeting to discuss estate planning, please direct your enquiries to me in the first instance, and I will arrange for Georgina or Laura to contact you.

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**Andrew.Holden@napthens.co.uk**  
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Finally, we all wish Melissa well and look forward to seeing her back with the team in due course. In the meantime rest assured you are in very capable hands with Georgina and Laura.



Laura Jackson

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