



THE HIGHLANDS SMALL COMMUNITIES HOUSING TRUST

**EMBO WOODLAND CROFTS INITIATIVE
HOUSING OPTIONS APPRAISAL STUDY
FINAL REPORT – 31st March 2010**



<u>Contents</u>	
1. Introduction	Page 3
2. Project Team	4
3. Approach	5
4. Options	8
5. Appraisal Criteria	10
6. Legal Opinion	12
7. Scoring	33
8. Conclusions	38

1. INTRODUCTION

- 1.1. The Embo Trust (Urras Euraboil) is pursuing a woodland croft initiative on land at the Fourpenny plantation by Embo that it plans to buy from the Forestry Commission Scotland (FCS) under the terms of the National Forest Land Scheme. The initiative is intended to provide local benefits to the local community in terms of sustainable economic development based on the woodland resource and the provision of affordable housing opportunities.
- 1.2. The Highlands Small Communities Housing Trust (HSCHT) was appointed by Urras Euraboil to undertake an options appraisal study specifically examining a number of affordable housing options in some detail. The Trust was successful in obtaining funding from the Highland Housing Alliance Charitable Trust to support the development of this innovative community ownership project.
- 1.3. Urras Euraboil was especially keen to investigate the legal, financial and procurement implications involved in options that could effectively link the provision of affordable housing for crofters to their crofting tenancy and in such ways as to give it long-term coordinated control over access to and management of both the crofting tenancy and any related affordable housing.

2. PROJECT TEAM

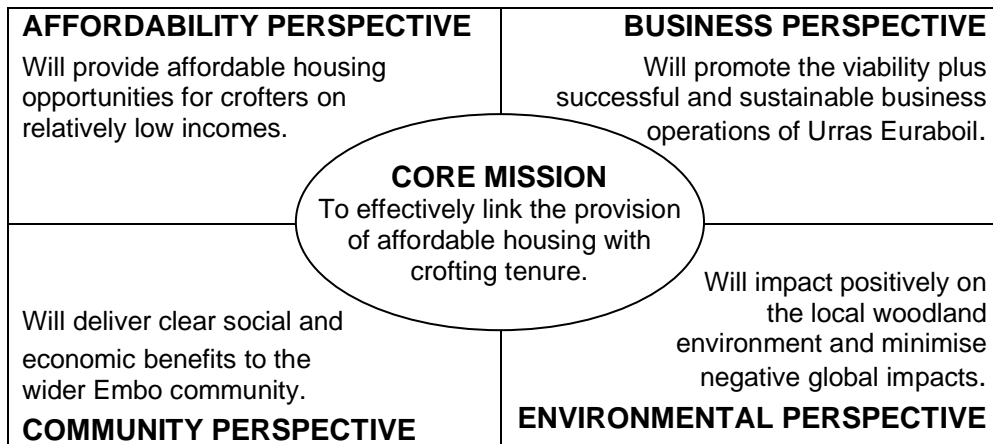
- 2.1. The Trust has over a decade of experience of working with local community groups across the Highlands in seeking affordable housing solutions. The lead officer on the project was the Trust's CEO, Tom Hainey, who has particular experience of undertaking innovative community led options appraisals on a range of housing related assignments. Tom was supported by Project Implementation Manager, Ronnie MacRae.
- 2.2. Specialist legal opinion was been provided by the Trust's principal legal advisor, Andrew Murchison of Murchison Law, Inverness. Andrew has considerable experience of crofting tenure and a particular interest in its relationship to the provision of affordable housing.
- 2.3. The project was overseen on behalf of Urras Euraboil by Catriona Grigg and Jim MacGillivray with additional input and advice also provided by Jamie MacIntyre of Highlands and Islands Enterprise's Community Land Unit (currently on secondment from the Forestry Commission Scotland).

3. APPROACH

- 3.1. The Trust has adopted a “modified balanced scorecard method” of options appraisal. The balanced scorecard methodology is a well-established business approach to performance management, originally a product of the Harvard Business School.
- 3.2. The Trust’s application of key aspects of this approach focuses on the need to consider the “pros and cons” of selected options by comparing their merits across a range of key objectives and desired benefits (the appraisal criteria).
- 3.3. In summary, the project proceeded as follows:
 - i. Agreeing the core mission that would drive the main project and which any options under consideration will be expected to deliver.
 - ii. Agreeing the various perspectives from which the core mission and options should be judged.
 - iii. Selecting specific options for consideration as part of the detailed appraisal process.
 - iv. Defining the specific appraisal criteria to be used in assessing the relative benefits of each defined options.
 - v. Weighting each of the specified appraisal criteria by level of importance attached by the client group.
 - vi. Robust appraising of each defined option, including detailed legal opinion.
 - vii. Completing a scoring exercise comparing each defined option’s potential against the agreed weighted appraisal criteria.

- viii. Reaching conclusions and make recommendations.
- 3.4. The foundation of the Trust's approach to options appraisal is a rational consideration of shared goals and objectives and being clear about the criteria against which the various options will be assessed.
- 3.5. This approach required Urras Euraboil to agree "Core Mission" around which four "Strategic Objectives" could be arranged. The original Balanced Scorecard approach adopts the following four business perspectives:
- i. Financial
 - ii. Customer
 - iii. Internal process
 - iv. Learning & Growth
- 3.6. In a business environment they are used to ensure that no one perspective unduly dominates i.e. a business may focus too much on the financial bottom line and, by neglecting the need to think about the customer's needs or to modernise its internal processes, the long term prosperity of the business may be put in jeopardy.
- 3.7. The Trust approach to options appraisal adopts a similar philosophy i.e. if options are only considered against financial criteria then this may arrive at one set of conclusions whereas, extending that consideration to other criteria such as community benefit, may significantly change those conclusions.
- 3.8. In this case, Urras Euraboil agreed to adopt the following core mission, business perspectives and specific objectives. The table illustrates how the traditional balanced scorecard

categories have been replaced by ones that are more specifically relevant to this assignment:



3.9. Their adoption was intended to avoid a skewed evaluation of the options under consideration. For an option to emerge from the appraisal process as a preferred option therefore it would have to deliver clear benefits, and by corollary avoid risks, for each of the four perspectives as follows:

- i. Affordability – to crofters
- ii. Community –benefits to the wider community
- iii. Business – impact on viability and sustainability
- iv. Environment – local and global impacts

3.10. This balanced scorecard approach should ensure that the assessment of the relative merits of the options under consideration, and the conclusions reached in the report, are not skewed in anyway.

4. OPTIONS

4.1. Six options were selected for consideration. They were:

1. Traditional individual crofter self-build

Crofter builds home on croft land. Home therefore becomes part of the croft tenancy and crofter entitled to compensation for improvements, including the house on tenancy end.

2. Traditional croft house built for the crofter by Urras Euraboil

Urras Euraboil provide house on croft land to be let as an integral part of the croft tenancy. Total rent would have to reflect the provision of accommodation as part of tenancy.

3. "Off-croft" RHOG self build with Rural Housing Burden attached

Crofter builds home on a plot of land that is clearly distinct from the main croft tenancy. That plot can be physically conjoined with, surrounded by or separate from the croft land. The crofter would be able to access normal lending and subsidy streams open to other self builders.

4. "Off-croft" rented accommodation.

Similar to option 3 but in this case the house would be provided by a third party landlord.

5. Co-operative building for rent on or "off croft"

Group of crofters work together as a legal entity to provide rented housing accommodation for its constituent

members. Crofters will rent from the legal entity. Can be on croft land or off-croft.

6. Shared equity sale with Rural Housing Burden attached

Similar to option 3 but, rather than using RHOG, Urras Euraboil can retain a stake in the equity of any house or plot sold by it to one of its crofters. HSCHT could apply the Rural Housing Burden on behalf of Urras Euraboil.

- 4.2. It should be noted that, for all options, Urras Euraboil made it clear that the occupancy of houses should be legally inked to the croft tenancies thus ensuring that it was in a position to integrate its control over access management of both elements in an effective manner.
- 4.3. This stipulation guided the selection of the six options and the instructions given to the Trust's legal advisors in forming their opinions.
- 4.4. It should also be noted that the term "off-croft" has been designed to reflect the legal relationship between the house and the crofting tenancy. It does not necessarily have to be physically remote from the croft.

5. APPRAISAL CRITERIA

- 5.1. With the core mission, strategic objectives and options for consideration decided, the next stage was to specify the appraisal criteria to be adopted, mirroring those objectives.
- 5.2. For each of the four chosen perspectives a series of specific appraisal criteria were agreed against which all six options were to be assessed for compliance.
- 5.3. It was then agreed that the relative level of importance attached to each of the specified appraisal criteria, the weightings, should be determined by the Urras Euraboil members who were overseeing the project using the following scale:
1. Not Important.
 2. Not Very Important.
 3. Quite Important.
 4. Important.
 5. Very Important.
- 5.4. The following table sets out the appraisal criteria that were adopted and the weightings applied to each of them using the scale set out above:

A AFFORDABILITY PERSPECTIVE		
Obj.	Will provide affordable housing opportunities for low income crofters.	Weight
1	By allowing access to adequate sources of public subsidy towards the cost of provision.	4
2	By providing opportunities for crofters to invest "sweat equity" into the provision of affordable homes.	5

3	By satisfying the eligibility criteria of private finance providers.	3
B	BUSINESS PERSPECTIVE	
Obj.	Will promote the viability and successful and sustainable business operations of Urras Euraboil.	
1	By establishing clear legal controls over access to and conduct of croft tenancy and housing occupation.	5
2	By creating sustainable income streams for UE.	1
3	By minimising risk to the financial viability of UE.	4
C	COMMUNITY PERSPECTIVE	
Obj.	Will deliver clear economic and social benefits to the wider Embo community.	
1	By enabling the Trust to control and manage access to croft tenancies and associated affordable housing in perpetuity.	5
2	By creating opportunities for local young families to live and work in their home community.	4
3	By generating income streams for local businesses	3
D	ENVIRONMENTAL PERSPECTIVE	
Obj.	Will impact positively on the local woodland environment with minimal negative impacts on the global environment.	
1	By minimising private vehicle miles.	3
2	By controlling house designs, specifications and the procurement of building materials.	5
3	By minimising infrastructure requirements.	4

6. LEGAL OPINION

- 6.1. With the appraisal criteria and six options clearly defined, Andrew Murchison of Murchison Law was asked to consider how the options might present different methods and mechanisms of holding property in relation to the proposed creation of up to twelve new crofts on former Forestry Commission land at Embo, Dornoch.
- 6.2. The six specific options were to be considered and assessed against certain set criteria. Those criteria are as follows:
- i. Best access to funding (both public and private);
 - ii. The occupancy of the house must be linked in perpetuity to the tenancy of the croft;
 - iii. The tenancy of the croft must be under the control of the landlord, Urras Euraboil
- 6.3. Murchison Law's opinions are presented then as follows:

Option 1 - Traditional individual croft or self build.

- 6.4. Explanation: This model would involve the creation of a croft, with a tenancy of that croft being thereafter given to an individual (the tenant). The croft would be a "bare land" croft. The tenant would have the right to build a croft house on his croft.
- 6.5. In relation to funding, we understand that this model would have the advantage of being eligible for crofting grant funding to a limited extent. The scheme available is the Croft House

Grant Scheme (CHGS). The area in which the build would take place would appear to be categorised as “low priority” and thus only attract a new house grant of £11,500.

- 6.6. Traditionally, to allow for funding a purchase and build from private finance, what was required was that a house site be de-crofted with thereafter a right to buy exercised to purchase the house/house site from the landlord. This largely severed the subsequent house/house site from the croft. If that were to happen here then if no other type of control were used the house/house site would cease to be under the control of the landlord, Urras Euraboil.
- 6.7. The important point is that the traditional position in relation to raising finance for the build of a croft house required decrofting and purchase of the croft house site by the purchaser. That is because a private lender would (generally) not accept land still under crofting tenure as good security for a bank loan.
- 6.8. Accordingly, and in summary, in relation to the **first of our stated criteria**, there is a limited public funding, but without the potential likelihood of availability of private funding from mainstream commercial lenders.
- 6.9. Turning to the **second and third criteria**, consideration needs also to be given to the exercise of the “crofter’s right to buy”. This is a complicated area. In brief sections 12-19 of the Crofters (Scotland) Act 1993 (as amended) provide crofters with a right to buy. There are in reality two separate “rights to buy”.
- 6.10. There is firstly, a right to buy in respect of the croft house (or the site thereof). This is a strong right (there is no statutory defence to it at all). There is secondly, a right to buy croft

land other than the statutory house site. Such other croft land is open to two statutory defences (both of which are fairly difficult for a landlord to establish). One is where the Scottish Land Court is satisfied that "in all of the landlord's circumstances and having regard to the amount of crofting land owned by him, granting the purchase order will cause him a substantial degree of hardship". The second ground is that the making of the purchase order would be "substantially detrimental to the interests of sound management of the estate".

- 6.11. At first examination, there would appear to be an attraction to employing these defences to "limit" the crofter's right to buy. However as noted the crofters right to buy a statutory house site is not a right which can be defeated by these defences. Accordingly the conventional defences to prevent the right to buy would not provide any real degree of control here for the landlord (where one of the primary objectives is to secure continued control of the house site (and house) once built).
- 6.12. That then raises the issue of whether there would be the ability to contract out of the right to buy.
- 6.13. The position in that regard has been altered as a result of the Crofting Reform Etc. Act 2007. This has now made express provision by amending the terms of Section 5 (3) of the Crofters (Scotland) Act 1993. The effect of this is that in relation to certain sections of the 1993 there is provision that these section are capable of being contracted out of. As it is important to our discussion we have highlighted the wording of Section 5 (3) which now reads as follows:

"Section 5(3):

Any contract or agreement made by a crofter by virtue of which he is deprived of any right conferred on him by --

- (a) a provision of this Act not mentioned in paragraph (b) below, shall to that extent be void unless the contract or agreement is approved by the Land Court;
- (b) any of sections 8, 12 to 19, 21 and 37 of this Act, may be intimated to the Commission by a party to the agreement (the intimation being in such form as the Commission may specify and there being provided to the Commission, along with the intimation, a copy of the contract or agreement)."¹

6.14. The particular sections where that ability to vary rights by contract is expressly permitted are now sections 8 (Assignment), 12 – 19 (Right to Buy) and 21 and 37.

6.15. It appears that simply by virtue of the agreement being entered into and being appropriately intimated to the Crofters Commission such an agreement (to the extent it relates to the rights in these sections) will be enforceable by the landlord.

6.16. This then becomes a realistic mechanism for the landlord to exclude the right to buy subject to one further comment. That is that the provisions in the Crofters (Scotland) Act 1993 which deal with compensation to a tenant would also need to be considered.

6.17. Under Section 30, a crofter can on renouncing his croft tenancy (or on its termination) claim for improvements made on his croft by him during his tenancy. We are under this part of the paper considering a situation where a "bare land" croft is let to a tenant with the intention of that tenant then building his croft house on it.

6.18. The building of a house would amount to one such improvement. This could result in a tenant building on his croft (perhaps with assistance from his landlord or third parties) and on his tenancy coming to an end, the tenant could then obtain the "value" of his house back from the landlord by making a claim for the improvements which he

had made during the period of his tenancy. This might mean that the landlord effectively had to pay back for the “build costs” of the house at market value. Whether that was something which would be acceptable to the landlord would be to a certain extent dependent upon how much it had cost the tenant to erect the house in the first place. However, given that this project envisages some assistance being given to the tenant for the original build, a result where the landlord had to pay out for the full value of the build of the property to an outgoing tenant could potentially be very unsatisfactory.

6.19. Section 30 of the Crofters (Scotland) Act 1993 (which deals with compensation rights) is not one of the sections of the Act which can be contracted out of by agreement. That is because it is not a section which is specifically mentioned in Section 5(3) (b) as a section that can be contracted out of (presumably on the basis that such rights for compensation were the sorts of rights which the legislature, as a matter of policy, did not wish to be capable of being easily taken away from a crofter). However, that does still seem to appear to leave available section 5.3(a) which allows an application to be made to the Land Court for approval of an agreement to deprive of rights under the Act found in other sections.

6.20. To put it another way, what could happen would be that an agreement would be entered into with the proposed crofter and the landlord to deal with Section 8 (assignation) and the rights under sections 12 – 19 (rights to buy). That agreement would also be entered into in regard to section 30 (compensation rights) but the agreement in regard to Section 30 (compensation rights) would only be enforceable to the extent that a prior approval of those terms was obtained from the Scottish Land Court.

- 6.21. That would clearly necessitate an application to the Scottish Land Court asking for approval to the contract (insofar as it dealt with the deprivation or modification of rights for compensation under section 30). The full agreement would then need to be registered with the Crofters Commission.
- 6.22. It does appear that if all of these steps were taken, and the appropriate consent from the Scottish Land Court obtained, it would be competent to restrict/modify a number of the crofting tenant's statutory rights in such a way as (a) secured the right of the landlord to retain ownership of the croft in perpetuity and (b) preserved the "value" of the buildings for the benefit of some-one living on the croft. As the house would be built on the croft, that would allow the second and third stated criteria to be achieved under this model.
- 6.23. In relation to the question of a Land Court application it should be explained that an application for consent to modify the compensation rights under Section 30 should not be particularly "contentious". It is likely that the Scottish Land Court would wish to carefully examine the underlying principle in regard to consenting to deprivation or amendment of the Crofters "standard rights". However once satisfied that a necessary and worthwhile objective was being fairly achieved as a result, it would be expected that the court would consent to the proposed alteration of these rights.
- 6.24. Furthermore once the court had looked at the issue "in principle" in regard to one holding, any subsequent applications for consent would be likely to go through the Court easily as almost an "administrative" procedure. As a result whilst the requirement to obtain Land Court consent is perhaps regrettable and can be seen as an additional hurdle,

it should not be considered as one which should in practice prove too difficult to deal with.

Option 2 - Traditional croft house built for the crofter by Urras Euraboil

- 6.25. Explanation: Under this model, what is being considered is exactly the same under model **(1) Traditional individual croft or self build** with the one difference that on this occasion the landlord would be responsible for building the house on the croft.
- 6.26. In relation to **first of our stated criteria**, the position with funding is that the Croft House Grant Scheme (CHGS) would not be available in these circumstances. However, it may be that the landlord would be eligible for other grant revenue of the build costs. We are unaware of other sources of funding which might be available to the landlord in these circumstances.
- 6.27. In relation to private funding, prior to the land being brought under crofting tenure, we consider that the land would be suitable for security for mainstream lenders. The difficulty that arises with the future use of the land is that it would be brought under crofting tenure.
- 6.28. As already noted, most mainstream lenders will consider this to be (at best) an unconventional security and we would be surprised if they would lend once they knew what the intended purpose for the land was. Tenanted croft land is not normally viewed as good security for the landlord's indebtedness.
- 6.29. We are however considering the creation of crofts to which no right to buy would attach. Previously any mainstream lender would not have accepted tenanted croft land as security for the landlord precisely because it was subjected to a right at a fairly nominal price. It is possible that if a mainstream lender

were convinced that the right to buy had been successfully excluded, that would change their perspective on whether the land subject to a crofting tenancy was a good security.

- 6.30. One way that it might be possible to consider this further is to compare the situation with land held in tenancy by an agricultural tenant under a "1991 Act" tenancy. Like a crofting tenant such a tenant has "security of tenure" by which it is meant that their landlord's ability to terminate the tenancy and remove the tenant is very restricted and highly regulated.
- 6.31. However, unlike the traditional crofting tenant, the "1991 Act" agricultural tenant does not have a similar right to buy at a discounted price. The agricultural tenant can register a right to buy at full market value (albeit discounted to reflect the existence of his tenancy).
- 6.32. The question which needs to be considered is really a valuation issue. What are such farms/crofts worth? We are aware that valuations for farms which are tenanted under a "1991 Act" tenancy vary widely with the existence of the tenancy sometimes being used to justify up to a 75% reduction in value (usually by the tenant's advisors) and at little as 20% (by the landlord's advisors).
- 6.33. In conclusion we consider that it is possible that a mainstream lender would be able to obtain a security from the landlord but the value of the lending so secured would be unlikely to be a significant proportion of the open market value.
- 6.34. It should be noted that in the current economic climate any "unconventional security" for lending is unlikely to be attractive to a mainstream lender.
- 6.35. Lastly on this point, we would again remind that the giving of a security always results in a potential loss of control. To put

it another way, if the loan terms are not met, the bank/lender may call up the security and sell the asset. That is the purpose of a security. Such an outcome would be unsatisfactory having regard to the third of our stated criteria.

- 6.36. In relation to **stated criteria two and three**, similar considerations apply to that identified under the heading **(1) [Traditional individual croft or self build]** in regard to retaining ownership of the land and preventing the onward assignation of the tenancy/exercise of the right to buy without the control of the landlord.
- 6.37. The only possible difference is that as the landlord had built the property, the issues with regard to a claim for improvements for the house (see section 30 of the Crofters (Scotland) Act 1993) are removed.
- 6.38. It may however be prudent to still include a provision dealing with section 30 improvements to exclude the possibility of any other sort of claim for improvements in respect of the house at termination of tenancy. Accordingly, under this heading also, provided the appropriate steps were taken, these stated criteria appear capable of being fulfilled.

Option 3 - Off croft RHOG self-build with Rural Housing Burden attached

- 6.39. Explanation: Under this proposal what would happen is that an area of ground which is not under crofting tenure would be used for the house plots. Accordingly, each proposed tenant/purchaser would receive a croft tenancy together with a house plot (which plot would not be part of the croft). The plot purchaser would then build his own house on the plot. As noted, the plot itself would not be under crofting tenure.

- 6.40. If we look firstly at the plot and the proposed house build, in terms of funding, this model should allow access to funding on both a public and private basis. In relation to the public funding each plot may be eligible for a Rural Housing Ownership Grant.
- 6.41. For the private financing, each plot would be available as security for mainstream private bank lending. We again note in passing that the current economic climate has restricted significantly the availability of loan funding for the purchase of land and building of property.
- 6.42. We have also noted already the issues that arise whenever a security is given to a commercial lender and the implications that has for Urras Euraboil retaining ownership (if for example a loan is defaulted on and the lender repossesses and attempts to sell on the open market).
- 6.43. Turning then to the **second and third of our stated criteria**, we can note firstly that with regard to the area under croft tenancy the mechanisms that we looked at under **(1) Traditional individual croft or self build**, for regulating the crofters statutory rights can also be used here. The conclusion would be that the third of our stated criteria can be achieved in that regard.
- 6.44. Where matters are more complicated, is in relation to the second of our stated criteria. What that requires is that the occupation of the house is linked in perpetuity to the tenancy of the croft. However as matters stand the croft tenancy has been created as a distinct legal relationship from the ownership of the plot (and the house built on it). In effect, unless something is done to link these two relationships together, the second of our stated criteria will not be met in any way at all.

- 6.45. Consideration can be given to carrying out this “linking” exercise from “both ends”. To put it another way, what should be considered is (i) including within the tenancy agreement for the croft a provision requiring occupation of the house; and (ii) to include with the house title, conditions relating the croft.
- 6.46. Regarding the first of these options, there is no reason in principle why we could not seek to impose a suitable obligation on the crofting tenant. What we could require (for example) would be an obligation on the tenant to renounce the croft tenancy back in favour of the landlord, in the event that for a period of in excess of three months he did not have his principal or main residence in the “house” which he had been allocated.
- 6.47. Such an agreement (as it does not fall within the scope of Section 5 (3) (b)) would require to be the subject of a specific Scottish Land Court consent under section 5(3) (a), as we have already considered in an earlier part of this paper.
- 6.48. It should be noted in passing that the current Crofting Reform Bill with the Scottish Parliament (see section 20 of the draft bill) contains a requirement for a crofter to reside on or within 16 kilometres from his croft.
- 6.49. Turning, then to the second of these options, we need to consider what title conditions would be appropriate to include in the title to the plot. Whilst it is possible to create an obligation to reside in a house (and that is the natural first inclination), it is difficult, given the current law, to enforce such an obligation. That is mainly because the right to “terminate” (for lack of a better word) a right of ownership based on a breach of the title conditions has been abolished since 2001.

- 6.50. Accordingly, if Urras Euraboil were to try to enforce a title condition of that nature it would be difficult to know how they could ever do it. A court would be inevitably reluctant to issue an order under the civil law requiring some-one to “live in” a specific house.
- 6.51. What we would suggest instead would be a combination of a title condition and a separate contractual right.
- 6.52. Dealing with the title condition what we would recommend would be a pre-emption right. What this would mean would be that if the owner wishes to transfer the plot (and house) then he would have to offer it back to Urras Euraboil first.
- 6.53. If this right were created as a rural housing burden under section 43 of the Title Conditions (Scotland) Act 2003 then there would be a period of 42 days within which such an offer would have to be accepted.
- 6.54. For present purposes we will assume that the terms and conditions upon which the “buy back” would be made would be based on the Rural Housing Burden and “open market value” as we deal with the question of a reduced price mechanism in a later part in this paper.
- 6.55. A further advantage of the inclusion of a right of pre-emption as a title condition is that if a secured lender repossessed the property and required to sell the lender would still be required to offer the property back under the pre-emption.
- 6.56. If the right were created as a rural housing burden, the offer would need to be made to a designated rural housing body. So Urras Euraboil would require to obtain such designation themselves, or alternatively utilise the assistance of such a body to act on their behalf.

- 6.57. Such a pre-emption right ensures a large measure of control for the Urras Euraboil (subject to them actually having available the finance to exercise any buy back), whilst still permitting some private financing to be obtained for the build.
- 6.58. We also consider that a contractual right should be separately created. This would not need to be recorded against the title in order to be effective (although in passing we note that it could be by way of a deferred standard security which may make it more robust).
- 6.59. Such a separate agreement could (i) oblige the owner to occupy the house for so long as he remained tenant of the croft (ii) require him (separate from the pre-emption right) to transfer the land back to Urras Euraboil on certain terms in certain circumstances. For example, if the owner had not built his house within a period of eighteen months from the date he acquired title, he might be required to transfer ownership back.
- 6.60. Similarly, if he had not resided in the house as his sole or main residence for the pre-eding three months, there could be a requirement to transfer title back on certain conditions.
- 6.61. As there would in effect be two agreements (one dealing with the croft tenancy and one dealing with the house) the resulting documentation could be lengthy and cumbersome. However, in principle there does not appear to be any reason why it should not prove effective.
- 6.62. As noted already, the third of our stated criteria was whether the croft tenancy could remain under the control of the landlord, Urras Euraboil. Our conclusion on that, again as noted already, is that provided the appropriate tenancy agreement was first entered into, and the consent of the

Scottish Land Court sought, where appropriate, there is no reason why this objective could not be secured.

Option 4 - Off croft rented accommodation

- 6.63. Explanation: In this scenario, certain land will be kept outwith crofting tenure, and will be built on by Urras Euraboil so as to provide accommodation to be rented. Each of the croft tenants would also receive, in addition to their croft tenancy, a separate tenancy for a house.
- 6.64. In relation to the question of finance, as the land involved will not be under crofting tenure, there should be availability for private financing to be obtained from mainstream lenders. Presumably, such a project may also be eligible to apply for public funding under the Rural Homes for Rent scheme.
- 6.65. Concerning the occupancy condition, similar comments apply to this as would have been identified under heading **(3) [Off croft RHOG self-build]** above. That is to say one would wish to secure that obligation from “both ends” by having appropriate conditions in the croft tenancy agreement (which will necessitate an application to the Scottish Land Court for consent under Section 5(3) (a)).
- 6.66. Separately the lease agreement for the rented accommodation will require to be suitably drafted to allow for obligations allowing the “house tenancy” to be brought to an end if the croft tenancy comes to an end. This would not be straight-forward.
- 6.67. We are proceeding for the purposes of this paper on the basis that the type of tenancy would be under the private sector regime (i.e. that the landlords would not be a registered social landlord or otherwise subject to the laws regulating

public sector tenancies). As such the tenancy would be governed by the terms of the Housing (Scotland) Act 1988.

- 6.68. The difficulty that arises is how to make an obligation to remain tenant of the croft, to be one the breaching of which would justify the termination of the "house" tenancy. We consider that such a provision in the "house" tenancy agreement would be problematic to enforce due to the statutory rights of tenure in favour of a tenant under the terms of the 1988 Act.
- 6.69. In the circumstances we consider that the best that can be done would be to create a short assured tenancy (which would need to be of a minimum six month period). Such an arrangement would normally entitle the landlord to terminate the agreement on two months prior notice to the tenant at the end of the contractual period (or at the end of any subsequent six month period).
- 6.70. This leaves matters on a rather unsatisfactory basis for the tenant. However, we see no reason why the landlord should not undertake not to exercise their right to bring the tenancy to an end provided, and for so long as the tenant also remains tenant of the croft.
- 6.71. We would note in passing, that there remain some risks associated with this type of arrangement. If, as a result of inadequate documentation at the outset of the tenancy, an assured tenancy was inadvertently created for the house, there would, in our view, be no right to obtain repossession of the house due to the termination of the croft tenancy.
- 6.72. Separately, lets under the private housing regime are heavily regulated. They also include certain minimum standards for the house build (which can affect design) at outset and also

repairing obligations on the landlord, liability for which cannot be excluded by contract.

Option 5 - Co-operative building for rent on or off croft

6.73. Explanation: This option considers use on both croft land or off croft. It is difficult to comment in detail on this option without considering whether the land to be retained in the ownership of Urras Euraboil.

6.74. In the event that it was to be so retained and the land for the houses was not in crofting tenure, then the position is similar to that set out in heading **(4) [Off croft rented accommodation]**.

6.75. In the event that what is being considered here is in relation to land retained in Urras Euraboil ownership within crofting tenure, then the legal position is similar to that set out in heading **(2) [Traditional croft house built for the crofter by Urras Euraboil]**.

6.76. The primary issue under this heading appears to be in relation to the question of funding. What is usually considered in a “co-operative” model is that there is a build which is, in effect, done by both parties (or using both parties resources). Such a co-operative model may involve the possibility that ownership of the land itself is transferred into the name of the co-operative body.

6.77. We would note that the third of our stated criteria (that the croft tenancy must remain under the control of the landlord Urras Euraboil), is likely to preclude any co-operative where the land is transferred into the ownership of a new body.

6.78. If what is being considered is some form of “co-operative” in relation to the work in the actual building, then before any

detailed comment could be given more detail on the proposed scheme would be required. However, in brief, if the build was done “on croft” we would have thought that modification of the terms of the croft tenancy agreement to provide appropriately for compensation for the input of the individual into the house build would be possible in the same way as we have considered removing/modifying the right to compensation for improvements under earlier parts of this paper.

6.79. Similarly, if the build was done “off croft” it seems to us that agreement on a modified sale price under a right of pre-emption when the owner left/sold would be entirely competent and effective to ensure that each party received what was fair having regard to their respective input.

Option 6 - Shared equity sale with rural housing burden attached

6.80. Explanation: What is being considered here is in effect a variation of that was outlined in option **(3) Off croft RHOG self-build**. Our comments on the availability of financing as noted under that heading apply here also. The main difference is that the buy-back for the pre-emption right would be at a discounted level.

6.81. As noted already, under this model a significant amount of control is retained by Urras Euraboil for the house/house plot due to the existence of the pre-emption right. The important point about the right of pre-emption is that if exercised (and the funding requires to be available to do such a “buy back”), it achieves two objectives. Firstly, if the price at which the buy-back has been suitably reduced, it depresses the value at which a buy back can be achieved (thus hopefully ensuring affordability).

6.82. However just as important is the fact that it allows the party holding the pre-emption (if they go ahead and exercise that right) to secure that the property goes to someone who is in "housing need". In the current project, it importantly may be used to secure and control that the house/house plot does not end up being held by some-one who no longer wishes to be, or is, the tenant of a croft in the area.

Supplementary points to be considered:

6.83. There are a number of supplementary points which should be noted for the sake of completeness:

6.84. It is worth considering the fact that there are other rights to buy apart from the crofter's right to buy which need to be assessed. For instance there is the community right to buy and separately from that the crofting community right to buy, both of which would be open to members of the local community to seek to exercise.

6.85. Whilst there is a degree of control of these rights (because they require Scottish Government approval) their existence nonetheless needs to be recognised because one of the objectives here was to secure continued ownership of the land and houses in ownership of Urras Euraboil. Further information on these rights can be provided. However, the crofting community right to buy is probably more problematic because it can (subject to having obtained the appropriate registrations) be enforced "on demand".

6.86. The community right to buy, in general terms, is only pre-emptive (that is to say, if the land-owner is about to sell, then the community body can "pre-empt" that by requiring a sale to them instead). This would be highly unlikely to receive

approval as it could undermine the intentions of the land reform legislation.

- 6.87. The second point which should be made is whether the above options give full enough consideration to the use of a Standard Security. The Standard Security can be used as a mechanism in two separate ways.
- 6.88. We have considered in the paper above using it in the first of these ways (i.e. to secure certain obligations). However, it is also possible to use it as an alternative to, or along-side the rural housing pre-emption right to try to secure a form of "equity share" in the property.
- 6.89. It is quite a flexible mechanism albeit its applicable life span is restricted in the first instance to twenty years. Standard Securities are usually used by banks in order to secure loans that they have granted for the purchase or building of property on the land.
- 6.90. Ultimately the security holder (normally the bank) has the ability to "call up" the security and force a sale of the property if the loan is not repaid. As mentioned, it is possible to use this mechanism to secure actual obligations.
- 6.91. For example it may be possible to create a requirement on a particular party to reside in the home and in the event that they cease to so reside there (or occupy it as their main or principle residence) in those circumstances to offer the house back to Urras Euraboil at a set specified price (and on other specified terms). This obligation could then be secured by a Standard Security.
- 6.92. The effect of that is that if the obligation was not complied with then Urras Euraboil could also "call up" the security and force the sale of the property (and the effect of the pre-

emption written into the title would mean that the property would require to be offered back to for instance, The Highlands Small Communities' Housing Trust or such other body as may have been utilised as the designated rural housing body). Such a combination of rights can be used quite effectively.

6.93. Lastly, there is a mandatory scheme for landlord registration for rental of properties with the Local Authority which should, to the extent applicable, be complied with.

6.94. It should be noted again that the advice in the foregoing section has been provided by Murchison Law on the instruction of the Trust.

7. SCORING

7.1. Having considered all of the advice given in section 6 above and a more general review of the potential merits of each of the six options the Trust undertook a scoring exercise in which the following scale was applied in consideration of the extent to which each option met the defined criteria:

- 0 Completely fails to satisfy criteria
- 1 Substantially fails to satisfy criteria
- 2 Moderately fails to satisfy criteria
- 3 Moderately satisfies criteria
- 4 Largely satisfies criteria
- 5 Fully satisfies criteria

7.2. The scores were then added to a scoring matrix where they were adjusted in accordance with the weightings previously agreed by Urras Euraboil and described in section 5 above. That matrix is shown below and results in the following weighted scores.

1	Traditional individual crofter self-build	144
2	Traditional croft house built for the crofter	176
3	“Off-croft” RHOG self build	187
4	“Off-croft” rented accommodation.	173
5	Co-operative building for rent on or “off croft”	160

6	Shared equity sale with Rural Housing Burden attached	179
---	---	-----

- 7.3. From the table it is clear that the highest scoring option is 3, “off-croft” RHOG self-build, closely followed by 6, shared equity housing for sale with a Rural Housing Burden attached, and 2, a traditional croft house built by Urras Euraboil, then 4, “off croft” rented provision.
- 7.4. Someway behind those four options is 5, co-operative building for rent off-croft and finally 1, the traditional individual crofter self-build, comes in a very clear last position due to the low grant award in this area and difficulties it presents in obtaining private finance.
- 7.5. In some respects the relative scores reflect the Trust’s assessment of the deliverability and accessibility of each of the six options. This takes particular account of the current availability of the different forms of public subsidy for affordable housing provision and the current more restrictive attitude of lenders to the provision of private finance.
- 7.6. Similarly it is clear from the scoring matrix that options that offer rented housing solutions, while access to finance may be more difficult, open up the provision of affordable croft related housing to a wider potential market as access to housing benefits can help reduce actual housing costs well below those of any of the owner-occupied solutions.
- 7.7. There is little to separate most of the options in terms of environmental impact as Urras Euraboil can effectively exercise control over that either directly, where it assumes responsibility for the design and build, or indirectly, through the application of design briefs and the configuration of plots released for self-build options.

- 7.8. In terms of impact on the Urras Euraboil business the scores reflect an assessment of the potential risks and rewards of each option with rented options deemed to pose a more significant financial risk from factors such as arrears and ongoing maintenance liabilities. Similarly the unknown quantity of any future compensation for improvements to crofts where the crofters build their own homes is seen as a greater risk.
- 7.9. It must be made clear however that the results of this scoring exercise are a product of the judgement of the individuals representing Urras Euraboil, who set the weightings for each of the appraisal criteria, and of the Trust's project staff, who interpreted the legal advice and other factors to apply a score for each criteria for each of the options.
- 7.10. It is not an exact science but rather a tool to assist with decision making. Ultimately it will be for Urras Euraboil to determine which of the six options, if any, it considers appropriate to take forward.
- 7.11. The third highest scoring option is in many ways the most straightforward i.e. making direct provision of housing as part of the croft tenancy. But that too would require a significant up front investment by Urras Euraboil and, by raising the overall cost of renting a croft tenancy and denying crofters the same opportunity to benefit from capital growth on investment in even an equity share of home ownership, the potential market for crofters might be restricted.
- 7.12. That is also a weakness in the other "off-croft" rented options but they have the advantage of being potentially more accessible to a wider market of lower income crofters.

- 7.13. Similarly, while a co-operative approach has a number of clear benefits, its requirement for the input of significant sweat equity and the sometimes difficult dynamics of such co-operative working can potentially put off a significant proportion of the market place. A new co-operative entity would also find access to private finance more difficult to access than a more established body with a reliable credit and general business history.
- 7.14. The bottom line is that the traditional crofting approach to housing provision is the lowest scoring option and strongly points to the need for Urras Euraboil to seriously consider alternatives that are practical and affordable to it and future crofters at the Fourpenny plantation. As previously mentioned the reason for this is the lower level of croft grant available and also the difficulties it presents with obtaining private finance. It should be said however that there may a limited number of applicants who can make this scheme work based on their financial status or sweat equity they can add.
- 7.15. While the Trust is happy to recommend that Urras Euraboil pursue options 3 and 6 in particular it recognises that the choice of those two owner-occupied options may restrict access to the crofting opportunities to those that can afford some degree of home ownership.
- 7.16. For that reason the Trust recommends that Urras Euraboil gives serious consideration to a more flexible package of options including some "off-croft" rented accommodation. With the support of one or more partner organisations with a track record of provision in the Highlands and in obtaining relevant public and private finance there is no reason why Urras Euraboil could not achieve all of the affordable housing objectives for its innovative woodlands croft initiative.

7.17. In conclusion, there is no particular or overwhelming reasons for affordable housing provision to be a block on the overall woodland croft proposals being put forward by Urras Euraboil. Clearly the main challenge is for Urras Euraboil to make the business case for the overall crofting proposals and to indentify a big enough local market for what would be a genuinely 21st century crofting solution.

7.18. The Highland Small Communities Housing Trust is available to assist Urras Euraboil in any ways it can and on an on-going basis to pursue the affordable housing aspects of its ambitions and wishes it good luck with its pursuit of what is potentially a most valuable community initiative of tremendous national interest.

8. CONCLUSIONS

- 8.1. It is clear from the legal advice on the six options provided in this report that there are a variety of ways that Urras Euraboil can ensure that the fundamental condition, that the occupation of the house must be linked to the occupation and conduct of the crofting tenancy, is met for all options.
- 8.2. So it is ultimately for Urras Euraboil to consider which options are more deliverable in terms of its capacity as a business and its willingness to be flexible in achieving the delivery of a balanced set of outcomes through its efforts.
- 8.3. The conclusion of the weighted scoring exercise does show one option emerging at the top of the list. "Off-croft" provision of self build housing for owner-occupation with Rural Home Ownership Grant support offers a tried and tested model for provision in the Highlands.
- 8.4. The legal advice shows how there is no need to compromise on control over occupation of the croft with this model while, the self-build dimension ensures that it is the crofter and not Urras Euraboil that absorbs the bulk of the financial risk.
- 8.5. The second highest scoring option is similar in most respects to the self build RHOG option but would require Urras Euraboil to raise significantly higher amounts of private finance itself and seek less obviously available subsidy packages.