

Scottish Land Commission:  
Transparency of option agreements

Report by The Diffley Partnership

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# Executive Summary

## Background and information

This report presents an analysis of research conducted by Diffley Partnership on behalf of the Scottish Land Commission.

This report presents the findings from a research project carried out from January to March 2023 comprising three stages:

- Stage 1: A scoping exercise of existing information concerning options agreements to assess availability and accessibility
- Stage 2: A short stakeholder survey
- Stage 3: Qualitative interviews with stakeholders

The research aimed to help the Scottish Land Commission to understand how much or how little information is available on land optioned for housing development in Scotland.

Given the backdrop of this potential lack of information, the research sought to engage stakeholders to discuss the case for transparency versus commercial confidentiality and to discuss options for a public record of option agreements and conditional contracts on raw land. Raw land, sometimes referred to as undeveloped land, refers to land that has not been built upon and would typically not have access to utilities such as roads or electricity. It is land that does not have planning permission but is likely to be developed in the future.

Over the past 30 years, the dynamic between developers and planners has shifted towards a relationship in which development proposals are brought to the planners for scrutiny. This has changed the role of planners to be focussed on adjudicating the process rather than promoting development in practice. Although it could be argued that market forces promote innovation, it is also argued that this disconnect between developers and planners can result in inefficient use of land or the use of land in the interest of stakeholders rather than public benefit.<sup>1</sup>

At the time of the commissioning of this research, and during the stage one scoping exercise, there was strong interest in land use for the benefit of the public, as outlined in The Planning (Scotland)

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<sup>1</sup>[Delivering More Homes and Better Places - October 2020 FINAL reduced.pdf\(landcommission.gov.scot\)](#)

Act 20 19. This act aimed “to manage the use and development of land in the long-term public interest”.<sup>2</sup>

This Act contained a wide variety of reforms to the planning system, such as a five-year programme implementing digital planning, using data and technology to provide a more accessible, inclusive and efficient system.

During this research commission, in February 2023, the fourth National Planning Framework (NPF4) was adopted. This replaced the National Planning Framework 3 and Scottish Planning Policy. As the national special strategy for Scotland, NPF4 aims to support the planning and delivery of:<sup>3</sup>

- sustainable places, where we reduce emissions, restore and better connect biodiversity;
- liveable places, where we can all live better, healthier lives; and
- productive places, where we have a greener, fairer and more inclusive wellbeing economy.

Relevant for this research in particular, planning is framed in NPF4 as ‘a powerful tool for delivering change on the ground in a way which brings together competing interests so that decisions reflect the long-term public interest’.<sup>4</sup>

The research explored a recommendation made by the Scottish Land Commission in their Review of Land for Housing to introduce a transparency obligation that would require option agreements and conditional contracts to be disclosed on a public register.<sup>5</sup>

Option agreements on land for housing are legal contracts between a developer or purchaser and a landowner. These agreements are often used in housebuilding to secure the rights to purchase land to develop the land subject to certain conditions being met.

The report goes on to weigh up arguments for and against increased transparency and options for increased transparency if such a register were to exist based on the reflections of participants.

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<sup>2</sup> [Transforming Planning in Practice: updated planning reform implementation programme - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/transforming-planning-in-practice/updated-planning-reform-implementation-programme/pages/2/)

<sup>3</sup> [National Planning Framework 4 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/national-planning-framework-4/pages/1/)

<sup>4</sup> [National Planning Framework 4 \(www.gov.scot\)](https://www.gov.scot/publications/national-planning-framework-4/pages/1/) p.3.

<sup>5</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(landcommission.gov.scot\)](https://landcommission.gov.scot/publications/land-for-housing-towards-a-public-interest-led-approach-to-development/)

## Scottish Land Commission's proposal

In the recently published 'Review of Land for Housing: Towards a Public Interest Led Approach to Development'<sup>6</sup> the Scottish Land Commission recommended that a new transparency obligation should be introduced that would require options agreements and conditional contracts over land to be disclosed on a public register.

This recommendation to increase transparency follows previous research published by the Scottish Land Commission on various issues within the land market and opportunities for improvement:

- A lack of transparency was identified in a report exploring 'land banking' in Scotland.<sup>7</sup>
- The lack of land available for rural development was connected to a lack of transparency in the land market<sup>8</sup>
- Opportunities to engage with communities early to improve placemaking<sup>9</sup>
- Opportunities to engage with communities on where to develop housing<sup>10</sup>

## Key Findings

### Availability of information on option agreements

Attempts to source information on option agreements in stage one concluded that there is no easily accessible, clear public information on which sites have been optioned to be developed in future for housing. The cost of land bought to develop housing is also not publicly available.

Stakeholders cited some information sources which could help them ascertain if an options agreement was in place, albeit with limitations:

- The presence of a standard security on the Land Registry as an indication that an option agreement may be in place.

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<sup>6</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(scottishhousingnews.com\)](http://scottishhousingnews.com)

<sup>7</sup> [The Model CHP for the Scottish Government and Associated Public Authorities Sector in Scotland - Word Template \(landcommission.gov.scot\)](http://landcommission.gov.scot)

<sup>8</sup> [The Role of Land in Enabling New Housing Supply in Rural Scotland - Events - News & Events - Scottish Land Commission](http://landcommission.gov.scot)

<sup>9</sup> [See lfa960 b 190\\_20200611 SLC REPORT Value of Early Engagement in Planning.pdf \(landcommission.gov.scot\)](http://landcommission.gov.scot)

<sup>10</sup> [See lfa960 b 190\\_20200611 SLC REPORT Value of Early Engagement in Planning.pdf \(landcommission.gov.scot\)](http://landcommission.gov.scot)

- The Registers of Controlled Interest in Land (RCI)- but that this would only cover some option agreements and that this would depend on the nature of the landowner and terms of the option, therefore this approach would also not allow interested parties to confidently rule out or identify an option agreement being in place on a given piece of land.
- Intra- market knowledge of what is in place- but this is not public knowledge.

The desk research and views of stakeholders show that it is not currently easy through public sources to establish when and where option agreements are in place and the cost of land bought to develop housing.

### Views on the current level of transparency

There were mixed views on the current level of transparency and the prospect of details surrounding option agreements being made publicly available:

- Around a quarter (27%) of survey respondents neither agreed nor disagreed that information regarding options agreements to develop land is sufficiently transparent. Around half (49%) expressed disagreement with this statement, while around a fifth (22%) agreed.
- Just under half of survey respondents disagreed (47%) that information regarding option agreements to develop land should be available for the public. However, a sizable group of respondents agreed with this proposition (36%),
- Over two-thirds (67%) of survey respondents tended to agree (22%) or strongly agreed (45%) that information around options agreements is commercially sensitive and should be treated as such. By comparison, less than 1 in 5 respondents disagreed.

From interviews with stakeholders, there was mixed feedback in terms of the current levels of transparency around option agreements. Commercial sensitivity was highlighted as a barrier to increasing transparency, whilst more transparency was desired to save time for non-developers with land development intentions.

There were mixed views on the concept of 'land banking' expressed in interviews. Some stakeholders argued that land banking was a problem in Scotland and argued that it was a practice

observed frequently in terms of developers sitting on land for a long time which created issues such as those outlined below.

There was also a sense that many people confused land banking with holding land under option for a long time to get through the process of planning and all the different elements associated with building housing. Also, housebuilders will sequence when they build units as there are only so many units they can build and sell that the market will absorb.

### Proposal for a transparency obligation

More than four in ten (44%) of respondents to the survey disagreed with the Scottish Land Commission's proposal to introduce a transparency obligation while 38% agreed with the proposal.

Given the hypothetical scenario in which a public register on option agreements and conditional contracts existed, nine in ten survey respondents (91%) believed that the location of the site optioned for future development should be made available. A common view was that should such a register exist that the site area should be searchable and displayed on a map.

Views were more mixed (52%) regarding the agreed duration of the option agreement being included on the public register and half (50%) believed the contact details for the party holding the option should be made public.

Only three in ten (30%) respondents thought that conditions of the options agreement should be included while a minority (14%) thought that the price should be included, reflecting concerns raised concerning commercial confidentiality.

As a general principle, access to the contents of a register was seen as positive. However, it was difficult for stakeholders to comment on the degree of accessibility that would be appropriate, before knowing what the register would specifically contain.

Various arguments were put forward by different groups in favour of a transparency obligation:

- Transparency as a democratic principle is viewed as desirable.
- Community engagement is viewed as essential to good development.
- Transparency has practical advantages for creating Local Development Plans.
- Transparency would enhance competition and efficiency in the land market.

- Transparency could improve compliance with legal agreements.

Several arguments against the transparency obligation were also put forward, some of which directly rebut the above arguments in favour, and some of which provide different perspectives:

- A transparency obligation infringes upon commercial confidentiality.
- Scepticism exists around early community engagement.
- Questions were raised about the practicality of the proposal.
- The land market already functions effectively.

## Recommendations

Based on the research carried out for this project, we recommend that any transparency obligation should require only the registration of the following information:

- The presence of an option agreement on a parcel of land
- The duration of the option agreement
- The name of the parties.

However, there are a number of areas that the Scottish Land Commission should explore further before formally recommending such an obligation:

- The Scottish Land Commission should work with developers, land agents, landowners and lawyers to better understand the administrative costs of registering option agreements,
- The Scottish Land Commission should consult with the sector to determine an appropriate lead-in period and realistic parameters for registering existing and new option agreements,
- The Scottish Land Commission should work with the Scottish Government and other relevant parties to establish the impact of a legal requirement to register options agreements on other related legislation.
- Before formally recommending such a requirement, the Scottish Land Commission, working with the Scottish Government, should conduct a wide consultation with the sector on the impacts of its proposals once the details of what would be contained within such a register have been established,
- The Scottish Land Commission should work with its stakeholders to develop tools and resources explaining what an option agreement is, how they work, and their role in the land market and the development of housing to allow better information about how they operate. The obligation for transparency needs to be supported by accessible resources explaining the purpose of option agreements.

# 1. Research aims and methodology

## Introduction

This report presents analysis of research conducted by Diffley Partnership on behalf of the Scottish Land Commission (SLC) regarding transparency around option agreements.

An option agreement can be described as:

‘an agreement that gives one party the option to purchase property within a certain time period (or at a defined point in time) at a pre-agreed price. Alternatively, there may be a mechanism put in place for determining the price on the date that the option is exercised. There is often (but not always) a non-refundable payment made to the landowner as consideration for the granting of the option.’<sup>11</sup>

This chapter explains the research aims and the methodology. Later chapters contain findings from desk research and results from primary research - an online survey and one-to-one interviews with stakeholders which took place between January and March 2023.

## Research aims

SLC is working to create a Scotland where everybody benefits from the ownership, management and use of the nation’s land.<sup>12</sup> SLC’s work on land for housing looks at how to deliver land for housing that:

‘can help to deliver major policy objectives – addressing rural depopulation and revitalising declining town centres by enabling quality affordable housing to be delivered.’<sup>13</sup>

This research aimed to help the SLC understand how much or how little information is available on land optioned for housing development in Scotland. Indeed, the availability or even the existence of information has been identified as a barrier to understanding ownership at a UK level:

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<sup>11</sup> [Scottish option contracts | Morton Fraser Lawyers | Edinburgh and Glasgow \(morton-fraser.com\)](#)

<sup>12</sup> [Home - Scottish Land Commission](#)

<sup>13</sup> [Housing - Housing & Development - Our work - Scottish Land Commission](#)

'Part of the problem of trying to quantify UK land and property ownership, in both urban and rural areas, is the paucity and disparate nature of the available data and gaps in record keeping' (Dixon 2009).<sup>14</sup>

In Scotland, it is not possible to register an option agreement in the Land Register. Therefore, the research also discussed a recommendation made by the Scottish Land Commission in the Review of Land for Housing to introduce a transparency obligation that would require option agreements and conditional contracts to be disclosed on a public register.<sup>15</sup> SLC were interested in the views concerning this case for transparency versus commercial confidentiality.

Therefore, the approach of the research needed to first scope out the availability of information in the public domain at present before bringing in stakeholder viewpoints on the idea of a register and their attitudes towards greater transparency.

## Methodology

To assess the availability of information on option agreements and the attitudes towards greater transparency on option agreements, Diffley Partnership conducted a three-stage approach to this research:

- Stage 1: A scoping exercise of existing information on options agreements
- Stage 2: A short stakeholder survey
- Stage 3: Qualitative interviews with stakeholders

The stage 1 scoping exercise involved consulting published sources to establish the extent to which there was information available on option agreements in Scotland. To do this a literature review of existing evidence, policies, and debates about optioned land in Scotland was conducted as well as a review of international evidence to establish whether there are existing examples of transparency obligations or evidence in other countries of issues arising from barriers to transparency obligations.

At stage 2 an online survey was issued to stakeholders to complete and contained a combination of open and closed questions relating to transparency and option agreements. There was a total

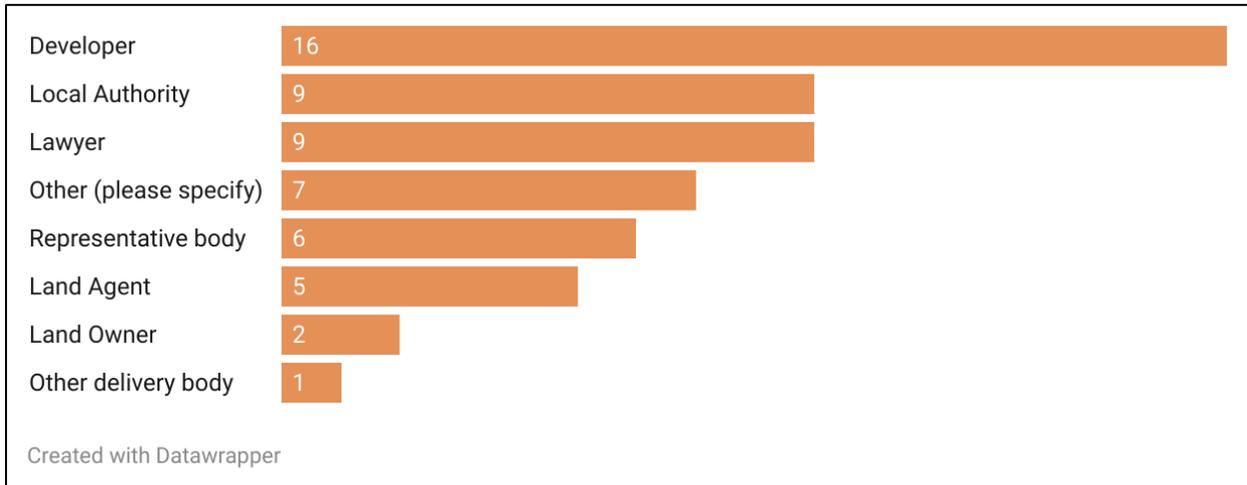
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<sup>14</sup> Dixon T. (2009) 'Urban land and property ownership patterns in the UK: trends and forces for change', *Land Use Policy*, 26(1), pp.43-53.

<sup>15</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(scottishhousingnews.com\)](http://scottishhousingnews.com); [Land Focus Land for Housing and Development \(landcommission.gov.scot\)](http://landcommission.gov.scot)

of 55 substantive responses to the survey beyond the designation of the type of organisation. Figure 1.1 below shows the profile of these 55 responses based on their self-selected sector. This is used to analyse responses in this report.

Figure 1.1 Sector



Among those who designated themselves as other, respondents were as follows:

- Community owned island
- Charity working on community participation in planning
- Developer, Land Promoter and Land Owner
- Academic researcher
- Charity working on planning issues.

At stage 3, qualitative interviews were conducted with stakeholders who indicated that they were interested in taking part in an interview in the online survey. These interviews covered the issues in the survey in more depth and allowed participants to expand on and give details about their views concerning a transparency obligation for option agreements. A total of 12 interviews were carried out with representation from developers, lawyers, academics, representative bodies, local authorities and land agents.

## 2. Research context

### Policy developments

When the research was commissioned, there was strong interest in land use for the benefit of the public, as defined by The Planning (Scotland) Act 2019. This act defined the purpose of planning as being “to manage the use and development of land in the long-term public interest”.<sup>16</sup>

This Act contained a wide variety of reforms to the planning system, such as a five-year programme implementing digital planning, using data and technology to provide a more accessible, inclusive and efficient system.

During this research commission, in February 2023, the fourth National Planning Framework (NPF4) was adopted. This replaced the National Planning Framework 3 and Scottish Planning Policy. As the national special strategy for Scotland, NPF4 aims to support the planning and delivery of:<sup>17</sup>

- sustainable places, where we reduce emissions, restore and better connect biodiversity;
- liveable places, where we can all live better, healthier lives; and
- productive places, where we have a greener, fairer and more inclusive wellbeing economy.

Relevant for this research in particular, planning is framed in NPF4 as ‘a powerful tool for delivering change on the ground in a way which brings together competing interests so that decisions reflect the long-term public interest.’<sup>18</sup>

Policy 9 confirms a preference for development regenerating brownfield sites rather than greenfield development:<sup>19</sup>

- a) Development proposals that will result in the sustainable reuse of brownfield land including vacant and derelict land and buildings, whether permanent or temporary, will be supported. In determining whether the reuse is sustainable, the biodiversity value of brownfield land which has naturalised should be taken into account.

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<sup>16</sup> [Transforming Planning in Practice: updated planning reform implementation programme - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/transforming-planning-in-practice/implementation-programme/implementation-programme-2023-2026/pages/12.aspx)

<sup>17</sup> [National Planning Framework 4 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/national-planning-framework-4/pages/1.aspx)

<sup>18</sup> [National Planning Framework 4 \(www.gov.scot\)](https://www.gov.scot/publications/national-planning-framework-4/pages/1.aspx) p.3.

<sup>19</sup> [National Planning Framework 4 \(www.gov.scot\)](https://www.gov.scot/publications/national-planning-framework-4/pages/1.aspx) p.50.

b) Proposals on greenfield sites will not be supported unless the site has been allocated for development or the proposal is explicitly supported by policies in the LDP. It is therefore important that local authorities and communities understand what land is held for development and that a discussion takes place on the location and nature of new housing.

## Option agreements in Scotland

Option agreements on land for housing are legal contracts between a developer or purchaser and a landowner. These agreements are often used in housebuilding to secure the rights to purchase land to develop the land subject to certain conditions being met.<sup>20</sup>

These contracts typically grant the developer or purchaser the option to buy the land in the future for a pre-agreed price.<sup>21</sup>

Option agreements typically have an “option period” which is the duration of time that the developer or purchaser maintains an exclusive right to exercise the option and purchase the land. The duration is usually negotiated at the outset and the timeframe ranges from periods of months to several years.<sup>22</sup>

Typically, option agreements will have a price at which the land can be purchased when the option is exercised. This tends to be agreed when the option agreement is signed but there can be changes based on market conditions at the time the option is exercised, the parameters for this would often be agreed at the outset.<sup>23</sup>

Moreover, the landowner will often receive an ‘option fee’ when the option is granted, this fee will often be a proportion of the option price or an agreed fixed amount. This fee is often non-refundable but can be credited against the option price if the option is exercised.<sup>24</sup>

Option agreements also typically contain conditions which must be met prior to the option being exercised. This can include the developer or purchaser needing to obtain planning permission for a

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<sup>20</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(landcommission.gov.scot\)](https://landcommission.gov.scot)

<sup>21</sup> [Scottish option contracts | Morton Fraser Lawyers | Edinburgh and Glasgow \(morton-fraser.com\)](https://morton-fraser.com)

<sup>22</sup> [What is an option agreement? | Napthens Solicitors](https://www.napthens.com)

<sup>23</sup> [Savills Blog | In plain English: Option Agreement price negotiations](https://www.savills.com)

<sup>24</sup> [Savills Blog | In plain English: Option Agreement price negotiations](https://www.savills.com)

specific type of development such as housing. The conditions would be negotiated between the parties, and these would often need to be met before the option on the land can be executed.

If conditions are met, then the options can be exercised with the landowner and the purchaser/developer proceed with the sale on the basis set out in the option agreement. However, if the option is not exercised or certain conditions are not satisfied within the option period then the agreement can expire. This means the landowner can enter a new option agreement with another buyer or opt to use the land differently.

There is currently no requirement to register option agreements in Scotland. They are not registrable deeds, so they are not required to be registered in the Land Register of Scotland to be legally valid or enforceable.

Lack of transparency of option agreements in place is one of a range of issues in the land market which are identified in the SLC's Review of Land for Housing.<sup>25</sup>

## The role of key actors in the delivery of housing in Scotland

In Scotland, private, public and community organisations all have various influences on the delivery of housing. This is through land ownership, planning processes and construction of housing developments.

Land plays a vital role in the provision of housing. Land is needed to build homes, and the value of that land plays a key role in the value of the home, due to the current system of speculative housebuilding.<sup>26</sup>

Starting with the private sector, in this system, developers buy land that they anticipate being able to sell homes on at a price on par with the existing homes in the area.<sup>27</sup> Where land is expensive, it has been argued that developers can be pushed to develop homes at a slow rate to make the ultimate house price higher and remain in business. 'Land banking', is a term with negative connotations in the UK, used to describe concern towards developers hoarding land while they

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<sup>25</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(landcommission.gov.scot\)](https://landcommission.gov.scot)

<sup>26</sup> Payne, S., Serin, B., James, G., & Adams, D. (2019). How does the land supply system affect the business of UK speculative housebuilding. An Evidence Review.

<sup>27</sup> [Land Focus: Land for Housing and Development \(landcommission.gov.scot\)](https://landcommission.gov.scot); [Land for Housing: Towards a Public Interest Led Approach to Development \(scottishhousingnews.com\)](https://scottishhousingnews.com);

wait for land values and house values to rise to make a greater profit. Past research into whether land banking takes place in the UK brings mixed perspectives. For example, the finding that developers do not seek to tie up land indiscriminately but participate in the process of planning policy formulation and look to option land likely to be released.<sup>28</sup> Therefore on the one hand critics of developers blame land banking for raising prices and reducing availability. On the other hand, developers maintain that land supply is a fundamental part of business viability in a system designed in this way.<sup>29</sup>

This system of speculative housebuilding is also seen to encourage large housebuilders to build mainly on greenfield sites in high-value areas to make a profit, meaning that rural areas and brownfield sites can be neglected.<sup>30</sup>

The Collaborative Centre for Housing Evidence found that public bodies can play a leading role in assembling land and preparing sites for development. In turn, this allows local authorities to shape housing markets and improve areas in the public interest.<sup>31</sup> For instance, more focus can be placed on greenspace and transport links and the regeneration of brownfield sites.

Although there are examples in Scotland where public bodies initiate housing development to secure public benefit, this is not standard practice. Rather, public bodies play a key role in housing development at the planning stage in Scotland. This includes consultation on the Strategic Environmental Assessment of development plans and working with planning authorities directly by Scottish Natural Heritage, Scottish Environmental Protection Agency and Historic Environment Scotland.<sup>32</sup> Furthermore, Loch Lomond and the Trossachs National Park Authority are responsible for decisions on all planning applications in that area. In the Cairngorms National Park, the role of the Park Authority is to work with the five local authorities and decide on applications 'big or important' to that national park.<sup>33</sup> As such, depending on the location and nature of the land, there are additional public stakeholders and bodies involved.

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<sup>28</sup> Adams, D., May, H. and Hope, T. (1992) Changing strategies for the acquisition of residential development land. *Journal of Property Research*, 9 (3), 209-226

<sup>29</sup> [Delivering More Homes and Better Places - October 2020 FINAL reduced.pdf \(landcommission.gov.scot\)](#);

<sup>30</sup> [Focus\\_Land for Housing and Development \(landcommission.gov.scot\)](#);

<sup>31</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(landcommission.gov.scot\)](#)

<sup>32</sup> [Historic Environment Scotland's Role in Planning | Hist Env Scotland](#)

<sup>33</sup> [National Parks - Landscape and outdoor access - gov.scot \(www.gov.scot\)](#)

Additionally, early engagement with the community has been found to produce desirable outcomes.<sup>34</sup> Examples of the public sector and local authorities playing key roles in creating quality places are found within Europe, specifically the Netherlands, Germany, and Switzerland.<sup>35</sup> Whilst in Scotland planners play a key role in granting planning permission and local authorities produce Local Development Plans, this focuses on public sector involvement through policy and regulation, rather than playing a more active role in initiating and shaping development in states like Germany and the Netherlands.

Previous SLC research attests that the additional lack of transparency on which land is optioned for development can hinder their abilities to plan and develop quality places in the way European counterparts can.<sup>36</sup>

Another key policy development is the encouragement of members of the public, through community groups, to be more actively involved in the planning process at the stage of setting out visions for their places. For example, the use of the Place Standard tool at a local level.<sup>37</sup> Housing and community is one dimension considered within ‘good place-making’.

## The role of transparency in improving market efficiency and requisite information

One of the key arguments behind the recommendation to make information on options agreements and conditional contracts publicly available is that, for a market to operate efficiently, all participants, or would-be participants, should be able to access information. It is argued that this could have knock-on effects like increasing the amount of land available for rural development.

As things currently stand, a lack of knowledge of prices means many rural landowners have unrealistic expectations of sale values.<sup>38</sup> Knowing the land which developers hold options on

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<sup>34</sup> [Value of Early Engagement in Planning.pdf](#)

<sup>35</sup> [Land Focus\\_Land for Housing and Development \(landcommission.gov.scot\)](#)

<sup>36</sup> [Delivering More Homes and Better Places - October 2020 FINAL reduced.pdf \(landcommission.gov.scot\)](#)

<sup>37</sup> [Place Standard tool | Our Place](#)

<sup>38</sup> [The Role of Land in Enabling New Housing Supply in Rural Scotland - Events - News & Events - Scottish Land Commission](#)

would also help in the development of Local Development Plans, securing the benefits of early engagement and improving the places that are ultimately built.<sup>39</sup>

Over the past 30 years, the dynamic between developers and planners has shifted towards a relationship in which development proposals are brought to the planners for scrutiny. This has changed the role of planners to be focussed on adjudicating the process rather than promoting development in practice. Although it could be argued that market forces promote innovation, it is also argued that this disconnect between developers and planners can result in inefficient use of land or the use of land in the interest of stakeholders rather than public benefit.<sup>40</sup>

## Scottish Land Commission's proposal

In the recently published 'Review of Land for Housing: Towards a Public Interest Led Approach to Development'<sup>41</sup> SLC recommended that a new transparency obligation should be introduced that would require options agreements and conditional contracts over land to be disclosed on a public register.

The proposal is for this obligation to come into force following a lead in time and apply only to future options, but a retrospective register of previous options could be useful but would require consultation with stakeholders. It was proposed that this information would be kept by the Registers of Scotland. It was also suggested that a regular statistical publication is created providing information on land sale prices in Scotland.<sup>42</sup>

This recommendation to increase transparency follows previous research published by the Scottish Land Commission on various issues within the land market and opportunities for improvement:

- A lack of transparency was identified in a report exploring 'land banking' in Scotland.<sup>43</sup>
- The lack of land available for rural development was connected to a lack of transparency in the land market.<sup>44</sup>

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<sup>39</sup> [Value of Early Engagement in Planning.pdf](#)

<sup>40</sup> [Delivering More Homes and Better Places - October 2020 FINAL reduced.pdf\(landcommission.gov.scot\)](#)

<sup>41</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(scottishhousingnews.com\)](#)

<sup>42</sup> [Land for Housing: Towards a Public Interest Led Approach to Development \(landcommission.gov.scot\)](#)

<sup>43</sup> [The Model CHP for the Scottish Government and Associated Public Authorities Sector in Scotland - Word Template \(landcommission.gov.scot\)](#)

<sup>44</sup> [The Role of Land in Enabling New Housing Supply in Rural Scotland - Events - News & Events - Scottish Land Commission](#)

- Opportunities to engage with communities early to improve placemaking.<sup>45</sup>
- Opportunities to engage with communities on where to develop housing.<sup>46</sup>

However, SLC is aware there are concerns about transparency at the expense of commercial confidentiality and that this could lead to a reduction in housebuilding activity in Scotland. Primary research was needed to explore these concerns and attitudes around the transparency of option agreements through research carried out with stakeholders.

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<sup>45</sup> [See lfa960b190\\_20200611 SLC REPORT Value of Early Engagement in Planning.pdf \(landcommission.gov.scot\)](#)

<sup>46</sup> [See lfa960b190\\_20200611 SLC REPORT Value of Early Engagement in Planning.pdf \(landcommission.gov.scot\)](#)

### 3. Availability of information on option agreements

Across each of the stages of the research, the availability of information relating to option agreements was explored.

In stage 1 of this project, a scoping exercise searched for data relating to option agreements. This was required to establish whether and where there was publicly available data and to establish if any data relating to existing option agreements were accessible.

In stages 2 and 3 of the research, stakeholders were asked about the availability and accessibility of data. Together, the desk and primary research provides a picture of current information and awareness of information amongst stakeholders.

#### Perception of availability of data

Stakeholders who took part in the primary research had mixed views in relation to the availability of information regarding option agreements.

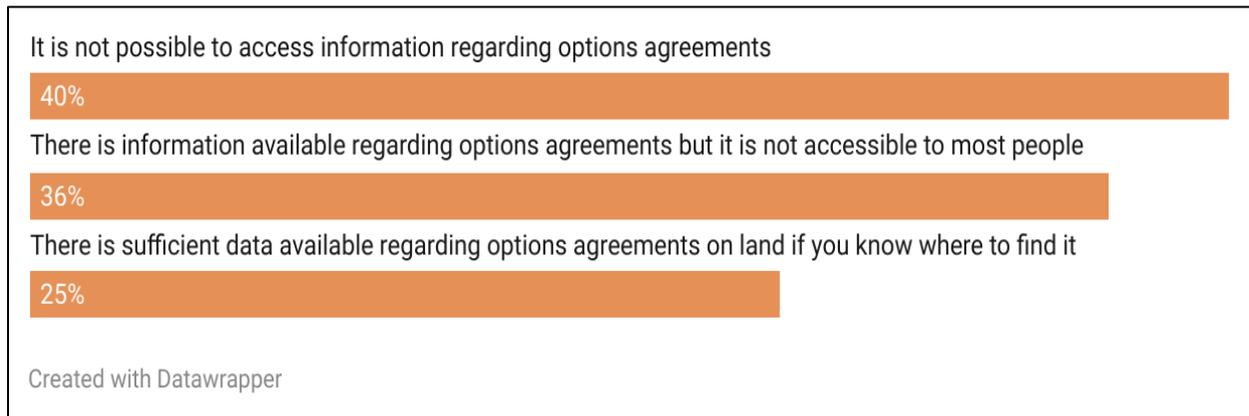
For example, two in five survey respondents (40%) did not think it was possible to access information regarding option agreements while a similar proportion (36%) took the view that information is available but is inaccessible to most people, while a quarter (25%) believed there is sufficient data on options agreements available, as long as you know where to find it, Figure 3.1.

In terms of differences by respondent type, land agents generally believed that sufficient data on option agreements are available, provided one knows where to find it.

Lawyers hold differing opinions, with some agreeing that there is enough accessible data, while others believed it is not possible to access information on option agreements. Developers are divided as well, with some acknowledging the existence of the information but considering it inaccessible to the general public, while others believe it is inaccessible.

Representative bodies tended to think that accessing the information on option agreements was not possible.

Figure 3.1: Thinking about the information available on options agreements in place for land, which of the following statements comes closest to your view?



## Information sources

Attempts to source information on option agreements in stage one concluded that there is no easily accessible, clear public information on which sites have been optioned to be developed in future for housing.

Respondents were asked where they would look for information on options agreements in qualitative responses to the survey and in interviews. Generally, the perception was that information was not readily available in an easy to access format.

“I wouldn’t know where to look. And that’s me as a professional involved in these sorts of things. I rely on us asking the question and the developers putting forward that information and knowing that’s going to be in the public domain when they do so [...] But if you were to say to me ‘did you know you can go to the land register or anything and pay your 35 pounds and find this’ I wouldn’t know where to start from my expertise, I would have to consult property specialists in my legal team I suppose if I was to go and ask to look for that information, if indeed it is available. I genuinely don’t know if it is or not.”

The Register of Persons Holding a Controlled Interest in Land (RCI) was also consulted as part of stage one and some stakeholders suggested this information may be available there.

The RCI shows who controls the decision of owners or tenants (for more than 20 years) of land and property in Scotland, where this information may not be publicly transparent elsewhere.<sup>47</sup> The RCI is designed to help make it clearer for people who makes the decisions about land and property. The RCI, therefore, goes beyond simply ownership to see who is responsible for making decisions about an area of land or property.<sup>48</sup> Those with a controlling interest in land may differ from the registered owner.

It was explained that this would only cover some option agreements and that this would depend on the nature of the landowner and terms of the option, therefore this approach would also not allow interested parties to confidently rule out or identify an option agreement being in place on a given piece of land.

However, despite this increase in transparency in terms of who has a controlling interest in land, this does not necessarily improve transparency around options agreements or conditional contracts as they are not required to be registered in the same way.

Another potential source of information that was consulted was the Land Registry. Some stakeholders noted that the presence of a standard security on the Land Registry could be an indication that an option agreement may be in place.

“If anybody has done their job properly, they will have secured their option via a standard security and the existence of that standard security will be known.”

It was suggested that if you knew a standard security was in place and you knew the company that had it, it was possible to look at their accounts which may show the option agreements as an asset. However, given that companies’ financial years differ it would remain difficult to build up a meaningful picture of the option agreements across Scotland utilising this approach and information would not be up to date.

“Frequently an option agreement is linked to a standard security over the land to secure the obligation which means yes you could go to the land register [...] to see if there is a standard security which may be sufficiently vaguely worded that you don’t know if it is securing an option agreement”

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<sup>47</sup> [Register of Persons Holding a Controlled Interest in Land - Registers of Scotland \(ros.gov.uk\)](https://ros.gov.uk)

<sup>48</sup> [Register of Controlled Interests in Land: How will it work? | Thorntons Solicitors \(thorntons-law.co.uk\)](https://www.thorntons-law.co.uk)

Others expressed the opinion that whilst a standard security may be indicative of whether an option was in place, the presence of a standard security was not enough to be certain that an option agreement was in place on land nor would the specific terms be available.

There was also a sense that information relating to option agreements would be known within the industry in terms of which lands had options out on it and that agents and developers would know this but would be unlikely to share the terms,

“It’s relatively straightforward to ascertain if land is under option but the terms on which its under option and the duration of that option is something you wouldn’t be able to get your hands on ordinarily. You’d need one of the parties to provide you with the document. So the existence of the option you probably know about, beyond that it’s not transparent.”

“In terms of transparency of information, I think it’s very much people involved in the market, so that’s all intra-market.”

Another potential source of information that was identified was in relation to local authorities. It noted that some local authorities may publish information in relation to options from local plan submissions so that information would be publicly available.

“We now put out quite a detailed questionnaire we ask proposers to fill in if they want us to consider their site as a development opportunity site [...] Some of those questions include very factual questions in terms of: are you the landowner, is there an option available on your site, who is that option with and are there any developer partners involved [...] That information that we now gather helps us in terms of moving that forward and we publish that information on our website so that local communities are able to see what sites are coming forward for development, be they ones that we think are successful or otherwise.”

However, this approach is not universal and there is no obligation for local authorities to collect this information and to publish it. Similarly, landowners, managers and developers are not obligated to provide it. Therefore, while this information is useful where published and can help drive earlier community engagement in these areas, it does not guarantee a full picture in terms of option agreements and sites potentially coming forward for development.

## Conclusion

Attempts to source information on option agreements in stage one concluded that there is no easily accessible, clear public information on which sites have been optioned to be developed in future for housing. The cost of land bought to develop housing is also not publicly available.

Stakeholders cited some information sources which could help them ascertain if an options agreement was in place, albeit with limitations:

- The presence of a standard security on the Land Registry as an indication that an option agreement may be in place.
- The Registers of Controlled Interest in Land- but that this would only cover some option agreements and that this would depend on the nature of the landowner and terms of the option, therefore this approach would also not allow interested parties to confidently rule out or identify an option agreement being in place on a given piece of land.
- Intra- market knowledge of what is in place- but this is not public knowledge.

The desk research and views of stakeholders show that it is not currently easy through public sources to establish when and where option agreements are in place and the cost of land bought to develop housing. The next chapter moves onto findings on the current lack of transparency.

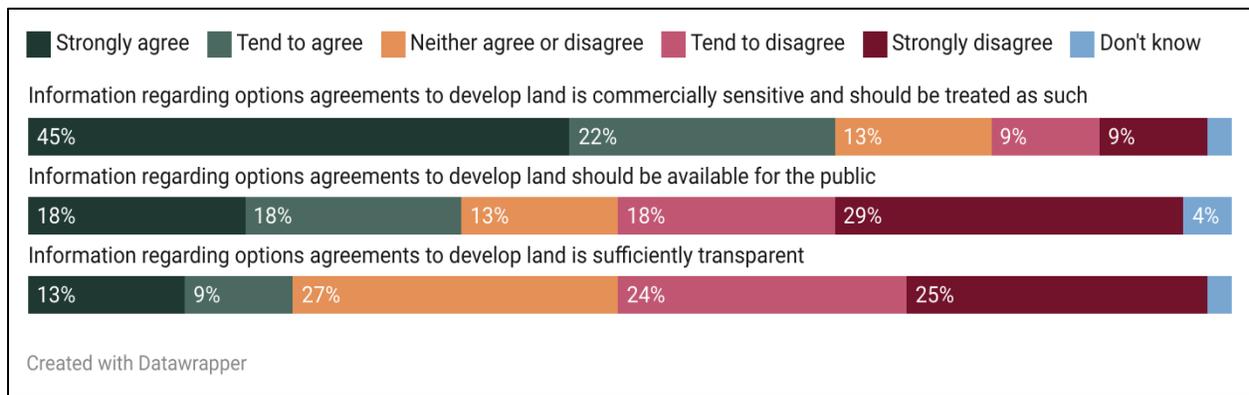
## 4. Views on the current level of transparency

In practice, the desk and the primary research had established that the current level is not transparent (see chapter 3). In stages 2 and 3 of the research, stakeholders were asked about their views on the current level of transparency.

### Degree of support for transparency of information regarding options agreements

Three statements were designed to ascertain degrees of support regarding the transparency of information on options agreements (see Figure 4.1).

Figure 4.1: Thinking about the transparency of information regarding options agreements in place for land, to what extent do you agree or disagree with the following statements?



Around a quarter (27%) of survey respondents neither agreed nor disagreed that information regarding options agreements to develop land is sufficiently transparent. Around half (49%) expressed disagreement with this statement, while around a fifth (22%) agreed.

Just under half of survey respondents disagreed (47%) that information regarding option agreements to develop land should be available for the public. However, a sizable group of respondents agreed with this proposition (36%),

Representatives from local authorities that responded to the survey were more likely to agree with this statement than some other sectors whereas developers and lawyers tended to disagree.

Over two-thirds (67%) of survey respondents tended to agree (22%) or strongly agree (45%) that information around options agreements is commercially sensitive and should be treated as such. By comparison, less than 1 in 5 respondents disagree (9% tend to disagree, 9% strongly disagree).

Information regarding options agreements was viewed as commercially sensitive by developers, lawyers, local authority representatives and land agents, signalling that the potential commercial nature of the information was something that many participants were cognisant of.

Despite the agreement that the information is commercially sensitive, opinions on public availability are split for or against this. Representative bodies however tend to agree the information should be freely available. Some, but not all, developers and lawyers that responded believed option agreements are currently sufficiently transparent.

## Exploring the support for greater transparency

As explained in chapter 1, it was expected that some stakeholders would be more in favour of greater transparency than others. Interviews with stakeholders provided the opportunity to understand the reasons behind different degrees of support.

Some argued that this should be more transparent and that there was a public interest element around this information being accessible and that increased transparency would allow communities and interested parties to take a more informed view on the status of land for potential developments

Others questioned what problem increased transparency was attempting to resolve and noted that the impact on commercial confidentiality and increased administrative burden for all parties outweighed the positive of a greater transparency obligation.

One of the central arguments among those who were in favour of greater transparency around option agreements was that a requirement to register option agreements would increase public accessibility. It was argued by some interview participants that land is a public resource and therefore all land interests should be made public.

A key thrust of the argument around increased public accessibility was that it allows potentially interested parties such as community groups, potential buyers, lenders and other stakeholders to

have access to information about option agreements meaning that time and resources are not wasted on exploring opportunities for land that already had an option outstanding on it.

“If there was greater transparency over options, then communities would have one less challenge in their work and acting in the public interest over land”

This view was not universal, and it was also argued that option agreements are private agreements between parties and therefore not necessarily information that should be deemed as in the public interest by default.

“These are commercially sensitive documents. There is no requirement on other private business/ individuals to make their contractual arrangements known to the public.

Publication of options may put landowners off which could harm land supply and restrict housing delivery.”

The sensitivities around commercial details being made public were expressed consistently among stakeholders both about whether this information would genuinely be in the public interest and the extent to which making this public adds additional risk to buyers and those selling land in what is an already long and risky process for those seeking to develop land for housing. This view was expressed both by those in favour of greater transparency and those who did not think this information should be available to the public.

“I would suggest limiting the information available to the name of the controlling entity holding the option agreement over the land but not the commercial terms”

## Land banking

### Views on Land Banking as an issue

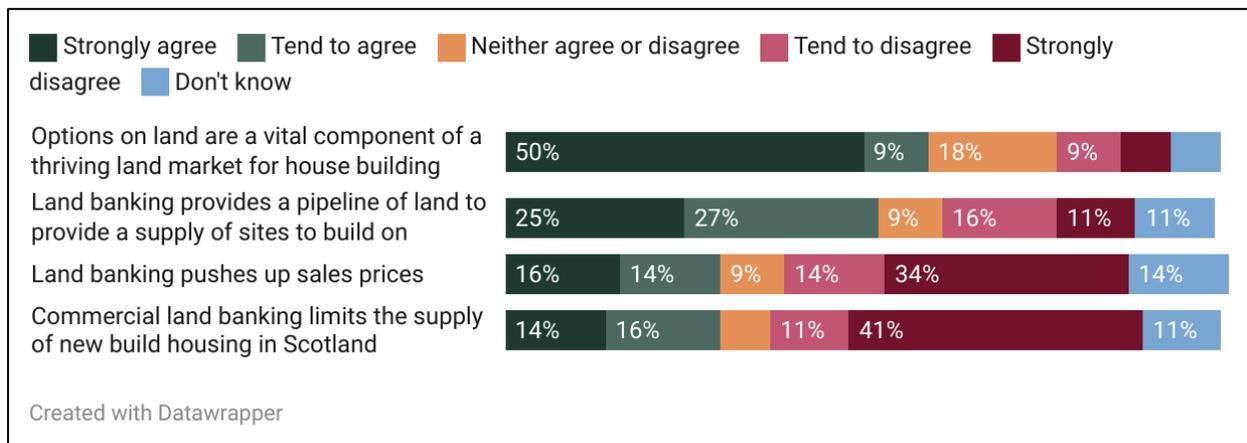
Half of the respondents (50%) strongly agreed and a further 9% tended to agree that options on land are a vital component of a thriving land market for housebuilding (see Figure 4.2).

Just over half of respondents agreed (25% strongly agree, 27% tend to agree) that land banking provides a pipeline of land to provide a supply of sites to build on. Conversely, 11% of respondents strongly disagreed with this statement and a further 16% tended to disagree.

Almost half of the respondents are not convinced that land banking pushes up sale prices: 34% strongly disagreed and 14% tended to disagree with this statement. On the other hand, 16% strongly agreed with this statement and 14% tended to agree. A further 14% say they ‘don’t know’.

Finally, over half of the respondents disagreed (41% strongly disagree, 11% tend to disagree) that commercial land banking limits the supply of new build housing in Scotland. 14% of respondents strongly agreed with this statement and 16% tended to agree.

Figure 4.2: To what extent do you agree or disagree with the following statements?



There were mixed views on the concept of ‘land banking’ expressed in interviews. Some stakeholders argued that land banking was a problem in Scotland and argued that it was a practice observed frequently in terms of developers sitting on land for a long time which created issues such as those outlined below.

“If developers sit on a site for a very long time there’s all sorts of issues associated with that. Whether that is not being able to fully implement the local development plan and intended allocations”

However, others did not agree that land banking was an issue and did not equate a lack of transparency around options as an issue with perceived land banking.

Indeed, it was argued that conditions applied to options often meant that if planning permission was granted then housebuilders would exercise the option and then want to begin developing the land immediately as that was where the profitability in house building lay.

“If you’ve got land under option the idea is that that land is not being put forward for housing even though, if it was put forward for housing today you would get planning permission, you would get to sell houses.

I just don’t think that happens. Because if you’ve got land which is ready today to go then your land owner and their land agent are going ‘what’s going on here?’. You are paying money for that land, and you only make any money off that land if you build houses and sell them.”

Further to this argument was the sense that once you had planning permission on land, you would either build on it or move it on to someone who would as this is where the profitability lies.

“Despite there being several looks into this, I’ve never seen any convincing evidence, and that’s not just me making that up, that land banking per se is going on. Option agreements yes, but land banking, i.e. the big names hanging on to a parcel of land.... the evidence I’m aware of suggests that as soon as they’ve got what they needed for their option agreement, they’ve got the planning permission, its actually in their interest to build through because their business model is based on capital receipts. [...] It’s never struck me as actually in the interest of housebuilders to be clinging on to land without building it”

There was also a sense that many people confused land banking with holding land under option for a long time to get through the process of planning and all the different elements associated with building housing. Housebuilders will sequence when they build units as there are only so many units a local market can absorb.

## Conclusion

Around a quarter (27%) of survey respondents neither agreed nor disagreed that information regarding options agreements to develop land is sufficiently transparent. Around half (49%) expressed disagreement with this statement, while around a fifth (22%) agreed.

Just under half of survey respondents disagreed (47%) that information regarding option agreements to develop land should be available for the public. However, a sizable group of respondents agreed with this proposition (36%),

Over two-thirds (67%) of survey respondents tended to agree (22%) or strongly agreed (45%) that information around options agreements is commercially sensitive and should be treated as such. By comparison, less than 1 in 5 respondents disagreed (9% tend to disagree, 9% strongly disagree).

From interviews with stakeholders, there was mixed feedback in terms of the current levels of transparency around option agreements. Commercial sensitivity was highlighted as a barrier to increasing transparency, whilst more transparency was desired to save time for non-developers with land development intentions.

There were mixed views on the concept of 'land banking' expressed in interviews. Some stakeholders argued that land banking was a problem in Scotland and argued that it was a practice observed frequently in terms of developers sitting on land for a long time which created issues such as those outlined below.

There was also a sense that many people confused land banking with holding land under option for a long time to get through the process of planning and all the different elements associated with building housing and also that housebuilders will sequence how they build units as there are only so many units they can build and sell at one time.

All the above perspectives on the merits and limitations of transparency around options agreements are discussed in more detail in the next chapter, which looks at an outline proposal for a transparency obligation.

## 5. Proposal for a transparency obligation

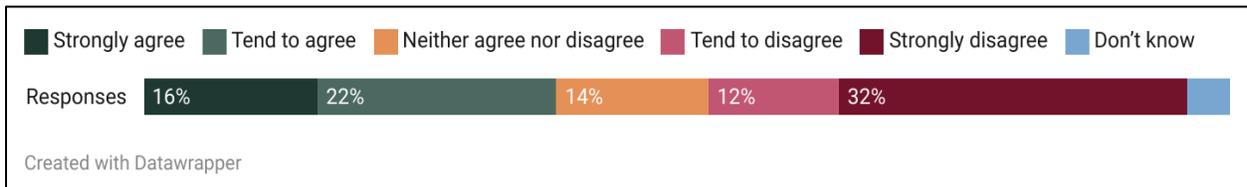
As highlighted at the outset of this report, SLC recommended that a new transparency obligation should be introduced that would require option agreements and conditional contracts over land to be disclosed on a public register.

This chapter presents the views of stakeholders in terms of the proposal itself, what would be contained within such a register and who should be able to access this register should it exist.

### Attitudes towards a register of optioned land and commercial interest

More than four in ten (44%) respondents disagreed with the Scottish Land Commission’s proposal to introduce a transparency obligation while 38% agreed with the proposal. The remaining 18% of respondents either expressed no opinion or said they did not know about the topic, see Figure 5.1.

Figure 5.1: The Scottish Land Commission recently recommended that a new transparency obligation should be introduced that would require options agreements and conditional contracts over land to be disclosed on a public register. To what extent do you agree or disagree with this recommendation?



The proportion of respondents neither agreeing nor disagreeing could be tied to a lack of detail with regards to what would be required to be published which chimes with later findings where there are mixed views on the degree of detail that this hypothetical register would require to be published.

Those who agreed with the recommendation included those from representative bodies, local authorities, developers, land agents and lawyers. However, those who disagreed were more likely to include developers, land agents and lawyers.

## Arguments for a transparency obligation

Various arguments were put forward by different groups in favour of a transparency obligation:

- Transparency as a democratic principle is viewed as desirable.
- Community engagement is viewed as essential to good development.
- Transparency has practical advantages for creating Local Development Plans.
- Transparency would enhance competition and efficiency in the land market.
- Transparency could improve compliance with legal agreements.

### Transparency as a Principle

Several respondents discussed the importance of transparency in this arena as a point of principle in a democratic society. This was the case even among some interviewees who were opposed to the transparency obligation: when asked to discuss an argument in favour of the proposals, transparency as a general principle was viewed positively, so long as it didn't infringe on commercial confidentiality. Comparisons were also drawn between transparency in other arenas, such as lobbying, to justify the use of a transparency obligation in the land market:

“Given that every kind of public service requires land. If you control a significant amount of land, then you have a great deal of influence over an otherwise democratically elected publicly accounted for body. That needs to be made apparent [...] It is important for the local community to know what land is available, but also who has an interest in that land and therefore what obstacles or opportunities might there be in terms of democratic allocation of land.”

### Transparency's impact on the community

Some respondents highlighted the fundamental right of the community to be informed of the way land around them is being used, with one respondent going so far as to suggest that the transparency obligation as proposed does not go far enough:

“the local community has no input in the negotiation of an option agreement. Once an option agreement is signed it ties that land to that purpose without the community of the general public having had any input. [...] That leads to a concern I have with the land commission's proposals, which are transparency after the event.”

“Once that’s tied up [an option agreement] it affects the use of the land on either side but neighbouring landowners have no input into that option agreement until it’s been fixed. At which stage they can only put their bit in during the planning.”

Informed community involvement early in the planning process was viewed as a route to better local development by some respondents, in line with the Scottish Land Commission’s previous research on the value of early engagement in quality placemaking<sup>49</sup>:

“I think it is useful for the communities and places to know what is happening with the land that is around them [...] I think if there’s going to be better conversations about how new development sites can integrate better with communities having that upfront knowledge in terms of what developers communities would potentially be talking to and what relationships they’ve got so far... information is power at the end of the day with these things and I think the more information you get out there the better, but appreciating that commercial sensitivity when it comes to the financials and things is obviously something that would need to be treated quite carefully”

Additionally, community right to buy was mentioned by a couple of interviewees. These interviewees discussed instances in which the community went through the process of attempting to buy a piece of land, only to discover that the land was under option very late in the process, highlighting the need for transparency to avoid such situations in future.

Another reflection was that promoting transparency through option agreements could enhance developers' public relations and reputation. This transparency could be seen to showcase a commitment to transparency, accountability, and good governance, which is beneficial for large-scale projects and those impacting local communities.

## Transparency and Local Development Plans

Several respondents additionally highlighted that a transparency obligation and register could assist in the development of Local Development Plans. It is argued by these interviewees that this information is important when evaluating the viability and deliverability of projects.

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<sup>49</sup> [Value of Early Engagement in Planning.pdf](#)

“I guess greater transparency would be more helpful in the development of local development plans so that you can understand what developers and land buyers are intending. Maybe that would make the call for sites process a bit easier to some degree [...] It would be useful for communities to know who’s got interests where especially through the local development plan preparation process but also potentially with emerging local place plans. That information would be helpful I think.”

It was additionally noted that up-to-date information on land availability would be increasingly important now that the LDP cycle has extended to every 10 years.

“We are moving to a ten-year cycle for a local development plan. If I go out and ask developers and landowners ‘what’s the status, what’s the situation’ in 2024 and then I don’t go back and ask them within 10 years, being able to go in and look at a register within that time to see if there’s been any change potentially could be useful if we are talking about housing land audits and looking at supply of land and deliverability as things move on.”

One interviewee specifically highlighted a possible connection between greater transparency and environmental considerations/improved environmental outcomes in the planning process.

“It links into the environmental impact assessments. A local authority who puts out their draft plan for consultation has to have an environmental impact assessment on that plan where you consider the environmental pros and cons of a different housing site where they’ve been designated. Legislation doesn’t cover a one off options agreement. [...] Why shouldn’t you have an environmental impact assessment prior to having an option agreement agreed.”

## Transparency and the Land Market

Additionally, a public register of option agreements was viewed as a route to promoting competition and efficiency in the land market, which could be viewed as both a positive and negative given that it may result in raises to the price of land.

“I think it might well trigger competition. Because people hear that somebody is looking for an option agreement in a particular area, everyone else will get into the market [...] It is likely to bring them out of the woodwork. [...] It might put up the price of land. [...] A

criticism of mine of the Scottish Government is that they allow land use to be driven by the developers.”

Registering option agreements could potentially improve market efficiency by providing clear information about the availability of land for development. It could help developers identify potential development opportunities, assess risks, and make informed decisions about their development strategies. This could facilitate more efficient and informed decision-making by developers, leading to better allocation of resources and improved market outcomes.

### Transparency and Legal Agreements

Finally, another argument made was that making the terms of an option agreement public could serve to encourage developers and landowners to keep to these terms. Given that an option agreement requires developers to commit to promoting land if conditions are met, making these conditions public could apply more pressure to ensure land is promoted in a timely and appropriate manner.

Registering option agreements could enhance transparency and trust between developers and landowners. It could provide clear records of the terms and conditions of the option agreement, including purchase prices, timeframes, and other relevant details. This could promote transparency in dealings and help build trust between parties.

### Against the transparency obligation

Several arguments against the transparency obligation were also put forward, some of which directly rebut the above arguments in favour, and some of which provide different angles to think about the transparency obligation:

- A transparency obligation infringes upon commercial confidentiality.
- Scepticism exists around early community engagement.
- Questions were raised about the practicality of the proposal.
- The land market already functions effectively.

### Transparency Obligation and Commercial Confidentiality

The most prevalent argument against the proposal of a transparency obligation is concern about the possible publication of commercially sensitive information.

It was argued that registering option agreements could result in a loss of confidentiality for developers given that such agreements often contain sensitive information, such as purchase prices, terms, and conditions, that developers may not wish to disclose publicly. Registering option agreements would make this information accessible to the public, which may not be desirable for developers who wish to maintain a degree of confidentiality around their business strategies.

“From a commercial point of view it put constraints on commercial developers and makes it more difficult for them to be secret about their commercial plans, which is something they are entitled to be, and on the prices they pay and that sort of thing. If it gets known somebody’s taking an options agreement on a particular area, everyone else will be up there competing and perhaps coming in. [...]”

It was also argued that ultimately option agreements represent private contracts between landowner and buyer. Stakeholders who were sceptical of a transparency obligation, particularly where terms such as the price and duration were made public, questioned why such private arrangements would be made public when this was not the case in other industries.

“I am not sure how effective it will be because the thing about an option is its personal, it’s a personal contract between probably a company, a developer, and then a landowner who may be a trust, may be a company may be an individual, but it’s a personal contract. [...] You wouldn’t make [company] put their contract with whoever they buy their timber from in the public domain.”

It was highlighted that those securing options on land for housing are often agreeing to take the land through the required processes to secure planning permission to build housing on the land and therefore were taking on an element of risk in terms of shouldering costs to get through these processes. Having to publish potentially commercially sensitive information around terms, the duration and costs associated would add an additional element of risk for developers which some were uneasy about.

Where conditions were made public, this could reduce the flexibility of developers to make changes throughout the life of the option agreement. Part of the attraction of option agreements is that they provide flexibility to developers, allowing them to make decisions about whether or when to exercise the option to purchase the land as they move through the process.

A requirement to register option agreements would potentially add a barrier which restricts the ability of developers to modify or terminate the agreement without going through the formal registration process.

Specifically, one interviewee raised concerns about how a transparency obligation would interact with other legislation:

“Well, it’s all the commercial confidentiality type stuff [...] I don’t know what pieces of legislation that would intersect with. For example, I know there [are] issues with land value capture for example potentially interfering with some of the human rights pieces of legislation. So, I don’t know if any of that could interfere with that”

### Transparency Obligation and Early Community Engagement

An element of this concern about commercial confidentiality surrounds scepticism about the efficiency of early stage community involvement in projects, particularly given that the conditions around options and the intended purpose of the proposed development can be highly speculative.

This earlier involvement could dissuade both purchasers and landowners looking to sell if they know that they will come under community scrutiny at such an early stage in the process leading to a slowing down of taking land through to the point where housing can be built and therefore having a detrimental effect on the delivery of new housing supply.

“Most of the industry would be reasonably wary of the local community being aware a long time before the process of planning actually starts....There’s a concern that you would hijack quite early the process. [...] The whole outputting of housing I think is going to get slower particularly if you bog it down in the beginning

“But if you put into the public domain ‘such and such a land owner has done a deal with [redacted] for their land to be promoted for housing and they are going to get insert big number here’ there is an immediate heightened public interest and you could see that being reported on in local newspapers and that may have a chilling effect on peoples willingness to engage at an early stage in the process [...]. And then it maybe more difficult to get people to interact with the process if the commercials are in the public domain from a very early stage.”

In general, several interviewees discussed a lack of public knowledge of the intricacies of the planning process. Developers highlighted the various elements involved in building new housing developments, including the various pieces of planning permission this involves such as train stations, road permits, and schools. As discussed in more detail in the ‘land banking’ section below, several interviewees expressed the sentiment that there is insufficient public awareness of the fact that building houses and surrounding infrastructure is a multiple year-long process, with some interviewees placing the blame for exceptionally long build times with the planning authorities.

“Within a local authority you’ve got many different..... you’ve got road consents, you’ve got all sorts of stuff to work through, building control itself as well, and so I sometimes feel the argument gets portrayed in a little bit of a binary and oversimplified manner.”

### Transparency Obligation and Administrative Burden

Several respondents raised additional concerns about the practicality of implementing a proposal of this sort. In particular, it was suggested that the costs of this proposal be considered closely given the administrative burden it would involve.

“One thing I would say is the regulatory burden that comes along with the new register that’s already in place in terms of disclosing ownership. That is increasing the burden particularly on the registers themselves and also on those who administer the transactions. This is a wee tiny violin moment for the lawyers. Often when this kind of thing is brought in the legal responsibility is put on to the lawyers, or the conveyancers or the land register to deal with and the resource implication of it shouldn’t be lost.”

Additionally, failure to register, if required, may result in consequences on the rights and obligations of the parties involved in an option agreement. Developers would need to ensure compliance with the registration requirements to maintain the enforceability of their option agreements.

### Transparency Obligation and the Land Market

On a more fundamental level, some respondents viewed the exercise as unnecessary and did not feel like there were clear reasons for a transparency register. These respondents argued that the land market functions effectively currently and that barriers to housing supply are not a result of a lack of transparency around options agreements.

“To my knowledge, [...] there’s never been a local authority that has gone through that process [call for sites] twice because they haven’t been offered enough land. So, my question is, who is this bothering? If there is a lack of transparency, who is it bothering? If it’s to do with housing land supply, then I’m not sure that’s an issue.”

Additionally, several interviewees said that they did not see the connection between a lack of transparency and a lack of housing availability, or between a lack of transparency and high land prices.

Though some did reflect that registering option agreements could theoretically have some impact on land values as publicly accessible information about option agreements could affect the perceived value or marketability of land.

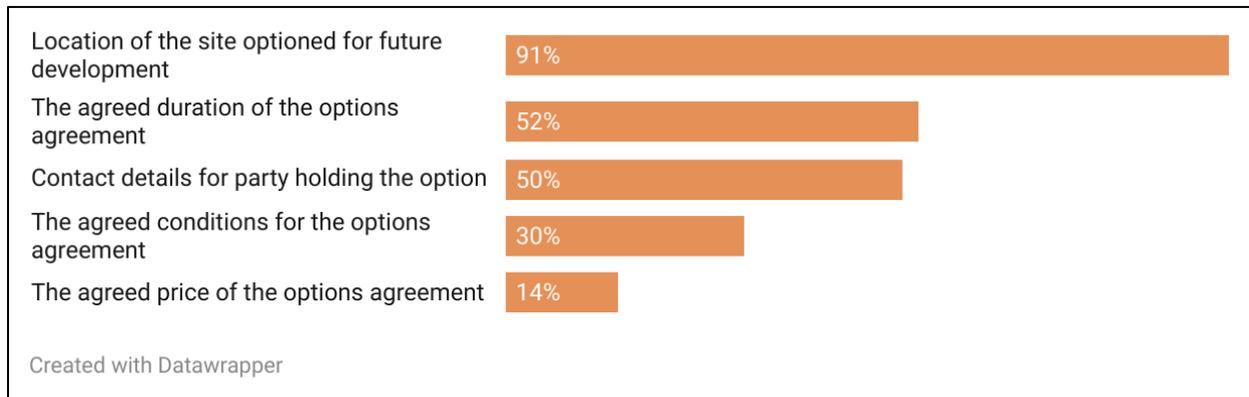
### Information to be included on the register

Given the hypothetical scenario in which a public register on option agreements and conditional contracts exists, nine in ten survey respondents (91%) believed that the location of the site optioned for future development should be made available. A common view was that should such a register exist that the site area should be searchable and displayed on a map.

Views were more mixed (52%) regarding the agreed duration of the option agreement being included on the public register and half (50%) believed the contact details for the party holding the option should be made public.

Only three in ten (30%) respondents thought that the conditions of the options agreement should be included while a minority (14%) thought the price should be included, see Figure 5.2.

Figure 5.2: The Scottish Land Commission recently recommended that a new transparency obligation should be introduced that would require options agreements and conditional contracts over lands to be disclosed on a public register. If such a register were to be established, what information do you think should be included in such a register?



Representative bodies, local authority representatives and landowners would like the agreed duration of the option agreement to be included in any register.

Those who are supportive of a public register, i.e., representative bodies and local authorities, are amongst those who think the contact details for the party holding the option should be included in the register. However, those from other sectors are not as positive about the inclusion of contact details.

The figures above largely reflected comments in interviews with stakeholders. Many were of the view that the inclusion of commercial information such as the conditions and price would go beyond what was necessary for inclusion on any register.

Views were more mixed on the inclusion of contact details or the duration, some stakeholders felt this was vital information for the register to be of use while others felt it strayed into territory that might put some off entering into such agreements or introduce risk for developers and buyers if some of the terms were out there.

Generally, most stakeholders felt that if such a register were to exist that the location of the site optioned should be on it. One commonly cited view was that this information should be searchable and appear on a map, marking that the land is optioned. A dissenting view was that

publishing this alone didn't seem like a lot of information and that it didn't necessarily add value or solve issues around transparency generally.

## Access to the register

Participants who took part in interviews were asked who should have access to such a register if it were to exist.

Generally speaking, it was felt that if such a register were to exist that anyone who would like to access it should be able to, this was often caveated with the argument that the level of accessibility may have to be dictated by what is included on such a register.

## Conclusion

Views were mixed on the proposal of the Scottish Land Commission with more than four in ten (44%) respondents to the survey disagreeing with the Scottish Land Commission's proposal to introduce a transparency obligation while 38% agreed with the proposal.

Given the hypothetical scenario in which a public register on option agreements and conditional contracts exists, nine in ten survey respondents (91%) believed that the location of the site optioned for future development should be made available. A common view was that should such a register exist that the site area should be searchable and displayed on a map.

Views were more mixed (52%) regarding the agreed duration of the option agreement being included on the public register and half (50%) believe the contact details for the party holding the option should be made public.

Only three in ten (30%) respondents think conditions of the options agreement should be included while a minority (14%) think the price should be included, reflecting concerns raised concerning commercial confidentiality.

As a general principle, accessibility to the contents of a register was seen as positive. However, it was difficult for stakeholders to comment on the degree of accessibility that would be appropriate, before knowing what the register would specifically contain.

Various arguments were put forward by different groups in favour of a transparency obligation:

- Transparency as a democratic principle is viewed as desirable.
- Community engagement is viewed as essential to good development.
- Transparency has practical advantages for creating Local Development Plans.
- Transparency would enhance competition and efficiency in the land market.
- Transparency could improve compliance with legal agreements.

Several arguments against the transparency obligation were also put forward, some of which directly rebut the above arguments in favour, and some of which provide different angles to think about the transparency obligation:

- A transparency obligation infringes upon commercial confidentiality.
- Scepticism exists around early community engagement.
- Questions were raised about the practicality of the proposal.
- The land market already functions effectively.

## 6. Discussion and Recommendations

### Discussion

The previous sections have summarised the existing work SLC has published to date in developing its recommendation to introduce a transparency obligation and the views of stakeholders who took part in this research.

The recommendation of the SLC to introduce a transparency obligation on option agreements is on the basis that such transparency would provide opportunities for earlier community engagement which improves placemaking and allows greater input on where to develop housing. This transparency would, theoretically, allow public bodies to play more of a role in highlighting sites for the development of housing and to engage with developers and landowners earlier.

Views from participants in this research were split about whether information on transparency agreements should be available to the public. Local authorities that took part were more likely to think that information on option agreements should be available to everyone while there were more mixed views among lawyers and developers who tended to disagree.

Respondents recognised that a balance had to be struck between transparency and the benefits it could offer, versus the impacts that impinging upon commercial confidentiality could have on the market. This discussion considers some of the views raised concerning the SLC's proposal to introduce a transparency obligation before setting out a recommendation for how a transparency obligation could look and further areas for exploration ahead of any potential introduction.

The notion of transparency and its benefits were viewed as being an important point in principle in a democratic society and that people and public bodies had a right to know about interests in the land around them and the intended purpose of development on them.

It was argued that the introduction of a transparency obligation would aid local development plans as local authorities would be able to access information on where development is proposed. This is set in a context that under the current system public bodies would not necessarily know about land optioned until they were calling for sites, given the longer timeframe proposed under NPF4, there was thought to be an imperative for this information to be available so that communities and public bodies could be aware of plans for land in their local area.

Indeed, it was also argued that this transparency would lead to more informed community involvement earlier in the planning process and that this would lead to better outcomes in terms of ensuring that development can better integrate into communities and allow for a more holistic consideration of how new housing development would impact on areas. Fostering earlier support has been identified in previous research as a factor in potentially speeding up processes.

However, it was also argued that at the point option agreements are taken out that the proposed use for the land can be highly speculative and there was some scepticism around the efficiency of early stage community involvement in projects. There was a sense that a transparency obligation could dissuade both purchasers and landowners from taking out an agreement in these scenarios, particularly where the financial information may be made public. There were fears that it could create difficult scenarios for landowners to navigate if the information was out there at a very early stage.

Additionally, given that there can often be a long time between an option being taken out on land and all the relevant preparations and processes covering planning across a range of areas not limited to housing being complete before any housing development can begin, there was a fear that having to navigate early community engagement would add time to an already potentially lengthy process.

There were also concerns with regards to public knowledge around the process and length of time it takes to develop land for housing and surrounding infrastructure and that therefore while early community engagement may be a laudable goal in principle that in practice it may lead to accusations of 'land banking' and frustrate an already complex process before the purchaser and landowner were in a position to be sure that they could use the land for the intended purpose set out in the option agreement.

In terms of positive outcomes relating to any transparency obligation, there were some arguments that transparency around option agreements could lead to promoting competition and greater efficiency in the market. The ability to build up a picture of existing options could better enable planning authorities to shape housing markets and earmark land for housing, moving to a more promotional role and shaping the housing market rather than being responsive and acting as an adjudicator of planning permission for housing.

Another benefit for the wider market was deemed to be that resources and time could be more efficiently spent if there was public information on land that is optioned for development as then potential purchasers and community groups could be aware of this from the outset rather than potentially investing resources into considering land which already has an existing option. There was a sense that this information was already fairly well known intra-market but not beyond that. Addressing this unequal access to information is a key argument in favour of a transparency obligation.

Furthermore, the SLC has previously argued that for the market to operate efficiently that all of the participants, or would be participants, should be able to access information about prices. It is argued that this could have knock-on effects like increasing the amount of land available for rural development.

The most prevalent argument against the proposal of a transparency obligation is concern about the possible publication of commercially sensitive information. It was argued that registering option agreements could result in a loss of confidentiality for developers given that such agreements often contain sensitive information, such as purchase prices, terms, and conditions, that developers may not want to disclose publicly. Registering option agreements could make this information accessible to the public, which is unlikely to be desirable for businesses operating in a commercial and competitive environment.

Therefore, it is clear that the proposal to introduce a transparency obligation whereby there is a requirement to register option agreements on a public register has implications across the land market and housing development sector. The potential benefits of early community engagement and access to information for communities on land in their area are some of the key advantages that such a requirement could unlock. However, there are real concerns in relation to commercial confidentiality which should not be ignored given the pivotal role that private developers play in the supply of housing in Scotland.

## Relation to previous SLC research findings

Three key issues were highlighted by SLC in response to views expressed by participants taking part in this research.

- The logic for increasing transparency- SLC assert that this is not purely to ensure there is enough land for housing, but to ensure that communities and local authorities take part in a discussion on where development takes place and about the new places created by development.
- Concerns about early community engagement – the suggestions by developers that this could slow down development and increase opposition contrast with findings from the Value of Early Engagement in Planning that approval is often speeded up and that community support may increase.<sup>50</sup>
- Claims on Land Banking – An Investigation into Land Banking found no evidence that developers land bank land with planning permission for excess profit – instead, they keep a pipeline of land so they can operate their business.<sup>51</sup> It is impossible to say what impact control of raw land has on the housing market or on the ability of other players/ models to enter the market as there is no clearly available information – hence the call for transparency.

In the next section, recommendations are set out based on the research undertaken within this commission. Any recommendation should be considered in light of prior research and up-to-date knowledge of SLC.

## Recommendations

### The register

Based on the research carried out for this project, we recommend that any transparency obligation should require only the registration of the following information:

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<sup>50</sup> [See Ifa960b190\\_20200611SLC REPORT Value of Early Engagement in Planning.pdf \(landcommission.gov.scot\)](#)

<sup>51</sup> [The Model CHP for the Scottish Government and Associated Public Authorities Sector in Scotland - Word Template \(landcommission.gov.scot\)](#)

- The presence of an option agreement on a parcel of land
- The duration of the option agreement
- The name of the parties.

The usefulness of any transparency obligation lies in the opportunity for communities to engage earlier in the process, perhaps fostering greater support for development and preventing communities and interested parties from potentially wasting time considering land that has an existing option on it. The information above would allow for this to happen without disclosing too many details that would impinge on commercial confidentiality.

Overall, we feel that the concerns raised around commercial confidentiality and the impacts this may have on those developing land for housing mean that including the conditions or agreed price is not necessary to achieve many of the aims that a transparency obligation is seeking to achieve.

### How a register should look

When thinking about the theoretical register, participants expressed a desire for the register to be online, have a visual element and be searchable.

In addition to the above, there should also be a search engine where people can search their local area and be able to find the information. This information should also contain a visual element showing the exact scale of the land where the option is taken out and the accompanying information.

### Areas for further consultation and consideration

However, there are a number of areas that the Scottish Land Commission should explore further before formally recommending such an obligation:

- The Scottish Land Commission should work with developers, land agents, landowners and lawyers to better understand the administrative costs of registering option agreements,
- The Scottish Land Commission should consult with the sector to determine an appropriate lead-in period and realistic parameters for registering existing and new option agreements,
- The Scottish Land Commission should work with the Scottish Government and other relevant parties to establish the impact of a legal requirement to register options agreements on other related legislation.

- Before formally recommending such a requirement, the Scottish Land Commission, working with the Scottish Government, should conduct a wide consultation with the sector on the impacts of its proposals once the details of what would be contained within such a register have been established,
- The Scottish Land Commission should work with its stakeholders to develop tools and resources explaining what an option agreement is, how they work, and their role in the land market and the development of housing to allow better information about how they operate. The obligation for transparency needs to be supported by accessible resources explaining the purpose of option agreements.



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From many voices to smart choices

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