Land For Good

Farm Access Methods

A DECISION GUIDE

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I. INTRODUCTION

A. OVERVIEW

Much has been written about the challenges that beginning and other farmers in the US face regarding access to farms and land to farm. Although agricultural land tenure has always been an issue, the consensus is that finding, getting onto and holding land for farming is harder than in past generations. Producers, service providers, policymakers and advocates are working to reduce barriers to land access and exploring less traditional models.

The purpose of this guide is to provide an organized framework of farm access methods to help farmers make informed decisions. This framework is built around certain terms and assumptions. In this guide, *farms* means land with infrastructure and land only. *Land* and *farmland* also refer to properties with infrastructure, unless the context is specific to raw land. In many discussions on these issues, people use *land access* and *land tenure* to mean basically the same concept—farmers' relationship to their land. But this guide makes a subtle distinction. Here, *land access* refers to *how* farmers get their land. *Tenure* means how farmers hold their land. For example, one land access method is purchasing; the corresponding tenure is ownership. Another access method is leasing; the tenure model is tenancy. So while this guide is named *Farm Access Methods*, we address both getting and holding farms.

In this guide, *farms* means land with infrastructure and land only.

Farm access and tenure are underpinned by law and custom. Only certain property transactions and agreements are allowed by law. Customs—both good and problematic—add variety and richness to common and less common arrangements. For example, many handshake agreements are honored from generation to generation. On the other hand, historic share-cropping customs deprived many farmers of basic land-holding rights.

This guide organizes farm access and tenure methods into three basic categories. In this model, all transactions fall into one of these categories—including most so-called "alternative" tenure methods. These categories are:

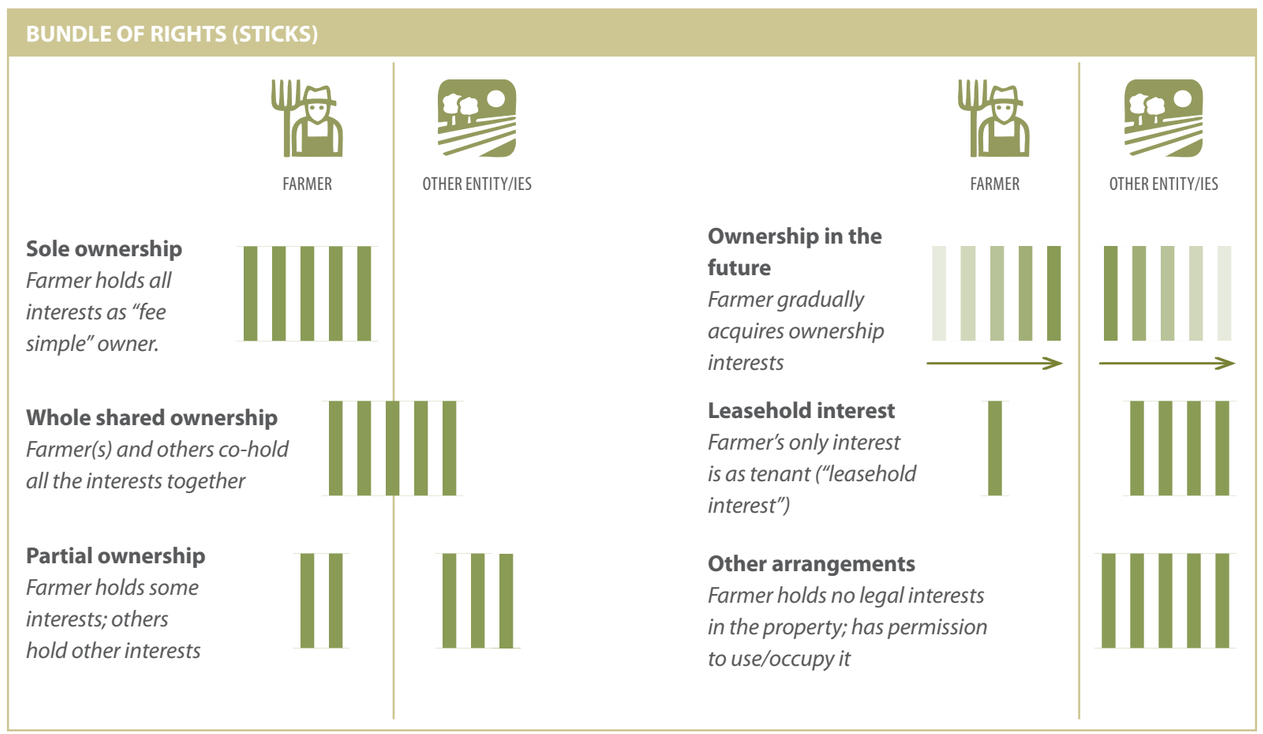
- Ownership now
- Ownership in the future
- No ownership

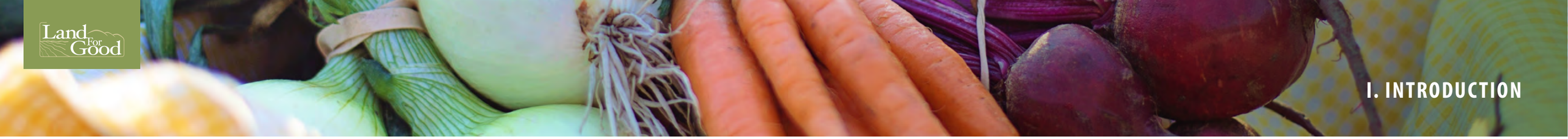
Land tenure hinges on the apportionment of interests (rights) in a property. Experts often talk about a "bundle of rights" in property and use the metaphor of a bundle of sticks. This bundle of rights is a set of legal rights afforded to the holder(s) of the real estate. These can include the rights of possession, use, control, enjoyment, and disposition (e.g., to sell), for example. These rights or "sticks" can be held by just one entity, they can be shared, or they can be divided.

The chart on this page depicts the apportionment of rights. The "Farmer" column represents a particular farmer's position—his or her "bundle." The "Other Entity/ies" column represents other parties holding certain rights in the land. In the case of sole ownership, the farmer holds all the rights; there is no "Other." The parties in the "Other Entity/ies" column may include, for example, other farmers, non-farming co-owners, landlords, and/or organizations or agencies holding easements or other rights. These arrangements are described in this guide.

The basic elements in all land transactions are:

- The parties to the transaction or arrangement (who is directly involved and has a stake)
- The arrangement and instrument (legal document) used
- How the rights are apportioned





I. INTRODUCTION

All land transactions can be categorized by who holds which rights (or "interests"), and under what terms and conditions. The legal instruments themselves are essentially neutral. How they are used, and how the participating parties reflect their intentions depend more on the values brought to the transaction than the particular entity or instrument. For example, "community-owned" of land is a term embedded with certain values. Nonetheless, in "community ownership," a legal entity (for example, a community-based, nonprofit corporation) owns the land, and a transaction for farming uses must follow certain rules. "Corporate" or "investor" ownership of farmland can have negative connotations to some. In reality, judgment about the goals of any landowner should be based on an understanding of that person's or entity's values, intentions and choices.

This is not to say that all arrangements are equal or adequate. Farmers' success hinges heavily on the nature of their tenure situation. A hasty decision or poorly conceived transaction can negatively impact the farmer, other stakeholders and the land itself. And while most tenure methods fall into the basic categories, each transaction is unique.

Farmers' decisions about land access and tenure are based on many considerations. Values about land ownership, private property, equity-building, legacy, land stewardship, and family quality of life form the foundation of their choices. Then there are the practicalities. What can you afford? Where does the farm need to be located? What features are necessary?

Each method is described along six factors. The guide does not get into great detail about each method because such information is available elsewhere.

For each method, the guide addresses:

- Parties and stakeholders
- Legal and financial considerations
- Equity and legacy provisions
- Challenges and responsibilities
- Advantages and disadvantages
- Most appropriate (for whom)

This guide also explores a set of variables that are common considerations for most farmers seeking access to farms. It analyzes and compares farm access methods across six variables and presents a graphic "score," indicating the extent to which the particular method addresses each variable. For example, a short-term lease rates high in flexibility but low on security. These "scores" are based on the guide authors' and reviewers' interpretation of each method; they are not absolute. You might score the variables differently for various methods.

While most tenure methods fall into the basic categories, each transaction is unique.

The variables are:

1 **Security:** Security refers to protection against losing control of the land. Full ownership provides maximum security; informal agreements offer the least. The degree of actual security can depend on the fine print in a lease, and sometimes interpretation of the agreement terms. For example, a lease could be for a ten-year term, but it might also say that the landlord has the right to terminate at any time. Farmers need *adequate* security to meet their farming objectives. In some situations, a casual short-term agreement might be secure enough—for example an added hayfield or one-year experiment with a pumpkin patch. For farmers just starting out, short-term security can offer enough time to test the parcel, farming practices and markets without a long-term commitment.

2 **Equity:** Equity refers to the value of owned assets, minus any liabilities against it. You can build equity through any increase in value of the asset, or by reducing the liabilities against it. Most typically people refer to the equity in a home or land. If there is a mortgage on the asset, the owner's equity is the portion held by him or her; the remaining portion is held by the lender(s). Real estate is always seen as a good equity-building investment because it nearly always appreciates over time. We've all heard about "land rich, cash poor" farm families. However, equity can be built in other, non-land ways, including in machinery and equipment, livestock, savings and retirement accounts. Many personal and practical considerations go into a farmer's decisions about how to build equity.

3 **Affordability:** Affordability is often mentioned as the biggest barrier to land access. But what does this mean? A definition of affordable is "that which can be afforded; … to be within one's financial means to bear the cost of." Affordable is not the same as "inexpensive." Affordability can be thought of in two ways. One describes market or structural conditions that determine price. The other describes individual capacity. What is affordable to one farmer is not affordable to another.

That said, **this guide considers three ways to make farms "more affordable."**

A The first is to *decrease the cost of purchasing land*. We distinguish the price of land (what is paid for it) from the cost of land (all the expenses that go into the acquisition including closing costs, mortgage interest and taxes, for example). Each method has consequences and requires compromises. Ways to lower the price *and* cost of land to the farm seeker are to:

- Remove the development or other rights
- Choose a location with lower land values
- Choose raw land (without improvements)
- Choose a lower quality property
- Buy less land
- Buy land with others
- Receive land as a gift or inheritance or at a bargain price

Another way to reduce the cost of purchased land is with less costly capital such as, for example, subsidized, friendly or "alternative" loans. USDA real estate loan programs, community lenders and family are sources of potentially more "affordable" capital than conventional real estate mortgages.

Affordability is often mentioned as the biggest barrier to land access.

B The second method to make farms more "affordable" is to increase one's ability to bear the cost of purchasing land. Strategies include increasing farm profitability, generating more off-farm income, or postponing purchase, with the purpose of being able to finance a land purchase at some point. With more capacity, land becomes relatively more "affordable."

C The third method is to eliminate the cost of ownership; that is, to access land without purchasing. These include all variety of leases, including lease-to-own, along with other land use agreements, and

farming as an employee on someone else's farmland.

4 **Flexibility:** In the world of farmland tenure, and in this guide, flexibility means several things. One is the ease of entry and exit from the agreement. Another aspect is the relative ability and ease to alter the agreement. A third is how much leeway the tenure method gives the farmer to practice his or her trade on that land. A high degree of flexibility will be demonstrated in a lease that allows relatively easy termination without penalty, includes a clause enabling revisions, and is broadly supportive of the farmer's right to farm without unreasonable conditions. A less flexible arrangement would be one in which a landlord imposes certain requirements such as organic certification, no animals, or hefty penalties upon early termination.

5 **Farming requirements:** Farming requirements can vary quite a bit. For a sole, fee simple landowner, there are no external requirements other than those imposed by zoning, environmental, health, and other ordinances. When other parties are involved, such as landlords or co-holders of land rights, requirements can be significant. For example on land with an agricultural conservation easement, the easement can impose requirements about where and how to farm. Inherited land may come with requirements about whom it could be sold to. Cooperative ownership might include requirements about types of inputs or other sustainable practices, or specific decision-making procedures.

As land access methods evolve, farmers will benefit.

6 **Access to capital:** This variable assesses the extent to which each method affects the farmer's access to capital to finance farm needs such as infrastructure and operating loans. Financing the operation typically depends a great deal on the farmer's ability to securitize the loan. One obvious way to do that is with equity in the farm property. An ownership ("fee") stake in the property as described in several methods below, will offer the most secure path to borrowed capital. Where a farmer's land tenure cannot be collateralized, other forms of personal equity such as other capital assets, investments, savings and retirement vehicles could be used to secure capital.

At the end of the discussion about each farm access method, the Guide employs two "scores." These are provided to assist farmers to compare the utility and applicability of each farm access method to their specific circumstances and land tenure goals. The "scores" are not meant to imply that any particular method is superior to another. Rather, they indicate the relative "weight" of a method. For example, a method that scores high on farming requirements means that that method has a relatively high degree of requirements. That may or may not be desirable to the farmer(s).

The first of the two "scores" is the **Variables Score**. It rates each method according to the six variables described above, using "high," "medium," and "low." Accompanying each "score" is a brief description.

H	**Security** This method offers maximum security to the farmer.

The second "score" builds from the bundle of rights discussion on p. 2. This **Ownership Score** is a continuum of ownership rights from none (zero) to full ownership (10). As with the Variables Score, the Ownership Score does not suggest that a higher score is "better." The allocation of ownership rights is in itself neutral. The Ownership Score simply reflects the relative division of those rights.

B. HOW TO USE THIS GUIDE

You might start by referring to the decision tool on page 8. This graphic depicts the three categories, the particular methods in each category, and who might be involved in the transaction. This decision tool corresponds to the organization of the guide. You might be particularly interested in one approach, such as "ownership in the future" which you can then read about in more detail in the guide. Another strategy is to just read through it, absorbing and comparing all the methods. Ask yourself what's possible for your current situation and down the road. What's desirable? Are you drawn to the idea of sharing ownership with others? Would you be comfortable with a public entity as a landlord?

Think about which variables are most important to you, or which ones drive the others. For example, if you grow perennials, long-term security is important. Which methods "score" higher (per explanation above) than others on this variable? Or perhaps maximum freedom to farm is a priority. Which methods offer the most flexibility and minimal farming requirements?

This guide is for educational purposes. Always check with the appropriate advisors, and for current state and federal laws, as they can change.

We've included a Glossary section to which you might refer before you dive in, and along the way as you get into the details. The Resources section at the end provides links to some organizations and materials.

Along with improvements to traditional agricultural land access and tenure methods, more innovations are needed to solve the farm access and tenure conundrum. They might range from tweaks to existing methods and bringing in new partners and stakeholders, to new public programs and funding support, fundamental shifts in our land-holding, economic and tax systems, and new paradigms to hold land. A strategy that looks "alternative" might be a creative variation on one of the methods in this guide—or something quite new and different.

Advocates are seeking public policy reforms to help make land more affordable, or leases more attractive, for example. Some seek to address more basic issues such as concentration of wealth in land. Agricultural service providers are delivering more land access programs and technical assistance. Attorneys are looking more closely at how legal instruments can better serve farmers and landowners around land transactions. As land access methods evolve, farmers will benefit, their businesses will thrive and communities will reap the rewards from farmers on the land.

C. FARM ACCESS DECISION TOOL

This decision tool shows the three categories of farm access methods described in this guide.

Each category lays out the division of interests (rights) in the property, the legal vehicles typically used, and a list of the parties that might be involved in the arrangement. This tool helps you compare methods and make informed decisions. A stand-alone version of this tool is available at www.landforgood.org/resources/toolbox.

WHAT IS MY FARM ACCESS GOAL?

Ownership Now			Ownership in the Future	No Ownership	

WHICH ARRANGEMENTS MIGHT WORK FOR ME?

Sole Ownership	Whole Shared Ownership Interests	Partial Ownership Interests	Path to Ownership	Leasehold Interest	Other Arrangements for Land
Farmer acquires title to land; known as Fee Simple. ▸ **Outright Purchase** ▸ **Financed purchase** with conventional or alternative financing ▸ **Gift** or **Inheritance** from family member or other	A group of farmers, or farmers with non-farmers, forms a legal entity to own the farmland. ▸ **LLC or Corporation** ▸ **Cooperative**	Farmer and other entities own different interests (rights) in the land. ▸ **Ground lease** where entity owns land; farmer owns structures and rents land ▸ **Life estate** where non-farmer retains rights to occupy ▸ **Easement**	Farmer purchases a specific farm over time. ▸ **Lease-to-own** with right of first refusal or purchase option ▸ **Land contract** where farmer pays landowner toward purchase ▸ **LLC or corporation** within which equity in the farm is gradually transferred ▸ **Gift** of land over time	Farmer (tenant) has a contractual agreement assigning use rights and responsibilities; may be written or oral. ▸ **Short-term lease** ▸ **Long-term lease** ▸ **Ground Lease** where entity owns land; farmer owns structures and rents land	Farmer has an arrangement granting permission to use the land (technically not a tenant). ▸ **License or Permit** ▸ **Agreement**

WHO MIGHT BE INVOLVED?

Sole Ownership	Whole Shared Ownership Interests	Partial Ownership Interests	Path to Ownership	Leasehold Interest	Other Arrangements for Land
▸ **Private bank** ▸ **State/Federal lender** ▸ **Seller-financer** ▸ **Community/Alternative lender** ▸ **Family/Trust** ▸ **Employer** ▸ **Other private landowner**	▸ **Other farmers** ▸ **Community members** ▸ **Investors** ▸ **Family**	▸ **Community land trust** ▸ **Conservation land trust** ▸ **Other Non-profit** ▸ **Public/Gov't entity** ▸ **Private landowner** ▸ **Investors**	▸ **Private landowner** ▸ **Family** ▸ **Non-profit** (e.g., land trust, school) ▸ **Public/Gov't entity** ▸ **Investors**	▸ **Private landowner** ▸ **Family** ▸ **Public/Gov't entity** ▸ **Non-profit** (e.g., land trust, school) ▸ **Investors**	▸ **Private landowner** ▸ **Public/Gov't entity** ▸ **Non-profit** (e.g., land trust, school) ▸ **Other landholding entity**

D. GLOSSARY

Access: A dictionary definition of access is "The permission, liberty, or ability to enter a place." In the context of this guide, access refers to how farmers acquire (get) their land. With respect to agriculture, "land access" is often synonymous with "land tenure"—meaning all the issues associated with getting and holding land to farm.

Agricultural conservation easement: a specific easement that protects farmland by in part restricting future non-farm development and subdivision.

Community land trust: Community land trusts (CLT) are nonprofit organizations that develop and hold properties for the benefit of a community. Projects often focus on affordable and cooperative urban and rural housing, and commercial spaces. CLTs are governed by boards comprised of CLT residents, community residents and public representatives.

Community-owned: Owned and controlled by a local community through some representative mechanism that allows a community to influence its operation or use, and to enjoy the benefits arising from it. "Community owned" still requires a legal structure. The "community" nature is defined by the membership and the operating rules.

Conservation land trust: Conservation land trusts are nonprofit organizations that acquire land or conservation easements, or that steward land or easements, to achieve one or more conservation purposes. These purposes include protecting and conserving water quality, wildlife habitat, historic features and farmland, for example. Conservation land trusts work with landowners to purchase or accept donated properties or interests in properties.

Contract: A contract is a voluntary, deliberate, and legally binding agreement between two or more competent parties. Contracts are usually written but may be spoken or implied. A contractual relationship is evidenced by an offer, acceptance of the offer, and a valid (legal and valuable) "consideration"—such as rent. Each party to a contract acquires rights and duties. While all parties may expect a fair benefit from the contract, the benefits are not necessarily equally distributed.

Cooperative: A cooperative is a legal entity owned, controlled and operated by its members for their own benefit. Each coop member contributes equity capital, and shares in the control of the asset. Farmland, housing, and commercial enterprises can be formed as cooperatives.

Corporation: A corporation is a legal entity that is separate and distinct from its owners. Corporations enjoy most of the rights and responsibilities that an individual possesses; that is the right to enter into contracts, loan and borrow money, sue and be sued, hire employees, own assets and pay taxes. Farms that choose to incorporate register either as an IRS-designated C or S corporation.

Easement: An easement is an interest in real property that either limits or allows certain uses of the land. These include allowing access (e.g., a farm lane), crossing the property (e.g., a powerline corridor) or limiting certain uses to achieve a conservation purpose (e.g., restricting certain uses adjacent to a streambank).

Entity: An individual or legal party—in this case, that holds rights (interests) in a farm or farmland. This could include the farmer as individual owner or tenant, a landlord, an LLC, corporation, cooperative, public agency or non-profit.

Equity: Equity typically means the sum value of owned assets. A person's equity is the value of the owned asset minus liabilities against it. A shareholder's equity is that person's financial interest in the entity. *Equity-building* refers to the capacity to increase one's equity through various means.

Equity also refers to the quality of fairness, as in "equitable treatment."

Fee simple ownership: Fee simple ownership is the highest form of ownership of real estate. It entitles the property owner to full enjoyment of the property limited only by zoning laws, deed or subdivision restrictions, or easements. The duration of ownership is not limited, and it can be passed along to heirs. Fee simple is the legal term for what we think of as full ownership, as represented by the owner's name on the title.

Ground lease: A lease for land ("ground") upon which the lessee owns some or all the improvements; in agriculture, typically a house and farm buildings.

Interests: See "rights."

Investor: An investor is a person or an entity that commits capital with the expectation of financial returns.

Land contract: A legal agreement in which the buyer makes payments to the seller for real estate. When payments are complete, title is transferred.

Landlord: A landlord is the person or entity that owns and leases (rents) property (e.g., farmland) and/or buildings to others. The landlord legally owns the property being leased.

Lease: A lease is an oral or written agreement between two parties to rent land. A lease gives the tenant (or lessee) use and possession of the property for a specified time, under specified terms. A lease is a *conveyance of interests* in property.

License: A license is *permission to use*—in this case, a farm property. A license does not convey any interests or rights in the property.

Lien: A lien is a legal claim held by another against a person's property.

Limited Liability Company (LLC): An LLC is a legal structure in which the members of the company are personally protected from liability for the company's debts or liabilities. LLCs are essentially hybrid entities that combine the characteristics of a corporation and a partnership or sole proprietorship.

Option to purchase at agricultural value (OPAV): An OPAV is a clause in an agricultural conservation easement contract which is intended to ensure that the protected farm is sold at its agricultural value and that the land continue in active farming

Partner: In the formal sense, a partner is a person who has a legal role in a business undertaking with others. Participants in a business *partnership* are partners. More broadly, a partner could be any individual or entity that is collaborating in an endeavor or project, without necessarily having a formal stake in it. For example, organizations working on a common cause might call each other partners.

Permit: A permit, like a license, is *permission to use*—in this case, a farm property. A license does not convey any interests or rights in the property.

Rights: Rights refers to a set of legal interests attached—in this case—to the holder(s) of real estate. These can include the rights of possession, use, control, enjoyment, and disposition (e.g., to sell). These interests can be held by just one entity, they can be shared, or they can be divided.

Sole proprietorship: A sole proprietorship is an unincorporated business owned by one individual who is personally responsible for it.

Stakeholder: A stakeholder is a person (such as a family member) or a group (for example, a community, members of an organization, or investors) with an interest or concern in something—in this case, farmland, a farmer, a landowners, or farmer. The interest may be tangible such as a financial investment, or intangible such as caring about the land or securing land access for a farmer.

Tenant: A tenant (or lessee or renter) is a person or group that rents and occupies land from another for a period of time. The tenant acquires use rights to the leased property.

Tenure: Tenure means "to hold." In the context of this guide, tenure refers to holding farmland or a farm, via ownership or tenancy. Tenure rules define how rights to land are allocated, used and transferred. Land tenure patterns and trends reflect many complex historical, cultural and political dynamics.

II. OWNERSHIP NOW

OVERVIEW

In the US, we are most familiar with private ownership as a form of land-holding, or land tenure. And while nearly half of US farmers rent some or all the land they farm, the vast majority of farmers desire to own their farm or farmstead at some point, akin to many people wanting to own their own home.

This section of the guide looks at various methods of ownership. Some forms are more complicated, some more creative. Regardless of the method, it's important to be clear about *what is being owned*. We stress this because discussions about "farm ownership" often confuse or combine *ownership of the real estate* with *ownership of the business*. Both could be owned by and in a single entity, but often that is not the case (or a good idea). Many farms operate under a dual legal structure with the farm operating business in one entity and the farm real estate under some other ownership form. This structure is especially useful for transitioning farms; the successor can acquire the business first and then the real estate in a two-step process. Separating the entities can also protect the real estate if, for example, the business owner is sued.

For example a group of farmers could form a limited liability company (LLC) that buys land. That group still must determine the structure(s) for *farming on it*—are they one business entity? Or is each farmer operating his or her own business? And do the businesses rent from the land-owning LLC?

Community owned is another term or concept that merits examination. "Community owned" assets, businesses or organizations are defined as owned and controlled by a local community through some representative mechanism that allows a community to influence its operation or use, and to enjoy the benefits arising from it[1]. Community owned businesses—or land—can be formed via several legal structures such as a cooperative, LLC or corporation. Being "community owned" still requires one of the legal entities discussed in this guide. The "community" nature (how the community influences use) of that entity is defined by the membership and the operating rules.

> The vast majority of farmers desire to own their farm or farmstead at some point.

A. SOLE OWNERSHIP

In this Guide, sole ownership refers to *fee simple ownership* of a farm property, regardless of how the purchase is financed. Fee simple means "complete ownership," represented by the title to the property (although certain rights can be split off), subject to any mortgages or liens. It is seen as the "highest" form of property ownership available.

1 https://www.amiba.net/resources/community-ownership

Sole ownership can be comprised of a single owner or two or more persons holding title together. In the US, the vast majority of farm businesses—typically smaller farms—are set up as sole proprietorships. Sole proprietorships are easy and simple. The individual farmer, the business and the landowner are one and the same—typcially "doing business as" (DBA). One disadvantage to sole proprietorships is not having a suitable framework to accomplish various business objectives. These include personal liability protection, separating the business from the real estate, and making room for others in the operation. Farms can be acquired, held and transferred by sole proprietors.

One of three forms may be used when there is more than one owner: Tenancy in Common; Joint Tenancy; and Tenancy by the Entirety. (Note that here the term "tenancy" refers to ownership, not being a "tenant." It's confusing.) Each type of concurrent ownership has advantages and disadvantages, especially in matters involving the sale or partition of the property, estate considerations, protection from creditors, and contribution toward maintenance and repair of the property. Seek information and legal counsel to choose the most appropriate form for your situation.

Sole ownership can be achieved through several methods described here. Farmers must understand and calculate the full costs of purchasing a farm, regardless of how the purchase is made. These include one-time costs such as legal fees and other closing costs, and ongoing costs including property taxes, insurance, debt service and maintenance. Owning a property comes with responsibilities such as complying with property laws and ordinances, adhering to any easements or other liens, and keeping the property in decent repair. These responsibilities are more substantial when a house and/or farm structures are involved.

> Farmers must understand and calculate the full costs of purchasing a farm.

1. OUTRIGHT PURCHASE

OVERVIEW

The purchase of real estate by a sole buyer is a common form of land acquisition in the US. Most purchases are financed—that is, the buyer borrows money–secured by a mortgage—and pays it off over time (see "Financed Purchase"). An outright purchase means that the buyer pays for the property in full; no debt. This is far less common in general, and especially rare among beginning farmers. Nonetheless, outright purchase is one option in the spectrum of tenure choices.

PARTIES AND STAKEHOLDERS

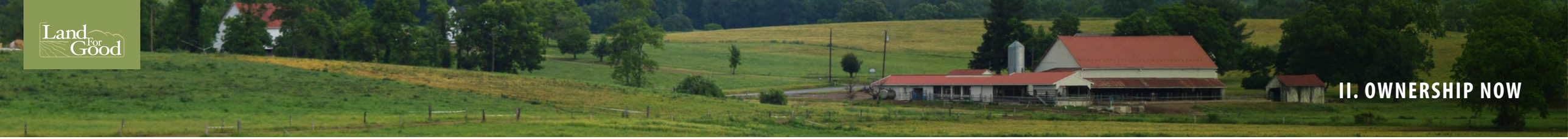
In an outright purchase, the only parties required are a willing seller and a financially capable buyer. Other stakeholders might include any who have an interest in the use and future of the property, such as neighbors. On the buyer's side, stakeholders could include those who have personal or business interests in the financial decisions and risks of the farmer-buyer. Is this the best use of capital? What are the risks? What improvements will be required?

LEGAL AND FINANCIAL CONSIDERATIONS

From a legal point of view, the normal procedures around real estate transactions apply, such as clean title (meaning without any encumbrances or doubt as to its validity), title insurance, relevant inspections, conditions for closing, etc. Financial considerations for the farmer start with whether the application of significant capital to an outright real estate purchase is a wise choice. (Note: this method assumes a purchase at market rate; gifting is considered below in Section 4.) How does this purchase fit with a farmer's business plan? Has the farmer-buyer calculated alternative uses for these funds and the comparable return on investment? Does it make financial sense to buy real estate outright rather than to finance the purchase? In some cases, it does!

EQUITY AND LEGACY PROVISIONS

Fee simple ownership without a mortgage lien provides maximum control of the property in that there are no restrictions other than zoning and the potential for a nuisance suit. It also offers maximum equity because



100% of the equity belongs to the owner. (Exceptions to this occur when there are deed restrictions such as a conservation easement (see "Agricultural Conservation Easement"). In terms of legacy, the landowner is free to sell or otherwise pass on the property (unencumbered or with restrictions) in whatever manner chosen. From a lender's perspective, unencumbered property is excellent collateral for other farm investments.

The emotional connection to owned land can be powerful.

CHALLENGES AND RESPONSIBILITIES

The biggest challenge is coming up with the money to purchase a farm property outright, and to manage the financial repercussions of allocating capital in this manner. The buyer may be taking on substantial risk, depending on the property, the buyer's stage of farming career and his or her overall financial profile. The responsibilities are those that any property owner faces—legal and financial.

ADVANTAGES AND DISADVANTAGES

The advantage of outright purchase of a farm property is that the farmer has total control and 100% equity in the property. The cost is the purchase price without additional interest that would pertain if mortgaged. It can be used as collateral to leverage other acquisitions. The emotional connection to land held in this manner can be powerful. The disadvantages are that significant capital is tied up in this purchase, and the return on this investment may not be as financially beneficial as other types or combinations of investments.

MOST APPROPRIATE

This method might be most appropriate for a successful established farmer or for a second-career farmer who has significant capital to invest. It might be appropriate for buying a small parcel of raw land.

VARIABLES SCORE

H	**Security** This method offers maximum security to the farmer.
L	**Affordability** If property is purchased at market price, the main advantage of this method is avoiding paying interest on a loan.
H	**Equity** In this method, the farmer holds 100% of the equity in the property. The farmer can build equity in the property by improving it, and via appreciated property value in the market.
H	**Flexibility** With fee simple ownership and no lender liens, the farmer has maximum freedom and flexibility regarding farming activities and land uses.
L	**Farming Requirement** This method does not stipulate farming or resource management practices.
H	**Access to Capital** Owning the land outright enables the farmer to use its full value as collateral and borrow against it.

OWNERSHIP SCALE

FINANCED PURCHASE

OVERVIEW

The purchase of real estate by a farmer or farm business with borrowed capital is very common. Most farm property purchases are financed—that is, the buyer borrows money secured by a mortgage and pays it off over time. Farm ownership—even financed—has become increasingly difficult in part because most land is expensive, and the revenue from a farm frequently is not sufficient to cover a down payment, mortgage and other ownership carrying costs, plus other expenses. For this discussion, it's important to note that the productive land and the farmer's residence may or may not be on the same property or financed together.

This section discusses two main categories of financing to purchase a farm or farmland. The first is conventional lending; the second addresses alternative financing.

2. CONVENTIONAL FINANCING

In this method, the mortgage holder is a traditional lender such as a commercial bank, a farm lending association such as Farm Credit, and/or a government lender such as the USDA Farm Service Agency (FSA). FSA offers a range of real estate loan programs, some targeting beginning and socially disadvantaged farmers.

PARTIES AND STAKEHOLDERS

With a conventionally financed farm purchase, the main parties are the buyer and seller. Another key partner for the farmer is the lender or lenders; more than one lending institution could be involved. For example. FSA might guarantee a loan made by Farm Credit or a commercial bank. Or the farmer could borrow from a local bank and FSA's down payment loan program. Borrowers' rights in the event of a default under FSA direct or guaranteed loans vary substantially, as do the interest rates. Farm lenders also have different security requirements. It is important to "shop around" and ask about the full range of farm loan programs available.

LEGAL AND FINANCIAL CONSIDERATIONS

While the mechanics of a mortgage are well established, entering into mortgage debt to buy a farm property is a significant step. Farmers—especially new and beginning farmers and first-time buyers—need to be knowledgeable and prepared in terms of the legal and financial aspects of a mortgage agreement. For example:

- Understand the opportunity costs: a) compared to leasing land; and b) compared to other uses of capital;
- Learn how to navigate the mortgage process;
- Understand the liabilities and risks to non-farm assets; and
- Calculate financial readiness and feasibility including one-time and ongoing costs.

EQUITY AND LEGACY PROVISIONS

A mortgaged purchase is considered fee simple ownership. The purchaser holds title and assumes the rights of ownership. The owner has some initial equity in the property in the form of a down payment and gradually builds more as the loan is paid off. The property can be sold, bequeathed, leased or gifted, thereby making it available to subsequent generations or other transferees, subject, however, to the mortgage terms and remaining debt.

CHALLENGES & RESPONSIBILITIES

Challenges include being able to service the debt and meet other land- and farm-related payments. It can be a challenge to find a lender willing to finance the purchase. For example, a small commercial bank may not have experience financing raw farmland or understand farm financial projections. Some producers will not qualify for a mortgage loan with traditional lenders, and some farmers find the process daunting.

ADVANTAGES & DISADVANTAGES

The main advantage of borrowing to buy a property is that it makes it possible to own the property, without

having to pay the full purchase price up front, and to begin to build equity in a property that may be appreciating. Mortgaged property is so very common and most mortgagees feel a complete sense of ownership, which for farm families can run deep. Farmers have complete freedom (subject to the mortgage and all regulations) to improve the property. A property can be refinanced for better terms. For many producers, especially if the property also includes their residence, it is an advantage to own the asset even if farming doesn't work out. Mortgaged property can be borrowed against, such as for farm operating credit.

Disadvantages include the risk of not being able to keep up with payments, less favorable mortgage terms (e.g., variable interest rate), and any lost opportunity cost compared to other uses of the down payment and monthly mortgage. One of the biggest disadvantages is carrying a significant amount of debt which can hamper other investments, especially for a beginning farmer. USDA research shows that beginning farmers without land debt were more likely to succeed in the long run[1]. The risk of default is higher with start-up operations, and capital might be better applied to working assets such as livestock or equipment in order to build equity for a land purchase in the future.

MOST APPROPRIATE

Conventional financing of a farm property makes sense for farmers who can come up with the down payment and confidently service the loan while meeting their other business development objectives; most typically these would be more established farmers and beginning farmers who qualify for an FSA beginning farmer loan program which can offer generous interest rates and other terms.

1 Parsons, Robert, K. Ruhf et al. 2010. The FarmLASTS Project Research Report and Recommendations. P. 11.

VARIABLES SCORE

H	**Security** This method offers high security to the farmer, depending upon the extent and terms of the financing to purchase the farm.
L	**Affordability** This method is more "affordable" than an outright purchase, assuming the borrower can secure the loan and service the debt. But interest paid may make this method "less affordable."
H	**Equity** This method provides some immediate equity in the property, and builds equity as the farmer pays off the debt.
H	**Flexibility** This method offers maximum flexibility to make farming decisions and exercise control over the property, subject only to the terms of the loan.
L	**Farming Requirement** This method does not stipulate farming or resource management practices.
H	**Access to Capital** Servicing the mortgage will limit access to additional capital. However, a farmer will be able to borrow against her equity in the property for other assets or operating needs.

OWNERSHIP SCALE

3. ALTERNATIVE FINANCING

OVERVIEW

In this method, a farmer purchases a farm property with debt financing provided by less traditional lenders—other than conventional banks or agricultural lending/credit institutions such as Farm Credit. These include: owner (seller) financing; investor financing; "crowdfunding"; and community-based lenders.

OWNER FINANCING

Owner financing used to be more common—when farms were less capital intensive. In this method, the current owner finances the sale instead of (or in addition to) a third-party lender. Title is transferred to the buyer. This is sometimes referred to as an installment sale. A promissory note is drawn up that spells out the repayment schedule (in "installments"), interest rate and provisions for default. The promissory note is a written promise to repay a loan and it is secured by a mortgage. It's like an IOU and if the payments are not made the seller can foreclose on the mortgage.

A promissory note should include the names of the lender (in this case, the seller) and borrower, the amount borrowed, collateral if any, terms of payment and signatures. Interest on the loan is specified in the note. If the seller desires not to charge interest (say, between family members), there are tax implications. The federal government sees "no interest" as a gift. A tax advisor will recommend among a couple of options to handle this situation. Promissory notes for owner financing are most often used between family members or other close relationships. It is important for family members to be protected with a mortgage to ensure their claims are not subordinated to other creditors.

INVESTOR FINANCING

Acquisition of agricultural land by investment entities has gotten increasing attention in recent years. On the national and global scale, some advocates are concerned about "land grabbing." Domestically, the percent of farmland owned by investment entities is very small (about 1%), but growing. These entities range from large diversified pension funds to "values-based" farmland-specific companies such as Iroquois Valley Farms. Most farmland investment entities are equity-based; they purchase the land and then rent it to or hire farmers. Some farm investment firms (for example, Dirt Capital Partners) offer debt financing in which they lend capital for land purchase typically under more attractive terms than most conventional lenders.

CROWDFUNDING

Crowdfunding is the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet, and through a moderating organization ("platform"). There are several forms of crowdfunding. Real estate (equity) crowdfunding is the online pooling of capital from investors to fund mortgages secured by real estate. This usually refers to "fix and flip" redevelopment of distressed or abandoned residential or commercial properties, and similar real estate deals. These types of investments are generally completed under the JOBS Act of 2012 and are limited to accredited investors. There are over 75 real estate crowdfunding platforms in the United States[2]. A few such as FarmFundr, specialize in farmland.

Debt crowdfunding further evolved with additions to the JOBS Act in 2016, which allow unaccredited investors to invest directly in private businesses[3]. It is not common to use debt crowdfunding for a farm property mortgage.

Donation-based crowdfunding, *if for a qualifying charitable cause*, can be tax-exempt. If the donation is for a for-profit (like a farm business), it's not. For example, if a CSA farmer asks for contributions from members to purchase a parcel (or equipment, etc.) such a donation is not charitable.

2 https://en.wikipedia.org/wiki/Crowdfunding#cite_note-88

3 https://en.wikipedia.org/wiki/Crowdfunding#cite_note-44

COMMUNITY-BASED LENDERS

Community development financial institutions (CDFIs) are private financial institutions that are dedicated to delivering affordable lending to low-income, low-wealth, and other less-advantaged people and communities. The U.S. Treasury Department certifies CDFIs, which include banks, credit unions, loan funds and venture capitalists. Each has its own structures and rules. All must be mission-driven, with the goal of helping underserved communities. CDFIs finance small businesses as well as nonprofit organizations, housing programs and commercial real estate.

CDFIs include community or economic development organizations, loan funds, and not-for-profit homeownership entities. They offer different products; some offer subsidized, below market mortgages, others offer entirely market-rate. Two examples of CDFIs that lend to farmers for farm properties are Coastal Enterprises, Inc. (Maine) and California Farm Link.

For further information about community-based lending, see *Guide to Financing the Community Supported Farm*.

PARTIES AND STAKEHOLDERS

With these alternative financing methods, parties could include alternative lending entities, family members and accredited or non-accredited investors. It may be possible to bring in both conventional and non-traditional lenders.

LEGAL AND FINANCIAL CONSIDERATIONS

The financial advantages can be significant (for example, no down payment, more favorable rates and terms, etc.) but there are also risks. Most importantly, whatever the agreement, it needs to be legally sound, which will involve the assistance of an attorney or other professional familiar with the instrument used. Due diligence is required to make sure the lending entity is credible. The legal procedures may be simpler, but not necessarily.

EQUITY AND LEGACY PROVISIONS

As with conventional financing, these methods allow for the farmer to own and build equity in the property. If holding title, the farmer has all rights to sell, gift or bequeath the property.

CHALLENGES AND RESPONSIBILITIES

Alternative financing could carry additional risks if the entity does not have a proven track record or strong protocols. The farmer must make sure all aspects of the transaction are in order; a knowledgeable attorney and financial advisor are essential.

ADVANTAGES AND DISADVANTAGES

Most alternative lenders have more flexible criteria and favorable terms. They don't necessarily adhere to standard benchmarks for borrowers. They may be willing to absorb higher risk. They may, for example offer deferred principal payments, revenue-based payment, or lower or no interest. They may offer technical assistance to improve loan readiness and chances for success. Closing and other associated costs may be lower. The whole process may be quicker and less complicated (less paperwork), depending on the parties and the arrangement. In some cases, however, the transaction and/or carrying costs may be higher.

Disadvantages may include additional time and effort required to find an alternative arrangement, and organize the transaction. There may be higher risk associated with private agreements which may result in more expensive loan terms. Certain transactions, such as crowdsourced funded, may be more complicated and time-consuming.

MOST APPROPRIATE

A less traditional method such as those described above may be most appropriate between family members (e.g.,owner financing) or for a farmer willing to work with a non-conventional partner. For farmers who would not (or have not been able to) qualify for a traditional loan, these alternatives might be the only way to purchase their first or dream property. Community-based financing will work best for farmers with a strong community of financial supporters and for those who are comfortable with what might be extra effort and risk.

VARIABLES SCORE

H	**Security** This method offers high security to the farmer, depending upon the extent and terms of the financing to purchase the farm.
M	**Affordability** This method is more "affordable" than an outright purchase, and the loan terms may be more favorable than conventional financing. But interest paid may make this method "less affordable."
H	**Equity** This method provides some immediate equity in the property, and builds equity as the farmer pays off the debt.
H	**Flexibility** This method offers maximum flexibility to make farming decisions and exercise control over the property, subject only to the terms of the loan.
M	**Farming Requirement** Some non-traditional lenders may offer their funds with an expectation of adherence to certain farming methods, e.g. organic standards.
H	**Access to Capital** Servicing the mortgage will limit access to additional capital. However, a farmer will be able to borrow against her equity in the property for other assets or operating needs.

OWNERSHIP SCALE

4. GIFT OR INHERITANCE

OVERVIEW

The transfer of farm assets from one generation to the next within the family is often done through gifting during the current owner's lifetime or as a bequest (inheritance) at the time of death. A gift or bequest enables a family member or other recipient to acquire the family farm business, land and/or other specific capital assets (for example equipment or livestock) essentially at no cost to the recipient. Generally there won't be federal tax consequences to the giver either, with the federal exemption at $11 million per person. State gift tax laws vary by state. Typically, recipients of farm assets through gifting or inheritance are family members who may or may not be involved in the farm operation. The recipient could be a non-family member who has been actively involved in the farm.

> There may be tax consequences for the person receiving the gift or inheritance.

In this section, we discuss one-time gifts and inheritance as two methods to acquire ownership of farm real estate. In the section on Ownership in the Future we address gifting of farm assets over time as a gradual transfer strategy.

The recipient of the gift or bequest is the new fee simple owner of the farm or farmland with all rights and responsibilities of fee simple ownership. Upon receiving a farm through gift or inheritance, the new owner will assume any outstanding debts or mortgage on the farm and will be responsible for future property taxes and insurance. There may be tax consequences for the person receiving the gift or inheritance. See the section on legal and financial arrangements, below.

The new owner will also assume any legal provisions or restrictions placed on the farm by the previous owner(s),

such as an agricultural conservation easement and/or a life estate (see sections on Life Estate and Easements). The gift or bequest of the farm may also include conditions governing any subsequent sale or other transfer of the farm. For example, if the recipient chooses to sell the farm, they must first offer it to a designated individual (such as a family member) or an organization (typically a non-profit).

A farm may be transferred via a gift or inheritance to more than one party, for example multiple siblings. In this scenario, decisions around the farm may be significantly more complicated. For instance, is there desire to operate the farm together? What if only one of the siblings wants to start or continue farming? What if some want to sell the asset and others don't?

It is important for the donor and the beneficiary to seek qualified tax and legal advice.

Farm families and their advisors often look at trusts as vehicles to hold or transfer assets. There are different kinds of trusts, and a trust is not always the best or only instrument to meet certain goals. In this context, farm real estate could be placed into a trust. The beneficiary(ies) would receive the asset upon the terms of the trust—for example when the beneficiary reaches a certain age, or upon the owner's death. This guide does not go into any detail about trusts.

PARTIES AND STAKEHOLDERS

In the gift or inheritance method, the main parties are the person or entity giving or bequeathing the asset, and the recipient(s). As with property acquired in other ways, the farm may be subject to a life estate, agricultural conservation easement, debts or liens. Any of these will introduce other parties that have a stake in the farm (see sections on Life Estate and Easements). Stakeholders may include the previous farm owners, if the farm was transferred as a gift during their lifetime, and other family members.

LEGAL AND FINANCIAL ARRANGEMENTS

It is important for the donor and the beneficiary to seek qualified tax and legal advice on the ramifications of each method. For example, property gifted during the lifetime of the donor will carry with it the original tax basis of the donor. If the property is later sold by the gift recipient, he or she will owe a capital gain tax equal to the difference between the carried over basis and the fair market value upon sale. If, on the other hand, the property is transferred as part of a bequest, the property carries a tax basis equal to the fair market value on the date of the donor's death. This is a major reason why lifetime gifting has fallen out of favor. This is an unfortunate trend in that it discourages timely succession. A gift tax return should be filed even if ultimately there will be no estate or gift tax liability. While the federal exclusion is very high, states vary in their exclusion limit, so consultation with an appropriate advisor is necessary.

The farm may come with conditions, debt or other liens as noted above. A lender has the choice to transfer outstanding loans to the new (giftee) owner, or continue to make original owner responsible, especially if lender is not confident in the new owner's ability to pay the mortgage. A gift subject to a mortgage may need the approval of the mortgage holder and may trigger some income tax liabilities.

EQUITY AND LEGACY PROVISIONS

The recipient of the gift or inheritance becomes the owner of the farm asset. At that point, the farmer has equity in the land, infrastructure and facilities, and/or business, depending on what was gifted or inherited. Subject to any debt against the asset, and/or conditions of the gift or inheritance, they can operate, sell, rent, bequeath or donate the farm.

CHALLENGES AND RESPONSIBILITIES

As recipient, the new owner has all the responsibilities of ownership—taxes, maintenance, liability, etc. In addition, inheriting a farm can bring a unique set of challenges and responsibilities not associated with, for example, purchasing a farm. There may be family dynamics to manage. This may be particularly acute if there are multiple recipients, or if the non-recipient family members are not supportive. Inheriting a farm can be viewed as inheriting the legacy of the previous generation. The recipient may feel responsibility and perhaps even pressure from other family members to uphold and honor that legacy, which could be subject to interpretation. The gifted or inherited farm may come with strings attached, which bring their own sets of challenges and responsibilities (see, for example, the sections on Life Estate and Easements).

Any conditions that come with a gift of land may be a small price to pay.

ADVANTAGES AND DISADVANTAGES

The outstanding advantage of receiving a farm through gift or bequest is getting what is likely a substantial asset and great opportunity essentially free, although many farm heirs have already spent much of their lives devoted to the farm. Any conditions that come along with it may be a small price to pay given the alternative of having to purchase or rent a farm on the open market. On the other hand, those conditions may be impediments to the full operation and enjoyment of the farm. If the gift or bequest triggers family tensions or worse, this could be a disadvantage, as could the burden of legacy and expectation that some might feel.

MOST APPROPRIATE

This method is most common among family members but could be appropriate in other close relationships or where the owner's values move him or her to this kind of generosity.

VARIABLES SCORE

H	**Security** A gift or bequest of the property in fee provides maximum security.
H	**Affordability** The farm is transferred, not sold, to the recipient making this land access method very affordable.
H	**Equity** In this method, the farmer will hold 100% of the equity in the property. The farmer can build equity in the property by improving it, and via appreciated value in the market.
H	**Flexibility** This method offers maximum flexibility to make farming decisions and exercise control over the property.
M	**Farming Requirement** The gift or bequest may come with stipulations or restrictions (e.g. an agricultural conservation easement) that may stipulate farming or resource management practices.
H	**Access to Capital** Owning the land outright enables the farmer to use its value as collateral and borrow against it.

OWNERSHIP SCALE

B. WHOLE SHARED OWNERSHIP INTERESTS

As explained in the Introduction, property rights can be thought of as a bundle of sticks. As sole owner, the farmer essentially holds all the sticks—rights (interests). In the whole shared ownership model, a legal entity comprised of multiple parties owns the property. The members of the entity collectively share ownership and management of all the interests. The members can be farmers only, or a combination of farmers and non-farmers. Some lenders, including FSA, will require that a majority of the owners are farmers. (If the land-owning entity were comprised of only non-farmers, a farmer's access to that land would typically be as a tenant (see Section IV).

Several types of entities can be used to share ownership in land. These include corporations, limited liability companies, and cooperatives. Each must follow specific rules for establishment, management, and taxes, for example. Creation is governed by state law while taxation is governed by both state and federal law. They have several features in common: 1) multiple parties can "buy in" and own interests in the property together; 2) parties can enter and exit, while the property is still held by the entity under the terms of the entity's operating agreement; 3) individual members have an equity interest in proportion to their individual investment or gifted capital; 4) individuals are shielded from personal liability from claims associated with the property; 5) individual members or shareholders share income and losses based on their percentage ownership share or other criteria.

A **partnership** is another entity used in business. A partnership consists of two or more owners. It is relatively easy to form via a partnership agreement which may or may not be written. Profits, taxes etc. pass through the partnership to the individual partners who report those items on their own tax returns. The partners share management, profits and losses.

A partnership can own property in the partnership's name. In this way, farmers, or farmers with non-farmers, can share ownership of a farm or farmland. A separate partnership, or other entities can be formed for the business operation. Each partner is co-owner and has equal rights to possess and use the property for stated purposes. Each partner's interests are considered personal property. One drawback is that the owners assume personal liability for the business, including partners' debts and liabilities. A partner cannot assign or sell his or her rights. Exit strategies in a partnership are important considerations; it may be hard to sell partnership interests.

Most farm advisors would not encourage partnerships to acquire and hold land. For this reason, this guide focuses on limited liability companies, corporations and cooperatives which offer more flexibility and protection.

1. LLC OR CORPORATION

OVERVIEW

As pointed out earlier, farm real estate and farm businesses overlap, but are often structured as separate entities. A farm can be set up as one or several limited liability companies (LLC) or corporations to hold separate assets and perform distinct functions. The farm operation can be in one entity and the farmland in another. LLCs and corporations are legal entities within which farm assets can be held by multiple parties. One main advantage is a certain amount of protection from liability.

This guide does not get into all aspects of these entities or their usefulness for farm businesses in general. The focus here is on using business entities to share ownership and management of the farm or farmland. As emphasized previously in this guide, an LLC or corporation also can be used for the farm operation. Corporations are set up as either sub-chapter S or sub-chapter C corporations per the IRS Code. For tax and management purposes, an LLC can choose to be taxed as a partnership or as an S or C corporation. Most farms opt for partnership taxation.

Several types of entities can be used to share ownership in land.

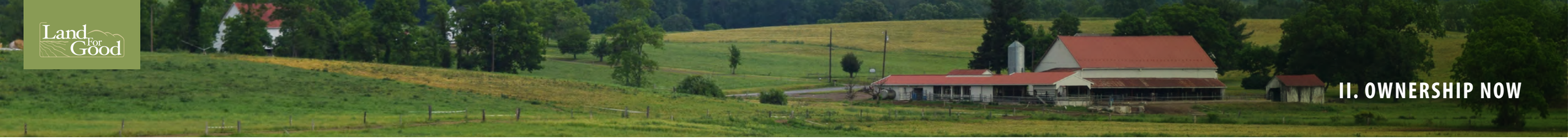
The LLC is the most flexible of the options. LLCs are being used more and more by farm operations of all types and sizes. For this discussion, we focus on LLCs; differences between LLCs and corporations that are relevant to shared ownership will be pointed out. Both enable more than one person or entity to share in the ownership of the asset (although an LLC can have a single member). Referring to the bundle of sticks metaphor, each individual in an LLC or corporation owns the whole together; the whole bundle is shared. The members' (LLC) or shareholders' (corporation) interest (unit or share) is in proportion to their investment. An LLC is an excellent tool for holding and managing properties. It allows for shared and also disproportionate ownership percentages within an owner group.

A farmer could join with other farmers and form an LLC to purchase land. Members of a farming family can own the real estate together in an LLC. The same or different members could own the business which likely would rent the land from the real estate LLC. In another example, farmers and non-farmers can own land together within an LLC structure. The members also can be legal entities such as trusts. The LLC is governed by an operating agreement that spells out how interests are bought and sold, who can buy in, and how entrance and exit are handled. It states how the LLC is managed and by whom. One use of the LLC or corporation structure is to transfer assets within the entity. See a fuller explanation of this in the section on Ownership in the Future.

A brief note on **nonprofit corporations**. A nonprofit corporation must meet specific tax-exempt purposes via benefits to the public, a special group or the membership, rather than for the purpose of making profits. Strict rules regulate nonprofits. Some nonprofits are exempt from taxes. We mention this here because farmers ask about this structure, believing that they might then qualify to receive grants or donations. It would be unusual for a commercial farmer to qualify as a nonprofit. If, however, a farmer's or group's primary purpose is education or food donation, for example, it might meet IRS standards. The nonprofit would nonetheless have to decide about whether and how to own land, and the relationship between land ownership and farming endeavors.

PARTIES AND STAKEHOLDERS

Regardless of how the LLC or corporation is structured, each farmer is a member (or shareholder) of a legal entity, and the entity owns the farm asset. Members may be active participants or simply passive investors (limited partners). As mentioned above, it is not uncommon for two separate entities to make up the "farm" – one that holds the real estate and another for the farm business. The members of each entity can be the same or different. Often the farm business entity includes only those



actively involved in farming, whereas the land-holding entity could be other family members, community members or investors.

LEGAL AND FINANCIAL ARRANGEMENTS

Most LLCs will be governed by an operating agreement that sets out the tax status and rules of the entity, and lists the initial owners. The agreement will include the procedures for a member to exit, sometimes called a buy-sell agreement. Similarly, a C or S corporation (or an LLC incorporated under one of these sub-chapters) will have governing rules in the form of corporation by-laws or articles of incorporation.

The legal details of these entities can be complicated. They need to reflect the specific circumstances of the investors and their objectives for owning the farm asset. So, seeking competent tax and legal advice is important. For example, if an LLC chooses to be taxed as a partnership, it can be very flexible with far fewer restrictions than the C or S corporation options in allowing for unequal distributions from the entity.

At formation, each member contributes property or cash to the entity. The value of the contribution is equal to that member's stake in the business, valued as a proportion of the aggregate value of all members' contributions. Shares or member's stake can change over time as the business grows or contracts, as members take or leave rights to realized profits, or as capital is taken out of the business.

Investing in land with others may be a preferred option for farmers with limited capital.

Limited liability will allow members to shield their personal and non-farm assets from claims against the business. Unsecured creditors and claimants can only look to the farm assets for their recovery. As a practical

matter, secured lenders will ask for a personal guarantee on any land-related debt. Farms can lose a liability shield if they mingle farm and personal assets or forgo other formalities of managing a separate business.

EQUITY AND LEGACY PROVISIONS

With an LLC or corporation, the entity owns and builds equity in the farm. As equity grows it is reflected in each member's capital account. As a member of the entity, the farmer is sharing in the equity in the farm equal to his or her stake in the entity. Lenders consider the entity as the owner of the farm when making loan determinations. An assessment of the ability to repay the loan is not focused on any individual member of the entity. However, many lenders will require personal guarantees from individual members or shareholders of closely held entities. The LLC operating agreement or corporate by-laws will include exit procedures for individual members, which will specify, for example, if members can sell their share in the entity to an outside party or if and how a member can withdraw.

CHALLENGES AND RESPONSIBILITIES

Neither LLCs nor corporations are casual constructs. Both require adequate record-keeping and other paperwork, and clear decision-making and management structures and processes. Depending on the farmer's role, responsibilities can be significant. Entry and exit can be complex, from valuing transferred interests to possible use of discounts. There may be limitations in federal and/or state farm program enrollment.

ADVANTAGES AND DISADVANTAGES

With respect to the LLC or corporation as a vehicle for shared ownership, one advantage is spreading the initial investment and risk over multiple parties. In that way, land access is more affordable. The farmer "investor" builds equity in the asset equal to their share. However, as a shared asset, the farmer is subject to the operating agreement which may limit or condition use, control, and exit, for example. The operating agreement is critical in setting out who decides what. There are risks associated with exiting and selling the farmer's equity, or being forced to buy out others. As fully discussed in the Ownership in the Future section, a strong advantage of an LLC or corporation is as a vehicle for gradual transfer of equity interests as part of a succession plan between family generations or unrelated parties.

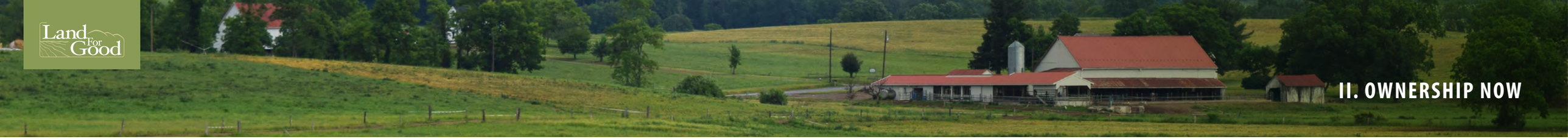
MOST APPROPRIATE

Investing in land with others may be a preferred option for farmers with limited capital. An LLC or corporation is appropriate for farmers with family members, other business partners or access to outside investors willing to assist them by sharing in the investment.

VARIABLES SCORE

H	**Security** This method offers high security to the farmer, depending on the terms of financing and the operating agreement.
M	**Affordability** An LLC or Corporation is more affordable because upfront and carrying costs are shared by the LLC or Corporation members. Each farmer's ownership stake is based on what she can afford.
H	**Equity** Each farmer-member of the LLC or Corporation will build equity equal to her stake in the entity.
M	**Flexibility** Subject to the rules of membership, the farmer will have a voice in decisions. Ease of exit depends on the rules.
H	**Farming Requirement** The entity may set requirements that will govern the operating procedures and practices of the farmer.
H	**Access to Capital** The entity owns the farm in-fee and as such has the full borrowing capacity of the assets at its disposal.

OWNERSHIP SCALE



2. COOPERATIVE

OVERVIEW

The term "cooperative" is used in various ways. In this guide, a cooperative (or coop) is *a legal entity that is owned, controlled and operated by its members for their own benefit*. Land, businesses and equipment can be owned by a cooperative. For farmers, cooperatives can increase access to markets, equipment and land, and reduce barriers for farmers with limited access to capital. This guide focuses on cooperatives as legal entities owning land. This is not the same as farming "cooperatively."

In the case of land, a coop is a vehicle to share ownership among multiple parties. Typically, a land-holding coop enables each member to hold a percent interest in the whole property based on their initial contribution. Cooperative ownership of farms can take different forms, all with the essential core components of democratic governance and equity. Cooperatives return any profits to its members in the form of dividends, according to the coop's bylaws. Most state laws require some dividend in order to be considered a cooperative. As a social structure, coops can foster sustainable farming communities around a cooperatively held farm and help farmers meet social and support needs. For a broader discussion of cooperative structures, and cooperative land-holding in particular, see Cooperative Farming.

As with other land-holding entities, the legal relationship between the landowning coop and the farmers who farm on it must be figured out. Are the farmers farming together as a single entity and renting the land from the coop? Are there multiple farming tenants on coop-owned land? For example, individual farming members (as sole proprietors or different entities) may lease land from the coop under the terms of the cooperative bylaws. Land is rented "at cost" with any profits not used for improvements that are shared by all members being returned to the members.

A land-holding coop owned by a group of farmers may lease portions of the coop's land to the individual farmer-members (or to non-members) for their own operations. Or the coop may lease the entire parcel to a single operation comprised of some or all the coop farmer-members. A farmer cooperative can also lease land from others; the coop would be the tenant. For example, New American Farmers Cooperative in Dunbarton, NH is an agricultural marketing coop that leases land from Organization for Refugee and Immigrant Success (ORIS). The nine farmer members operate their farms independently and lease their individual plots from the coop. They share management of the leased land as a coop.

Establishing a legal cooperative to acquire and hold land typically requires professional guidance. Cooperative development centers can be important partners to help cooperatives start and survive. For example, the

Cooperative Development Institute (CDI) is the USDA designated cooperative development center for New England and New York. USDA has several programs specifically for cooperatives and most USDA financial programs, including Farm Service Agency loans, are available to cooperative entities.

PARTIES AND STAKEHOLDERS

In a cooperative, the parties are the members. *The cooperative is the owner of the real estate.* The members of the cooperative could be multiple farms or farmers. Or, it could have both farming and non-farming members, or only non-farming members that rent to farmers. The members might have different interests, benefits and responsibilities. For example, might a coop rent its land at below-market rates to member farmers? Examples include Poudre Valley Community Farms and Wellspring Land Cooperative.

LEGAL AND FINANCIAL ARRANGEMENTS

Cooperatives can be set up in different legal structures depending in part on a state's incorporation laws. In all New England states, farmer-owned agricultural cooperatives can be incorporated under state statutes. It is not uncommon for coops to be incorporated as democratically governed LLCs (see the section on LLCs). However, all coops operate on a principal of "one member, one vote", not on percentage of ownership of the coop.

Unlike corporations, partnerships or LLCs, the coop structure does not name a "leader" of the business, such as the president of the corporation or the managing member of the LLC. Therefore, a coop needs to assure that specific members are given specific responsibilities so that key functions (such as paying real estate taxes) are taken care of. Legal support is essential.

Cooperative Fund of New England and Local Enterprise Assistance Fund lend to cooperatives and assist with coop business development. Other community development financial institutions (CDFI), such as Coastal Enterprises, Inc. work with cooperatives throughout the region.

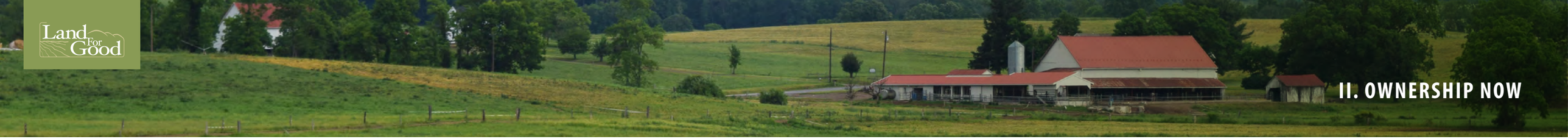
EQUITY AND LEGACY PROVISIONS

Equity and legacy are addressed differently in each cooperative. A cooperative allows a member to invest and build equity in the business; in the case of a land-holding cooperative, the asset is the real estate. If the cooperative is profitable (from rent collected exceeding expenses), the surplus revenue would be shared amongst the members and can be invested, for example, in an account for the members' retirement. Additionally, profit is reinvested in the coop so that it can be better capitalized for improvements and growth.

A well-designed cooperative is set up so that members can transfer their equity to the next member. The equity is sold back to the cooperative, which then finds new members who invest in the cooperative. Cooperative members must share the stewardship of the land and the organization itself. While the structure of a cooperative can be more durable and resilient because of this shared responsibility and greater participation, it depends on members being committed to the success of the cooperative in addition to their own personal success.

CHALLENGES AND RESPONSIBILITIES

With the group nature of the cooperative model, each member gives up individual ownership and management control over the real estate. The cooperative's governance is democratically organized, which may pose risks to some individual members and at times cause decisions to be made less efficiently than in a hierarchical structure. Typically, certain individuals have more active roles or shoulder more responsibility than others; they may or may not receive a proportionately greater reward. Devotion to coop principles, values and structures requires education, training and frequent communication. Responsibilities can vary greatly among cooperatives depending on the type of membership.



For a land-holding coop, these responsibilities can include managing lease agreements, developing and/or maintaining infrastructure, and/or paying taxes and other fees. Farmer-members of a land-holding cooperative will, for example, have a much larger degree of responsibility in the day-to-day management of the farm than a consumer member.

ADVANTAGES AND DISADVANTAGES

One big advantage of a land-holding coop is making farmer ownership more possible by pooling capital. Cooperatively held land might be harmonious with and supportive of other cooperative endeavors among the same group of people, such as a marketing or equipment coop of the farmers who co-own the real estate.

The biggest disadvantage is relinquishing sole ownership and control of the land. As mentioned above, another disadvantage is the relatively significant amount of time and effort that are required to form and sustain a cooperative structure. Also, since equity is typically built up and paid out over several years, it's not easy to get all accumulated equity out quickly. Another disadvantage might be more difficulty in securing loans or cost-share agreements. Depending on how they are structured, a coop may or may not be eligible for certain USDA programs. Every New England state has its own cooperative formation statute, so legal help is necessary.

Cooperatively held land might be harmonious with and supportive of other cooperative endeavors.

MOST APPROPRIATE

Since a member invests less up-front by sharing in the expense of the land purchase, this model is attractive for new, beginning and limited resource farmers, particularly New Americans, such as immigrants and refugees. It's also appropriate for farmers who value the attributes of a cooperative structure and the associated processes.

VARIABLES SCORE

M	**Security** The cooperative owns the farm; each member-farmer's land security hinges on the agreement between the coop and the farmer as owner-member or tenant.
M	**Affordability** A land-holding cooperative farm is more affordable than individual purchase. The farm is jointly purchased by the coop members, thus spreading out and sharing upfront and carrying costs.
H	**Equity** A farmer's equity in the coop-owned property is equal to his investment, plus his percentage of any appreciation and subject to any debts. The coop's by-laws and financial condition will dictate the equity redeemed.
M	**Flexibility** Flexibility depends on the controlling agreement. Collective decision-making may be required. Individual decision-making and flexibility may be increased if plots are leased separately.
H	**Farming Requirement** A cooperative will often set farming requirements that will apply to land users, whether as direct co-owners or as tenants.
M	**Access to Capital** Coop-owned farms may have difficulty borrowing from traditional lenders. However,FSA and several organizations specifically lend to cooperatives.

OWNERSHIP SCALE

C. PARTIAL OWNERSHIP

Remember that bundle of sticks? A *sole owner* holds all the sticks, or rights. In *whole shared ownership*, multiple parties hold all the rights together. In *partial ownership*, the rights are divided. A person, persons or entity holds some of the rights; other persons or entities hold other rights. The bundle of sticks is split into two or more "sub-bundles." In the non-farming world, mineral or logging rights can be transferred by the landowner to a mining or forestry company, while the landowner retains all other rights. A landowner could sell or give access rights to a neighbor or utility company. These transactions are not uncommon. The interests are separated, not shared.

For this discussion, we look at three types of partial ownership constructs: ground leases, easements and life estate. They are quite different but they share a common feature: the farmer holds certain interests, and other parties hold certain interests in the farm.

1. GROUND LEASE

OVERVIEW

In an agricultural ground lease, a landowner owns the land ("ground") and leases it to a farmer-tenant. The farmer purchases or builds and then owns the buildings (and sometimes other improvements) on the land. In this method, the rights in the property are divided between two parties—each holding distinct equity interests. Ground leases are common in the commercial building sector and also used in affordable housing. They are less common in agriculture, but interest is growing.

Because the farmer invests in the buildings and not the land, an agricultural ground lease offers more affordable tenure while also enabling the farmer to build equity in the buildings. In an agricultural ground lease, the landowner is usually a community-based entity such as a community or conservation land trust. Typical agricultural ground leases provide a long term—99 years is not uncommon. The farmer purchases the existing improvements, and also may have the opportunity to develop (and own) additional improvements, if the ground lease allows. The farmer can sell the improvements subject to the terms of the ground lease—most often to the next tenant.

In one example, title to land at Caretaker Farm in Massachusetts is held by Williamstown Rural Lands Foundation, a land conservation organization. The farmers hold a 99-year ground lease on the property. They own a farmhouse and other improvements on the land. At Scatter Creek Farm Conservancy, in Tumwater and Rochester, WA, the title to the property is held by South of the Sound Community Farmland Trust which owns nearly 100 acres of farmland with water rights. It provides several farmers with long-term, inheritable ground leases.

PARTIES AND STAKEHOLDERS

As the examples above illustrate, the primary parties involved in long-term ground leases on farms are often non-profit conservation or community land trusts (CLT). Other entities such as an LLC or a private individual or family landowner could own farmland and make it

available to a farmer with a long-term ground lease. The landowning entity will have a legal and financial stake in the ground lease with the farmer. As landlord, they assume long-term stewardship and management of the lease and relationship with the farmer, as with any landlord-tenant arrangement. Depending on the arrangement, other stakeholders could include lenders and easement holders. For example, a CLT owns the land. Another holds an agricultural conservation easement on the land. The farmer owns the buildings. In this scenario, the bundle of interests is split three ways.

LEGAL AND FINANCIAL ARRANGEMENTS

Securing financing by the farmer to purchase or construct improvements in a ground lease scenario can be tricky, as banks may be hesitant to capitalize an asset where the land underneath their investment is owned by a separate entity. Equity Trust has provided loans for infrastructure purchases on ground leased land. The USDA Farm Service Agency (FSA) could finance the purchase of infrastructure subject to a ground lease under its Farm Ownership Loan Program, as long as the length of the ground lease is equal to or greater than the life of the loan, and provided that the owner of the buildings has a lease that gives them the right to mortgage the property, or the owner of the land would be willing to give a mortgage to collateralize the loan. Essentially, if the ground lease is designed in such a way that it provides the tenant with rights of possession to the land, FSA is comfortable with lending for infrastructure purchases.

> Ground leases are more complex than regular leases or conventional purchases.

Funding for such projects can come from multiple and creative sources. For example, the Caretaker Farm project was financed through a combination of local fundraising by the farm's CSA members, funds raised by the land trust partner and the town of Williamstown, and proceeds from the sale of an agricultural conservation easement to the Commonwealth of Massachusetts.

Ground leases are more complex than regular leases or conventional purchases. They require specific legal expertise. Typically, a ground lease will detail the rules for selling the buildings to another farmer, specify "active farming," limit the improvements to the buildings, or include a resale formula so as to maintain affordability for the next ground lease tenant.

EQUITY AND LEGACY PROVISIONS

The basic premise of the ground lease is that it enables a farmer to build equity in the home, farm buildings and/or other infrastructure on the farm without the burden of having the upfront capital or securing the financing to purchase the land as well. By not needing to purchase the farmland, the farmer is freer to invest in his or her farm enterprise and the associated infrastructure on the farm with the security that they are building recoverable equity in the business and improvements. Typically, a ground lease is for 99 years with an option to renew for another 99 years. During the term of the lease, it can be transferred to an heir.

CHALLENGES AND RESPONSIBILITIES

Ground leases can be complicated legal and land use arrangements. They are rare between private parties, although not impossible. It can take quite a bit of negotiating to determine the rules for improvements, rents and fees, termination, and other aspects of the lease. Typically the landowner is an organization , so additional layers of decision-making and monitoring can slow down or frustrate the farmer-tenant. The farmer is responsible as both tenant on the land and owner of improvements such as the house and/or barns. Obtaining financing can be tricky. That said, sharing ownership through dividing the interests in this way meets the goals and values of quite a few farmers and landholders.

ADVANTAGES AND DISADVANTAGES

For the farmer, a ground lease provides entry onto land without having to capitalize a fee-simple purchase for the entire property. At the same time, it provides a level of security that investments in farm infrastructure and improvements will be redeemed according to the provisions of the ground lease at the time the farmer elects to leave the farm. The farmer must be comfortable with not owning the farm in the traditional sense. They must always reckon with the landowner—their landlord—around the terms of the ground lease.

For the landlord and community, a ground lease can fulfill a mission to see land productively farmed without having to directly manage and assume the risks of the farming operation. This method requires the entity to be willing to administer a non-conventional, long-term lease with a chosen individual or enterprise.

> The farmer must be comfortable with not owning the farm in the traditional sense.

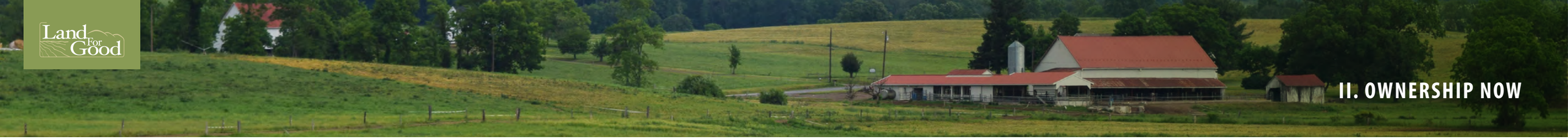
MOST APPROPRIATE

The ground lease model is suitable and appropriate for farmers who wish to build equity without needing to actually own the land that they farm and who seek affordable rent. The method can work for farmers willing to be in a non-traditional arrangement, and who can forge the necessary partnerships to make the arrangement happen. The method is likely to be most promising where there is strong community interest and land trust capacity.

OWNERSHIP SCALE

VARIABLES SCORE

H	**Security** Based on a very long-term lease, this method offers high security.
H	**Affordability** A ground lease is a more affordable than outright purchase because the farmer buys improvements, not the land. Overall "affordability" is also tied to lease fees and the costs of purchasing the improvements.
H	**Equity** This method enables the farmer to accrue and capture equity in the infrastructure--including a residence--owned and improved by the farmer. The sale of farmer-owned infrastructure may be subject to equity-limitation formulas per the lease agreement.
M	**Flexibility** Degree of flexibility depends on the terms of the ground lease. It may be more challenging to modify a ground lease, sell the farmer's owned improvements, and/or transfer the lease to the next owner/tenant.
M	**Farming Requirement** A ground lease will not provide as much autonomy over farming decisions as fee ownership. The degree of autonomy will depend on the terms of the ground lease.
M	**Access to Capital** The options to borrow capital are limited with a ground lease. Some lenders may be wary about lending based on a ground lease. Some alternative lenders and USDA FSA are willing, depending on the terms.



2. LIFE ESTATE

OVERVIEW

Life estate is a retained right to live at and/or control part of a property sold to another, until the holder of the right passes or moves away. Life estate can be retained for an entire farm property (such as a farmer donating the whole farm to a charitable organization, but retaining the rights to live and farm there until death), but is more typically focused on the home. The right to live on the property is split off from the remaining ownership rights. It amounts to a partial interest (one stick in the bundle) in the farm. As such, the life estate needs to be recognized legally, and managed as a dynamic between parties.

> Life estate is a retained right to live at and/or control part of a property sold to another.

Depending on the agreement, the life tenant may have legal obligations such as paying taxes and making repairs. The holder of a life estate has the right to possess (meaning they can live there) the property (home), but that interest extinguishes upon their death or, in some cases, upon their exit from the home.

Any new farm owner may assign a life estate on the farm to the current owner(s) or someone designated by the owner. A new owner assumes ownership with the understanding that those individuals subject to the life estate will continue to live on the property until they release the life estate or die. The value of the asset retained in the life estate goes to the person holding that interest. It remains in their estate for estate tax purposes. It is taxed separately and for future borrowing purposes, its value is typically not considered part of the rest of the farm.

Life estates are most commonly employed in family farm estate planning to enable parents to transfer the farm to

a child or children, while retaining the right to live on the property until their deaths. Farmers may donate the farm to a charitable organization, such as a conservation land trust, with a life estate enabling them to live there and even continue to operate or lease the farm until they die. In these cases, the value of the "gift" is the net value of the farm minus the value of the life estate.

PARTIES AND STAKEHOLDERS

The owner of a farm subject to a life estate and the individual(s) with the life estate are parties to the agreement, and "partners" on the farm in the sense that they have some kind of relationship. The life estate may amount to nothing more than a former owner or their family member living in a house on the farm and keeping to themselves. But perhaps the previous owner-operator holds the life estate and remains in close proximity to the farm and its daily operations. The new owner might need to more actively manage a relationship with a former owner or family member living right on the farm.

LEGAL AND FINANCIAL ARRANGEMENTS

A life estate is a legal agreement typically contained in the deed held by the owner of the "remainder interest." Life estate should be carefully reviewed and considered, and not entered into lightly. The cost of "managing" the life estate can be a drag on the profitability of the farm business if the terms are unclear, unfavorable, or out of farmer's hands. At a minimum, the agreement should clarify who will handle paying for the repairs, taxes, maintenance, utilities, etc. of the property subject to the life estate. The life tenant may be expected to pay rent.

> As a specific right, the life estate has a monetary value.

As a specific right, the life estate has a monetary value, which is not considered part of the farm. Therefore, the contribution of the farm asset to the borrowing capacity of the farmer will be based on the value of the property *subject to the life estate*. Similarly, the property subject to the life estate will typically be lower than market value because of the life estate encumbrance. Life estate has practical considerations such as, who handles maintenance costs of the life estate, is rent paid and how much?

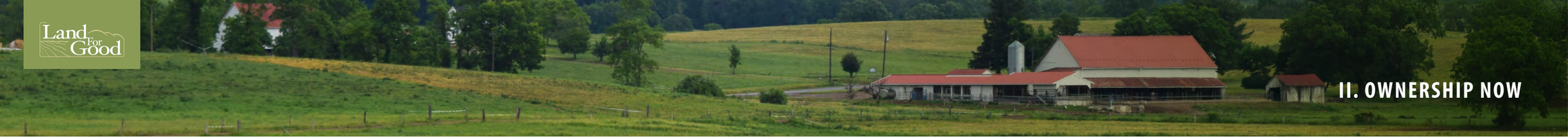
EQUITY AND LEGACY PROVISIONS

The new owner owns the farm in fee simple, but with the life estate right peeled off and held by another. The farmer is building equity in the land, infrastructure and facilities, and business. His or her control over the house(s) and buildings subject to the life estate are limited until the life estate is extinguished. They can sell, bequeath or donate the farm, but the life estate would remain in force.

CHALLENGES AND RESPONSIBILITIES

The farmer inheriting or purchasing a farm subject to a life estate should only do so acknowledging that at least for some time they do not own the farm in full (recall the bundle of sticks); it is encumbered by the life estate. Their use of the farm may involve someone with close ties to the farm living right there. Owning and operating a farm with a life estate means accepting and managing this legal arrangement and the presence of (typically) the former owner. This could lead to tension over the management and operation of the farm.

On the other hand, the resident might offer a helping hand and/or advice. Being respectful of this individual(s) and the challenges they may face transitioning from what was more than likely a lifetime of dedication may ease the changeover and may result in the acquisition of hard-earned experience, advice and knowledge



ADVANTAGES AND DISADVANTAGES

Accepting a life estate for a surviving relative is a small price to pay given the alternative of, for instance, having to purchase a farm on the open market. The life estate is a retained right which has value. Most likely it would reduce the price of the farm which would make the farm more affordable than purchasing it with a full bundle of rights. On the other hand, the terms might be burdensome. The previous farm owner/operator could be living on the farm, which may create tensions over changes being made on the farm and in the operation.

Life estate can be an opportunity to learn from a resident mentor.

MOST APPROPRIATE

Life estate would be most appropriate in intra-family situations where the senior farmer, farming couple or surviving spouse want to stay in the home. However, non-family life estate situations have been successful too. The living situation for the successor farmer would need to be adequately addressed. It will work best for farmers who are comfortable with the previous farmer or a surviving spouse being physically proximate. Life estate can be an opportunity to learn from a resident mentor.

VARIABLES SCORE

H	**Security** As fee-simple ownership, this method offers high security to the farmer.
M	**Affordability** The price of the farm is reduced by the value of the Life Estate, which may make it more affordable to a farmer.
H	**Equity** This method provides some immediate equity in the property, subject to the Life Estate, and builds equity as the farmer pays off any debt on the farm.
H	**Flexibility** This method offers maximum flexibility, subject to the terms of the Life Estate. It may be more challenging to transfer a property subject to a Life Estate.
M	**Farming Requirement** The terms of the Life Estate may condition certain uses such as shared access to facilities.
M	**Access to Capital** The value of the Life Estate does not impact the borrowing capacity of the farmer. The remaining value of the farm is available as collateral for a loan.

OWNERSHIP SCALE

3. AGRICULTURAL CONSERVATION EASEMENT

OVERVIEW

In general, an easement is a property right conveyed to the easement holder. As with the other divided interests discussed in this section, an easement gives certain rights on land that is in the possession of another. In an easement, the interests in the land are apportioned between two parties; one party holds the rights specified in the easement, while the fee owner holds the remaining or underlying interests. Owning a farm with an easement is a form of partial ownership, in the sense that the interests (or rights) are divided—in this case between the fee owner (the farmer) and the entity holding the easement rights.

Easements are usually created via a deed or contract. An easement can permanently "run with the land" or be limited to the present owner or to a temporary use such as allowing construction vehicles to cross a property. An *affirmative easement* authorizes the use(s) of another's land for, say, a through-trail or access to riverfront. The right to cross a property with a driveway, or to lay utility lines are examples. A *negative easement* limits what can be done on a property.

A **conservation easement** is a voluntary legal agreement between a landowner and a land trust or government agency that limits uses of the land in order to protect various conservation values such as water quality or wildlife habitat. Land with this type of negative easement is referred to as *protected* or *conserved*. Typically, but not always, conservation easements are in perpetuity. Protection can be achieved by removing the landowner's right to develop the land by transferring that development "stick" from the bundle of rights to a qualified easement-holding entity.

The value of the development rights is calculated by an appraisal.

Starting in the late 1970s, some states, localities and conservation land trusts have used easements to permanently and specifically protect farmland. This category of conservation easement is referred to as an agricultural conservation easement (ACE). Public and private entities at the local, state and federal levels fund Purchase of Agricultural Conservation Easement (PACE) programs (also known as Purchase of Development Rights or PDR programs).

The value of the development rights is calculated by an appraisal that compares market with agricultural value. Public and/or private funds are then raised to purchase these rights from the landowner. Since 1996, the federal government has contributed funding in support of these efforts through what is now known as the Agricultural Conservation Easement Program (ACEP), administered by the USDA Natural Resources Conservation Service.

Landowners may also donate some or all the value of their agricultural conservation easement to a qualifying organization or agency (such as a land trust or state department of agriculture), utilizing the charitable conservation easement tax deduction in the IRS Code. Some states offer additional conservation tax incentives. According to American Farmland Trust, as of 2017 over five million acres of agricultural land across the country have been protected with ACEs through these public and private efforts.

An ACE typically protects the subject land from future non-agricultural development and subdivision, while allowing for agricultural activities and structures. Some ACEs may include additional provisions such as: an affirmative farming clause requiring that the land always be in some type of agricultural production or use; an Option to Purchase at Agricultural Value (OPAV), which is intended to ensure that the protected farm is sold at its agricultural value and that the land continue in active farming; adherence to certain farming practices, methods or standards; and/or requirements to protect, for example, related water features, sensitive habitats, or historic or archeological resources.

Some ACEs may include additional provisions.

For the farm seeker, farmland protected with an ACE may present an opportunity to purchase a farm at a more affordable price than a similar farm property with all its development rights and potential retained. A farm seeker may also collaborate with a third-party, such as a conservation land trust or a values-based investor, to identify an unprotected farm they wish to purchase. The third party would protect it with an ACE and then sell it to that farmer at its agricultural value. In these instances, the purchasing farmer should be actively involved in helping to negotiate the easement (see sidebar: "Buy-Protect-Sell").

The ACE is legally held by the party to which the easement is sold or donated. This could be the state or local government that administers a PACE program or a conservation land trust that brokered the sale or donation of the ACE on the farm, or both. The ACE holder stewards the easement to ensure that the terms of the easement are upheld, for example, no unapproved development occurs on the farm and any requirements for certain farming or environmental practices are honored. If the ACE includes an OPAV that the provisions of this clause must be followed when the farm is sold.

ACEs can be rather lengthy agreements; they must meet specific requirements to qualify for both funding and any charitable deduction. Some land trusts place additional restrictions in their easements such as certain types of farming or treatment of riparian areas. For more detailed information on conservation easements and agricultural conservation easements see this Fact Sheet from the American Farmland Trust.

PARTIES AND STAKEHOLDERS

The primary parties in this method are the farmer and the easement holder, which could be a state or local government, or a conservation land trust. Stakeholders

can include the local community, land trust members, and/or the public (in cases where public funds are used). That does not mean these stakeholders have a say in the use of the property. It means they have an interest in the conservation values reflected in the easement. Sometimes stakeholders have donated to the purchase of the easement.

State, local, federal and private sources of funding for an ACE may impose certain provisions in the easement document that may influence future farming activities and practices. For example a grant from a foundation toward an easement purchase may require specific easement provisions to achieve resource protection and/or social goals.

LEGAL AND FINANCIAL ARRANGEMENTS

With over 40 years of farmers protecting, buying and selling farms with conservation easements, many farm lending institutions and programs are comfortable financing the purchase of, and improvements to, protected farms. A farm seeker wishing to purchase a protected farm will still need to qualify for a loan. But, as described above, the purchase price of the farm will be reduced by the value of the removed development rights, thus making the farm more affordable and reducing the size of the loan required.

Farmers purchasing an already protected farm, or intending to sell or donate an ACE on an unprotected farm will want a legal opinion on the terms and impact of the existing ACE to the new owner. The ACE is a legal, recorded document that runs with the property, usually in perpetuity. The purchasing farmer and any subsequent owner and/or tenant of the farm must live with the easement and adhere to its legally enforceable provisions.

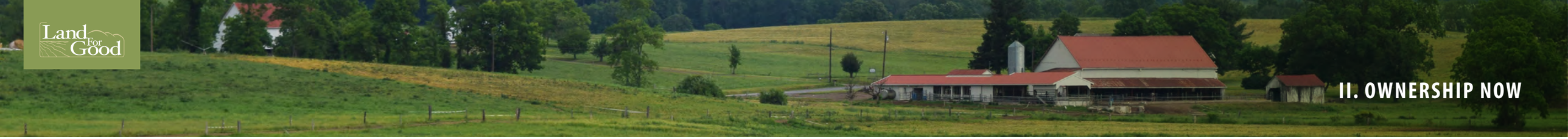
The resale value of the protected farm is influenced by the ACE and any specific conditions that may affect the sale of the farm, such as the easement-holding entity retaining a right of first refusal and/or the inclusion of an Option to Purchase at Agricultural Value. These resale restrictions help to ensure that a protected farm will stay in active farming. Without such conditions, some protected farms may be subject to demand from buyers wishing to purchase country estates. This escalated value may be too much for a farmer to reasonably afford.

EQUITY AND LEGACY PROVISIONS

As the fee-simple owner of the farm, the farmer is building full equity in the land, infrastructure and facilities, and farm business. However, "full" equity is limited to the value of the property as *restricted*. The farm may be transferred by sale, gift or bequest, subject to any limits in the easement (e.g., OPAV).

CHALLENGES AND RESPONSIBILITIES

For a farmer, owning a farm protected by an agricultural conservation easement means accepting the provisions of the easement on that farm. The easement will place some boundaries on what can and cannot be done on the farm, how it might be resold, and perhaps what type of agricultural practices are acceptable. The farmer must accept a relationship with the easement holder and its responsibility for monitoring and stewarding the ACE. Easement holders vary quite a bit in the amount and type of monitoring they conduct.



ADVANTAGES AND DISADVANTAGES

For the farmer, this method provides access to a farm at a more affordable price. As an owner of a farm in fee, the farmer has a great deal of flexibility to run and operate the farm and to recover his or her investments in improvements. The farmer must be comfortable with owning a farm subject to an ACE, which may govern certain farming practices, require environmental safeguards and set parameters on the resale of the farm.

Many farmers are pleased to own protected land.

Disadvantages might include the process to secure permissions, and potential disagreements around interpretation of the easement language. Some farmers note that their easement holder is not adequately familiar with farming, which can be a disadvantage. In situations where an OPAV is included in an easement, the easement holder may be in a position to reject a potential buyer. This can have an effect on the ease of sale and potential proceeds from the sale.

MOST APPROPRIATE

A farm subject to an ACE is a suitable and appropriate fit for farm seekers who wish to own their farm in fee and are comfortable with the concept of, and restrictions imposed by, the ACE. In fact, many farmers are pleased to own protected land. It can be a good option for farmers who might not otherwise be able to afford a parcel at market value. It is appropriate for farmers who understand the implications of owning protected land, who value the security that it can never be developed, and accept that the resale value and potential buyer audience are limited by the ACE. It is also appropriate for farmers who want to leave the farm to their heirs but ensure that it "will always be in farming."

VARIABLES SCORE

H — **Security**
This method offers high security to the farmer, subject to the terms of any financing to purchase the farm.

M — **Affordability**
One purpose of the agricultural conservation easement is to reduce the market price of the farm, which may be more affordable to a farm seeker.

H — **Equity**
The farmer can fully reoup his equity in the farm, as limited by the terms of the easement.

H — **Flexibility**
This method offers flexibility to make farming decisions and exercise control over the property, subject to the terms of the ACE.

M — **Farming Requirement**
The ACE may include requirements relative to farming practices, conservation standards and environmental safeguards.

H — **Access to Capital**
Most agricultural lenders are now comfortable with lending to farmers to purchase farms with easements. Future borrowing will be based on the restricted value of the property.

OWNERSHIP SCALE

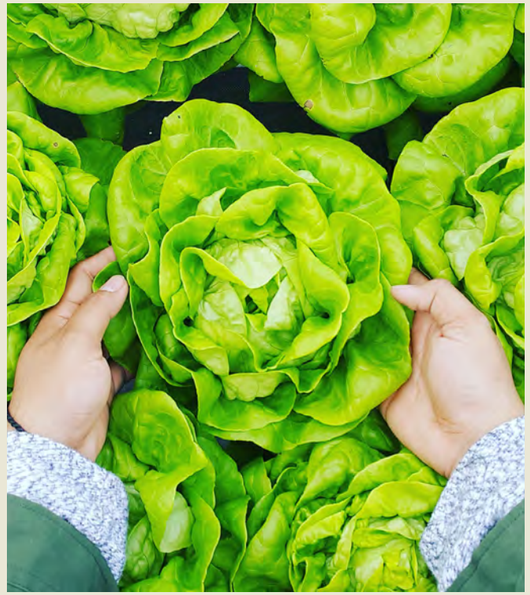
BUY-PROTECT-SELL

A farm seeker can work with an entity such as a conservation land trust or a values-based investor to secure a farm through a process coined "Buy-Protect-Sell" (BPS), which is built around an agricultural conservation easement (ACE). The basic framework of such a transaction is that a land trust or investor entity purchases a farm on the open market, secures funding to sell an agricultural conservation easement on the farm and then sells the protected farm to a farm buyer, either in a direct sale or through a lease-to-purchase arrangement.

This opportunity hinges on the placement of an ACE on the farm to not only reduce the eventual sale price of the farm to the farmer but to also enable the partner entity to recoup all or some portion of its original investment in the farm by: a) selling the easement; and b) selling the underlying fee simple. The sale of the easement on the farm may be through a state or local PACE program, in conjunction with the USDA ACEP, private fundraising or a combination.

This opportunity hinges on the placement of an ACE on the farm.

A conservation land trust or values-based investor may work directly with a farm seeker to identify a farm for protection and then purchase. This could be a farm that the farmer has been leasing or that they have found that suits their needs. In some cases, the partner entity may purchase a farm that is on the market and threatened with development and then seek a farmer to match with the farm. In these instances, the purchasing entity may solicit proposals from potential buyers and select an applicant based on such factors as their



business plan, farm experience, commitment to the community and available financing. The Vermont Land Trust and Maine Farmland Trust have actively employed this technique to help farm seekers secure access to farmland. The Local Farms Fund, described as a "community impact farmland investment fund," has used BPS to help young and early-stage farmers secure land access within the New York City food shed.

A partner entity may lease the farm for a period of time to the farm purchaser to allow time for his or her business to become established, to restore fallow farmland, or to build sufficient equity and secure financing for the purchase. However, it is expected that the farm will be sold to a farmer in fee subject to the conservation easement so that the partner recoups its original investment in the farm to then redeploy funds using the same method.

III. OWNERSHIP IN THE FUTURE

OVERVIEW

In this guide, *path to ownership* refers to the methods by which a farmer can acquire ownership of a specific property over time. It does not address the broader concept of how farmers might eventually own land. In this section, we look at several methods. Lease-to-own and land contracts are one category. A second category is legal entities through which interests in the property can be transferred. Third, we look at gifting. While business entities and gifting are detailed in the previous section on ownership, their particular usefulness as mechanisms to transfer land over time—rather than via a one-time transaction—is the emphasis of this section. Many farm seekers are particularly attracted to methods by which they might own a particular property in the future.

A. LEASE-TO-OWN

OVERVIEW

"Lease-to-own" is not a legal instrument or principle. Rather, lease-to-own refers to strategies to gain ownership of a particular property at a future point via specific legal transactions involving the property owner (landlord) and the buyer (tenant).

There are two lease-to-own methods—Purchase Option and Right of First Refusal. **NOTE:** Both these methods can exist outside of a lease. In other words, a farmer can hold a Purchase Option or Right of First Refusal as a separate agreement on land he or she is renting, or on land not rented.

The **Purchase Option** (or Option to Purchase) clause in a lease gives the tenant the right to trigger the sale of the property from the landowner (seller) to him or her according to specific procedures and within a specific timetable. A Purchase Option clause must contain certain details to make it legal. These include identification of the property (which may not be the entire leasehold), the time period for exercising the Option, and the price or the process for determining the price. As noted above, a Purchase Option may be negotiated outside of a lease agreement. For example, an Option could be set up between two parties not already involved in a lease situation. Or a landowner and tenant may agree on an Option after a lease has been signed; they don't need a new lease.

At minimum, an Option must include:

- A description of the property subject to the Option.
- Consideration, meaning that something of value has been exchanged for the Option. It can be nominal; sometimes lease payments can qualify for the consideration.
- Duration of the Option period, meaning when the tenant can trigger it.
- Terms and timetable—how is the Option exercised? How does the tenant inform the landlord? What is the timeframe for accepting or rejecting the purchase price?
- Price, which can be stipulated in the Option, or arrived at through a process detailed in the Option language, such as an appraisal at the time the Option is exercised.

An Option also should stipulate if any portion of the lease rent goes toward the purchase, how it's held and if it's returned, if the Option is not exercised. This portion is technically considered an equity interest (*not rent*) and would be handled differently in tax reporting and in a court of law. It should also stipulate whether the depreciated value of any improvements to the property made by the tenant may be deducted from the fair market value at the time of purchase.

The Option can be voluntary or it can become an obligation when specific conditions in the Option agreement are met. For example, the farmer-tenant can back out of the purchase if the price ends up being too high, or if she or he cannot obtain financing. The owner, however, cannot back out if the terms of the option are met.

The other method is the **Right of First Refusal**. In a lease agreement, a Right of First Refusal (ROFR) clause allows the tenant the first chance to buy the property if the owner puts it on the market. Generally, a ROFR allows the farmer-tenant to step up after a third party has made an offer. The farmer usually has the chance to buy the property on the terms the seller and the third party negotiated. ROFR clauses are highly variable but they should contain specific conditions, such as how the right may be exercised. In a ROFR, the farmer-tenant is not obligated to make an offer; he or she just has the right to do so.

PARTIES AND STAKEHOLDERS

In lease-to-own agreements, the parties are those who sign onto the agreement—the landowner/landlord/seller and the farmer/tenant/buyer. The owner can be any land-holding entity including family, other individuals, corporations, investor entities, institutions, conservation organizations and so on. Leases between a farm operating entity and a senior generation landowner can include a Purchase Option or a ROFR to allow the farming heir to purchase the farm during the lifetime or at the death of the senior landowners. A lease, binding on heirs and assigns, can protect the farming operation and provide secure tenure for the full lease term and a right to purchase the farm from any other heirs. Several conservation land trusts and farmland investment entities use lease-to-own methods with good success. The Vermont Land Trust and Maine Farmland Trust are two examples. They acquire properties with the intention to sell to the farming tenant down the road.

FARMLAND INVESTORS

Farmland investors acquire land for various purposes and under varied arrangements. Some investment entities mainly see farmland as a sound contribution to their portfolios. Typically they purchase tracts of farmland and rent them out or hire managers. Some self-described "socially responsible" or "values-based" investment firms have social goals such as conversion of the land to organic, saving the land from development or providing land security to beginning, military veteran or socially disadvantaged farmers. The socially motivated investor's lower expected return on investment is moderated by achieving the environmental and social objectives of the transaction. The common thread among these social investors is to secure the land, make it available for farming and eventually have the farmer own the farm. In that regard, this type of investor is the owner/landlord/seller.

Sometimes the investment entity buys a farm and then seeks a farmer.

Sometimes the investment entity buys a farm and then seeks a farmer. The other approach begins with the farmer identifying desired land. Sometimes an easement is involved (see also p. 35), which helps make the package more affordable for limited resource farmers. The entity can be an LLC, corporation, partnership or individual. The stakeholders are the individual investors. Their engagement and involvement in the project will range from hands-on by the individual investor or small group to the arm's length engagement of an investor represented by an investment firm. The firm's representative is the point of contact as landlord.

LEGAL AND FINANCIAL CONSIDERATIONS

For lease-to-own methods, the legal language must be sound—written or reviewed by an attorney with expertise in these kinds of instruments. Although there are some basic legal standards, the parties can craft an Option that meets their needs. It can be a few sentences or several pages. Sample language is available online at Land for Good and Farm Commons. Of particular note is whether any portion of the lease payments go toward the purchase; if so, they need to be treated in a particular way for tax reasons.

These arrangements do not require down payments; nonetheless the farmer must calculate all costs over time to make sure the method is financially prudent and feasible. Lease-to-own allows the farmer-tenant to get onto the property, and build equity in the farm operation as they save for the purchase down the road. At some point, however, the farmer needs to come up with the purchase price, typically via some form of financing. In most cases, the lender will not consider built-up equity in a lease as collateral. But operating loans secured by other assets can be used to cover rent.

EQUITY AND LEGACY PROVISIONS

A lease with the possibility of ownership offers the promise of equity, which can actually start building with a Purchase Option, if a portion of the rent payment goes toward the purchase. The Purchase Option must be written carefully to assure this. The risk is that payments are not considered a contribution to the purchase, so no equity is built. What happens to any payments toward equity if the farmer-tenant does not end up purchasing the farm also must be detailed. A ROFR does not provide for equity-building or legacy unless and until the property is purchased by the farmer-tenant. There is always the risk that the land is sold to a third party, if the farmer cannot afford to purchase it when it goes on the market. If the lease is broken – or is in default – the Option and all improvements and equity can be lost.

What constitutes default under the lease? Is there a right to cure? The stakes are much higher if there have been improvements and equity has built up.

CHALLENGES AND RESPONSIBILITIES

In any of the above methods, the farmer assumes all the responsibilities of a tenant. In a ROFR, there is no commitment to purchase the property, so risk is mitigated. In a Purchase Option, the tenant might lose his or her equity contributions unless the Option is clearly and legally written otherwise. In the Option, the procedure for establishing the purchase price must be fair; most methods involve some tradeoffs to account for the unknowns about future land values. In most cases the farmer will still have to come up with a down payment at the time of purchase. But the idea is that by then the farmer will have built adequate equity to do so.

The procedure for establishing the purchase price must be fair.

The challenges of purchasing a farm in collaboration with an investor are no different for a farmer than if they were to purchase the farm outright or through a lease-to-own arrangement with a private landowner. They will need to secure the necessary financing and in the meantime be comfortable with the terms of a lease-to-own agreement.

In deciding to purchase a farm, the socially conscious investor takes on significant challenges, responsibilities and risk. But all for a good cause – to secure a future for the farm and to make it available to a farmer at an affordable price. Recouping its investment in the farm through lease fees and eventual sale to a farmer at a price the farmer can afford will be the biggest challenge for the investor, especially when the land price was high to begin with. It's a challenge for the farmer as well, since this can drive all transaction costs higher.

Disadvantages of lease-to-own include the risk of a poorly constructed contract.

ADVANTAGES AND DISADVANTAGES

Advantages of lease-to-own include: no initial down payment (at the beginning of the lease); customizable terms and conditions; less bureaucracy; farmer can start farming without land debt, while offering the promise of ownership down the road.

Disadvantages of lease-to-own include the risk of a poorly constructed contract. The farmer might hope to exercise his or her ROFR in time, but the landowner might put the property on the market before s/he can afford to purchase it. Note that a well-crafted lease will protect the farmer from termination if the property changes ownership to a third party. Another disadvantage is that none of the rent payments build equity, especially if the rent payment is close to what mortgage payments are.

MOST APPROPRIATE

Lease-to-own provisions are advantageous for farmers who cannot arrange for a conventional mortgage, are transferring property between family members or other "friendly" landowner, and are pretty certain they want to own this particular property in the future.

VARIABLES SCORE — PURCHASE OPTION

M — **Security**
A Purchase Option offers more security than a long-term lease or ROFR because it commits the seller.

L — **Affordability**
The relative affordability of this method depends on the terms of the ultimate purchase.

M — **Equity**
If the Purchase Option agreement credits any portion of lease payments toward the eventual purchase of the farm, the farmer will gradually build equity in the farm and capture this equity if the option is exercised.

H — **Flexibility**
With purchase option, the farmer is in a good position to make long-term decisions and plans. There is a risk that the lease will be terminated before the option is exercised.

H — **Farming Requirement**
This arrangement may have farming requirements in the lease agreement until the purchase transaction replaces the lease.

L — **Access to Capital**
This method does not extend borrowing capacity based on the value of the farm to the farmer until the Purchase Option is exercised and ownership is transferred.

OWNERSHIP SCALE

3

VARIABLES SCORE — RIGHT OF FIRST REFUSAL

L — **Security**
A right of first refusal offers a small margin of security to plan for future ownership of the farm.

L — **Affordability**
Since the farmer must match whatever offer is received to purchase the farm, affordability is not a hallmark of this method.

L — **Equity**
Unless successfully exercised, this method does not offer any equity or equity-building capacity.

L — **Flexibility**
The speculative nature of this option is a hinderance to making long-term decisions and plans.

H — **Farming Requirement**
This arrangement may have farming requirements stipulated by the owner until the transfer to the farmer is complete.

L — **Access to Capital**
This method does not extend borrowing capacity based on the value of the farm to the farmer until the ROFR is exercised and ownership is transferred.

OWNERSHIP SCALE

2

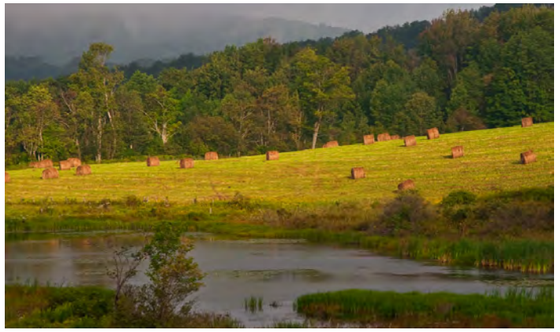
B. LAND CONTRACT

OVERVIEW

A land contract—also known as a Contract for Deed—is a legal arrangement in which the buyer (farmer) makes installment payments to the landowner over a period of time. When the final payment (typically including interest on the payments) is made, title is transferred to the buyer. (Compare with a mortgage in which title is transferred at the beginning.) Typically the buyer also has a lease agreement.

> A land contract can be a good way to receive nearly all the rights and responsibilities of ownership.

Land contracts are popular for transferring property between family members. A land contract can be for a long period of time—similar to a mortgage. Typically a down payment is not required; the parties might agree on a balloon payment down the road, at which time the buyer must pay in full. At that point, the buyer could be sufficiently established to finance a conventional mortgage to cover the balloon payment. Responsibility for real estate taxes and other land costs will be specified in the land contract. Most often it is the buyer who is responsible for these expenses along with responsibility for upkeep and maintenance of the property.



The land contract will also provide the amount and timing of payments and what happens in the event of default. Sometimes land contracts will carve out a life estate for the seller in the homestead. A land contract can be a good way to receive nearly all the rights and responsibilities of ownership without paying the full purchase price immediately, but there are risks for both buyer and seller.

The USDA Farm Service Agency has a Land Contract Guarantee Program that protects landowners against the risk that the buyer (who must be a beginning farmer) will miss a payment.

PARTIES AND STAKEHOLDERS

In a land contract, the parties are the farmer-buyer and the seller, often a family member. But it could be an unrelated party. A conventional or alternative lender may also hold a mortgage on the property, if financing was required for a down payment or for improvements, for example.

LEGAL AND FINANCIAL CONSIDERATIONS

A land contract comes with risk. A buyer's rights in the event of default are governed by state law. In some New England states, if the buyer defaults on (misses) a payment, the seller can withhold title to the land because the buyer has essentially defaulted on the contract. The buyer's payments made up to the point of default are lost. In other states, courts have made land contracts more equitable to the buyer. For example, the court system may require a land contract seller to go through the foreclosure process before evicting a defaulting buyer, or must return a portion of the monthly installments. It is important to know your state laws on this issue. As with most contractual agreements, a land contract should be in writing and reviewed by a legal advisor familiar with this type of agreement.

EQUITY AND LEGACY PROVISIONS

As the tenant-buyer in a land contract, the farmer does

not build equity in the land under contract. The entire payment goes toward the final purchase price of the property and in the end, if all payments are made, will lead to transfer of fee simple title to the buyer. The primary risk in a land contract is whether the buyer will be able to recoup payments in the event of default. The land contract can provide for this if the seller is amenable. Without such language in a land contract, the buyer must understand what their rights would be under state law in the event of default.

Land contracts are not common outside of family transactions.

Since the buyer has no actual equity in the property, he or she cannot borrow against it. Also, the buyer cannot depreciate any existing or installed improvements on the subject property for the same reason: he or she does not own it.

CHALLENGES AND RESPONSIBILITIES

Even with the most supportive and forgiving seller (a parent, for example), the farmer-buyer must avoid defaulting on the contract. Payments must be kept up. If things turn sour, a court might not rule in the farmer's favor. Responsibilities under a land contract may include taxes and assessments, for example; these are usually not the obligation of a tenant. A land contract and a lease will differ with respect to how court procedures are handled following a default.

ADVANTAGES AND DISADVANTAGES

The main advantage of the land contract method is that the farmer-buyer has a relatively secure arrangement to own the property down the road, typically without an initial down payment and frequently with more favorable terms. The farmer has nearly all rights of ownership, compared to a lease. The parties may not have to deal with banks or lenders unless the buyer needs to finance a balloon payment. The farmer-buyer has time to build equity through the farm business or otherwise, to

purchase the property or refinance out of the contract with conventional mortgage financing.

One disadvantage is that the buyer does not have title (compared to a regular mortgage) until all payments are made; and technically has fewer rights in the event of default. Also, in a land contract, the buyer's equity may be at risk if he or she misses a payment.

Land contracts are not common outside of family transactions but not prohibited. The big difference between a land contract and a lease-to-own arrangement is that in a lease the owner/seller retains ultimate responsibility for the property. The landowner is responsible for the maintenance of the property, any repairs, and for paying property taxes and insurance, the same as any landlord. Of course, any of these responsibilities can be delegated to the tenant per the lease agreement. In a land contract, these responsibilities most often fall to the buyer.

MOST APPROPRIATE

A land contract is a good option for farmers who cannot obtain a mortgage because of their credit history or other reasons. It might be that the particular property would be difficult to finance conventionally. A land contract is appropriate between family members or with other"friendly" landowners, when the farmer is certain that they want to own this particular property in the future.

VARIABLES SCORE

H	**Security** With a signed agreement to purchase the farm over time, this method offers a secure path to eventual ownership.
M	**Affordability** Since a down payment is typically not required, this method can be more affordable than securing a mortgage to purchase a farm.
M	**Equity** Equity is accumulated over the time of the contract. However, if a farmer-buyer were to default on payments, he may not be able to re-coup or get any credit for their equity to date in the farm.
H	**Flexibility** With the expectation to eventually own the farm outright, this method provides stability to a farmer to make long-term decisions and plans.
H	**Farming Requirement** This arrangement may have farming requirements stipulated by the owner until the transfer to the farmer is complete.
H	**Access to Capital** A land contract transfers the right to mortgage the property to the buyer, allowing the value of the farm to be used as collateral.

OWNERSHIP SCALE

C. LLC OR CORPORATION

OVERVIEW

As described in the "Ownership Now" section of this guide, a farm can be set up as one or several limited liability companies (LLC) or corporations to hold separate assets and perform distinct functions. In addition to serving as vehicles to hold property, these entities can be used to transfer majority or full ownership of the farm property to one or more members of the entity. For this purpose, the entity will govern how interests are bought, sold or otherwise transferred. The operating agreement for the entity will include a strategy, process and timeframe for the transfer of the assets. LLCs are frequently used to transfer ownership interests between generations in a farm family, but such arrangements are not limited to families.

These entities can be used to transfer majority or full ownership of the farm property.

Refer to the "Ownership Now" section for a basic overview of these entities' features. See also the "Gift Over Time" section for how these entities can be used to transfer ownership interests. Partnerships also can technically be used to transfer ownership but since this is uncommon and rarely advised, this guide does not go into this use of partnerships.

PARTIES AND STAKEHOLDERS
An LLC or corporation may have a number of members, some of whom are active owners and some may be passive (such as co-called limited partners). Typically, the active owners are the farmer(s) who may include an older farmer preparing to exit, and the successor farmer (whether or not a family member). If the entity is used to transfer interests in the property, some of the owners (such as the senior farmer) may exit the entity completely while some (for example, non-farming family members) might retain minority interests.

As a shared asset, the farmer is subject to the operating agreement.

LEGAL AND FINANCIAL ARRANGEMENTS
The entity's operating agreement lays out the rules for entry, exit and other aspects of membership. So, if the intent is to transfer the entity's assets to a farmer(s), the agreement will address how and when the shares or units transfer and how they are valued. The agreement may spell out a certain schedule, or may be more open-ended to accommodate the capability of the transferee to build cash or sweat equity to purchase the units. Units may be gifted, too. Each transaction must be recorded. The key is sufficient detail in the agreement and/or a detailed buy-sell section.

EQUITY AND LEGACY PROVISIONS
As a member of the entity, the farmer owns an equity interest in his or her units or shares, but cannot borrow individually against it. As units/shares are transferred to the recipient, his or her equity increases until he or she owns the property or gains a majority interest, per the agreement.

CHALLENGES AND RESPONSIBILITIES
Each member's responsibility is to the terms of the operating agreement or by-laws. As the receiving member of units or shares being transferred, the farmer

is responsible for meeting the rules and timeline for purchasing the interests, which will likely include raising enough capital for the payment, or performing adequately to acquire sufficient sweat equity.

ADVANTAGES AND DISADVANTAGES
With respect to the LLC or corporation as a vehicle to gradually own a farm in fee or majority interest, one advantage is spreading the initial investment and risk over multiple parties. And, because ownership interests are gradually acquired, access is more affordable than a one-time purchase. However, as a shared asset, the farmer is subject to the operating agreement which will set the parameters for executing the transfer of shares of the entity. There are risks associated with not meeting those parameters. Not being able to use the asset as an individual to borrow capital could be seen as a disadvantage.

MOST APPROPRIATE
An LLC or corporation to gradually transfer the ownership of farm to a farmer(s) is especially appropriate for an intra-family transfer to the next generation. This method is also used by non-farming investors interested in fostering land access for farmers.

VARIABLES SCORE

M	**Security** Depending on the terms and implementation of the operating agreement, this method can offer a solid path to high security.
M	**Affordability** Because land "units" are transferred within the entity and over time through the farmer's purchase, sweat equity or gifting, this method is more affordable than methods requiring financing.
H	**Equity** A farmer-member of the LLC or corporation will build equity equal to her stake in the entity through transfer of shares or units in the farm.
H	**Flexibility** With the expectation to eventually own the farm outright, this method provides stability to a farmer to make long-term decisions and plans.
H	**Farming Requirement** This arrangement may have farming requirements stipulated by the entity until the ownership transfer is complete.
H	**Access to Capital** The entity owns the farm in-fee and as such has the full borrowing capacity of the assets at its disposal.

OWNERSHIP SCALE

D. GIFT OVER TIME

OVERVIEW
As described in our section on "Gift or Inheritance", a farmer may receive a farm as a one-time gift. In this section we look at how farm real estate can transfer to the next farmer via a series of gifts over time, rather than a single, one-time transaction. Gifts could be conveyed as shares or units in the farm real estate within an entity, by deeding over specific parcels, or by granting percent ownership as a joint tenant on the deed—all spread out incrementally over time. Gradual gifting is more typical between family members, but not unheard of in other situations. With each gift, the receiving farmer gains that much equity in the asset without having to purchase it. As with other gradual transfers of farm assets to the next operator this method can work well when coupled with gradual transfer of farm management.

Because of how LLCs are set up, portions of the asset can be distributed as gifts.

As mentioned, an interest in land can be gifted by deed, but that method can be inefficient if the gifts are small, partial and recurring. Farms operating as sole proprietorships would make gradual gifting a challenge. Farms that form legal entities such as limited liability companies (LLC) often put their farm business and real estate into separate entities. Because of how LLCs are set up, portions of the asset can be distributed as gifts easily within the entity. Much of the information about LLCs elsewhere in this guide will apply to gradual gifting.

PARTIES AND STAKEHOLDERS
The parties in a gifting scenario are the giver and the receiver. If the giver is a senior farmer still involved in the operation, the senior and the recipient may share expenses, earnings/or and decision making relative to

their shifting ownership portion of the farm. The giver might be the owner of the real estate but not the farm operator. For example, a surviving farm spouse might gradually gift the farm real estate to the child who is developing his or her own business on it.

LEGAL AND FINANCIAL ARRANGEMENTS

In the past, when the federal estate tax exclusion was low, this farm transfer method was often used to avoid estate taxes. The current high federal estate tax exclusions essentially remove the federal tax savings incentive of gifting during one's lifetime for most farms. Many states' estate tax are not tied to the federal estate tax. In states with a relatively low exclusion amount (Massachusetts, for example) it may still be a wise tax saving technique to gift a farm during one's lifetime to remove that value from the owner's estate and avoid state estate taxes.

There may be tax implications down the road.

Depending on the the value of the gift, there may be no *immediate* tax consequences to either the giver or the recipient of the gift. But there may be tax implications down the road. Givers and receivers should examine—with their financial advisors—the relative merits of gifting versus bequeathing (inheritance). In any case, the parties should have a clear understanding of what has been transferred by gift, backed by documentation.

As the gifting of farm assets occurs over time, the recipient will transition from being a minority stakeholder to equal partner to majority stakeholder and then eventual sole owner. During this period, the expenses (debt, taxes, operating costs, etc.) associated with the asset are allocated between the parties equal to their respective ownership stake.

EQUITY AND LEGACY PROVISIONS

The gift recipient is gradually building equity in the farm's land and facilities, and/or the business, depending on what is being gifted. When the gifting is complete, or as part of a multi-pronged transfer strategy (e.g., part gifting, part purchase and/or inheritance) the giftee will have control of the LLC or become fee simple owner. Subject to any conditions attached to the gifted asset (e.g., an agricultural conservation easement and/or life estate), the recipient can sell, rent, bequeath or donate it.

CHALLENGES AND RESPONSIBILITIES

The challenges and responsibilities during an extended period of asset transfer within an entity are similar, regardless of how the partial transfers are done. Allocations of expenses, income and responsibility will shift over time according to the agreement. It's not always easy to execute those shifts in the real world. In addition, gradual gifting may come with "baggage" such as the dynamics of the giver-recipient relationship, and expectations (often unspoken) about gratitude or responsibilities that could drag on as the outgoing owner shifts from the majority to minority (or zero) stakeholder in what had been their farm. There is a risk that the gifting could get disrupted before the asset is completely transferred, potentially resulting in a legal situation. The gradual gifting method is only successful if the intention is followed through.

ADVANTAGES AND DISADVANTAGES

Receiving a farm by gifting over time is a very affordable path to farm ownership, mainly due to the generosity of the giver. The capital gains liability in a future sale of the gifted asset may (or may not) be a small price to pay given the alternative of having to purchase a farm on the open market. The receiving farmer must be well informed about what the gradual gifting really involves. Gradual gifting of a farm asset paired with gradual transfer of income and management can be a rewarding experience for both parties.

Gifting is most typical between family members.

MOST APPROPRIATE

Gifting is most typical between family members. It can work well for farmers who are patient and can wait to receive the full asset. Recipients also have to live with the potential tax impact due to the low basis when it comes time to sell the asset.

VARIABLES SCORE

M	**Security** This method results in high security, provided, however, the gifting process is completed.
H	**Affordability** Gifting makes this method maximally affordable.
H	**Equity** The recipient of the gifts gradually builds equity in the farm until they eventually own it.
H	**Flexibility** The ability to make decisions on the farm grows as the recipient's stake in the farm increases over time.
M	**Farming Requirement** Any farming requirements will be at the discretion of the majority owner.
H	**Access to Capital** If gifting is done through an LLC, the LLC can borrow with the farm as collateral. If segments of the farm are deeded as gifts, the value of those assets can be used as collateral.

OWNERSHIP SCALE

IV. NO OWNERSHIP

OVERVIEW

For many farmers, use, control and appropriate security on land are more important than ownership. For others, farm ownership is simply not an option. Nearly half of all US farmers rent some or all the land they farm. Non-ownership tenure includes renting (leasing) and other agreements described in this section.

Tenancy means the temporary possession or occupancy of something (in this case farms) that belongs to another. Globally, farming on land owned by others is a very common method of land tenure—not always beneficial to the user. With a reasonable agreement, a farming tenant has certain rights of possession during the term of the lease agreement, along with certain obligations. Renting land to farm has advantages and disadvantages, touched on below. It can be a sensible—or the only—option for beginning farmers. As previously pointed out, USDA research shows that beginning farmers without land debt are more likely to succeed in the long run[1].

> Tenancy means the temporary possession or occupancy of something.

Typically, and in this discussion, "rent" and "lease" are interchangeable, as are "lessee" and "tenant," and "lessor" and "landlord." A written lease is a legally binding contract if it contains the essential contract elements. An oral or handshake agreement likely will not be enforceable under many state stautes of fraud. Most statutes of fraud require that contracts involving land, such as a lease, be in writing and be signed by the person against whom compliance is sought.

Some arrangements to farm on land owned by others do not fall into the category of leasing. These non-exclusive use rights are legally not "tenancy," and the farmer is not technically a tenant. This guide includes a discussion of licenses, permits and other agreements for non-exclusive use property in this section.

For many farmers, renting land makes financial and practical sense, whether they rent all their land or own some and rent additional acreage. For some, it is a step along their path to ownership, whether on *that* leased land (see our section on "Ownership in the Future") or on other property.

1 Parsons, Robert, K. Ruhf et al. 2010. The FarmLASTS Project Research Report and Recommendations. P. 11.

A. LEASEHOLD INTEREST

1. SHORT-TERM LEASE

OVERVIEW

An enforceable short-term lease is a written contract between the landowner and the farmer, usually for 1-3 years. Depending on each state's statute of frauds, a non-written (oral or "handshake") lease may not be enforceable. Many short-term leases are annual, renewed each year. To be a legal contract, the lease must contain the names of the landlord and tenant—whether individual, multiple parties or entity, a description of the property being leased, the start and stop dates (the "term"), the rent ("consideration") and the parties' signatures. For some short-term leases, that's all that's needed. Others, while only for a relatively short time, contain more detail.

Many online and print resources offer instruction and examples about how to construct a good farm lease (see our Resources section). They address ways to calculate and pay the rent, how maintenance and other responsibilities are divided, and how termination and renewal are handled, among other terms. The clarity and technical accuracy of a lease are important, but the relationship between the landlord and tenant is as critical. Shared goals and good communication habits will improve the likelihood of success.

> Farmers should not simply resort to a generic lease template.

PARTIES AND STAKEHOLDERS

The main parties in a short-term lease situation are the landowner and the farming tenant. That said, there are many types of landlords, including family members, retiring farmers, absentee or occupant non-farming landowners, religious and educational institutions, conservation organizations, investors and public agencies. Every landlord has a unique story about why they own and choose to rent their land—their motivations, vision and goals, standards, and

expectations. Some landlords are quite laissez faire while others can verge on overbearing. That said, a good landlord-tenant partnership can be rewarding to both parties, even in the short term, whether with handshake agreements or more detailed documents.

LEGAL AND FINANCIAL CONSIDERATIONS

The legal aspects of leasing focus mainly on the lease agreement itself. Both parties should obtain guidance from their own attorney who is familiar with farm leases. There is a lot of online and print information, as well as sample leases, to draw from. But farmers should not simply resort to a generic lease template.

Even with a short-term lease, things can go wrong if something is left out or is not clear, such as who is responsible for which and what types of repairs, or what is the recourse if there is a crop disaster and the farmer can't pay the rent on time. Farming on someone else's land always raises concerns about permitted uses and liability, for example, which can (and should) be addressed in the lease document--typically by specifying a range of permitted uses and who is responsible for insurance. There is always a risk that things go awry; at worst, mediators, lawyers and courts may become involved.

Renting land can make sense financially. In one example comparison budget calculated by personnel at Farm Credit East, the net return to family living from farming on rented land is six times that on land purchased conventionally. This enables the farmer to invest in the farm operation and to build equity in other ways besides land. There are no initial costs as with most land purchase situations. Land rents can run the gamut from quite high

to free (although there must be some "consideration" in order to be a contract). Many states offer significant real estate tax benefits for leased land in agricultural use. These programs often will require a written lease for a specified time period. While short-term leased land is not available to use as security for a loan, there is also no need to borrow funds to purchase land and no land payment to be made. Livestock and equipment are often adequate to obtain operating credit, if needed. Tenants who want to participate in FSA farm programs will need to have a written lease. Both tenants and landlords must treat rental payments according to tax codes.

EQUITY AND LEGACY PROVISIONS

With a short-term lease, there is no opportunity to build equity in the land. A short-term lease typically is not inheritable, although some annual handshake rental agreements between landowners and farm families have passed from generation to generation. Unless specified, a short term lease may not be binding on "heirs and assigns" meaning that if the landowner passes away or sells the property the new owners need not honor the lease.

CHALLENGES AND RESPONSIBILITIES

The main challenges with short-term leases are their relative insecurity, and the disincentive to invest in the property for the benefit of the farm business. With an annual lease, you don't know for sure if you'll be on that same land next year, so longer-term soil improvements, drilling a well or putting up permanent structures is usually not a wise investment. That said, adding soil amendments or a hoop house during a three-year lease might be a good business as well as stewardship decision. Sometimes, landlord relations can be a challenge, best mitigated with a strong written lease, good communications and shared goals for the property.

ADVANTAGES AND DISADVANTAGES

One big advantage to a short-term lease is getting onto land relatively affordably compared to purchasing. It can limit the farmer's financial risk. A short-term lease can be a good trial period for the farmer to test the site, location, markets, landowner relationship and even whether farming is right for him or her. A short-term lease is often more appealing to a landowner, at least initially, and especially one who is new to farmland renting. So negotiating a successful short-term agreement may be easier than a longer-term commitment. Plus, it may lead to a longer-term lease or a purchase. A short-term tenant does not bear many of the responsibilities of the landlord, or of ownership.

> A short-term lease can be a good trial period for the farmer to test the site.

Disadvantages include insecurity, inability to build equity in the land, dealing with a landlord, constraints on borrowing against leased land or participating in some farm programs if the lease is not in writing or of insufficient duration to cover the program benefit. Short-term leases are a disincentive to rotate crops, invest in perennial plantings or permanent structures, and install conservation measures. A short-term lease can make it hard to make long-term business or family plans. For some farmers, farming with short-term tenure diminishes their emotional investment in the land. Lenders may balk at financing a loan without a written lease covering the loan period.

MOST APPROPRIATE

A short-term lease is appropriate for farmers who are starting out, for those who want to test a particular parcel or farming in general, and for those who want to add acreage to an existing operation. It is a reasonable option when there is no other feasible method to get onto land due to finances, location needs or other constraints. Short-term leases are appropriate as a way for landowners to wade into the agricultural land leasing world.

VARIABLES SCORE

L	**Security** This method offers very little security to the farmer.
H	**Affordability** Leasing a farm is an affordable alternative to borrowing or spending cash to purchase a farm.
L	**Equity** Unless otherwise provided, there is no opportunity to build equity in the land.
L	**Flexibility** Given the short duration of the arrangement, the farmer's flexibility to make plans and decisions on the use of the land is very limited.
M	**Farming Requirement** Short-term leases may include specific farming requirements or restrictions.
L	**Access to Capital** A short-term lease provides little, if any, collateral to support a loan.

OWNERSHIP SCALE

2. LONG-TERM LEASE

OVERVIEW

A long-term lease is a contract that grants rights to use another's property for the term of the lease which could be 5, 10, 20 and up to 50 years or more. Commercial leases are a good comparison, as they are typically for longer terms. The principles that govern a long-term lease are the same as for any lease, but a longer-term lease typically has more detail and complexity than a short-term lease.

> A long-term lease requires a strong working relationship between the parties.

Depending on the terms, a long-term lease offers many of the same financial, practical and emotional advantages as owning land, without some of the associated costs and responsibilities such as taxes, fees, depreciation and insurance (although some of those costs may be built into the rent). It provides a longer planning horizon, giving the farmer time to implement sustainable farming measures and capture the benefits of investments in soil building, for example.

A long-term lease requires a strong working relationship between the parties, along with legal guidance to set them up. Once established, a long-term lease rewards the tenant with a commitment to the land, and to the community where the land is located.

PARTIES ANDSTAKEHOLDERS

The main parties to a long-term lease are the landowner (landlord) and the farming tenant. As with short-term leases, the landlord can fall into many categories including individuals, nonprofit and community-based organizations, investors, and public entities.

LEGAL AND FINANCIAL CONSIDERATIONS

A long-term lease can run up to 99 years, but some states limit the term for farm leases. Long-term leases can be

quite complex. They may need to address permanent improvements and rent increase formulas, for example. Each party should work with an attorney familiar with agricultural leases, and this can lead to higher legal costs than for a simple, short-term agreement. A long-term lease is a significant commitment; the lease should provide for the tenant's reasonable termination if things don't work out. That said, a tenant *could* be held liable for the rent for the remaining term of the lease. One common farmer concern is getting kicked off the leased premises if the land is sold or the landowner dies. This can be mitigated by language in the lease that binds the landowner's "heirs and assigns." In some states, in order to bind a third party, the lease or a memorandum of lease must be filed with the municipal land records.

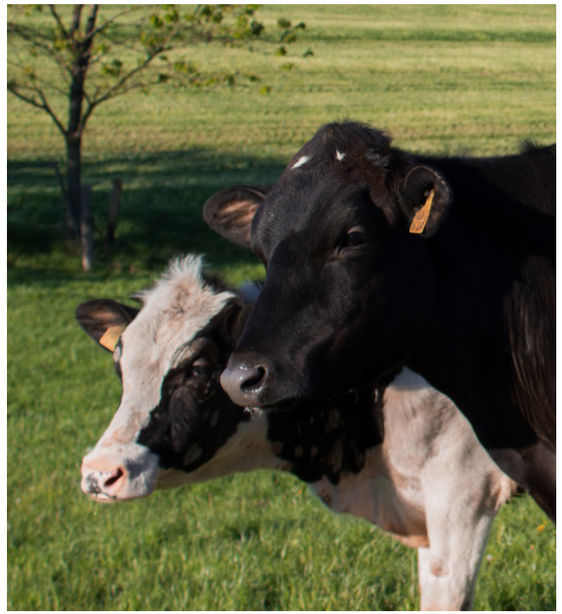
A good lease will provide for revisions and negotiation procedures.

A long-term lease can be more affordable than purchasing land, while providing many of the same advantages. Farmers can make and capture the benefit of improvements to the natural resource base and structures on the rented property. Some of these improvements may be compensated financially, depending on the lease provisions, or at minimum by increased productivity. As with any lease (except a ground lease; see this section), the farmer is not contributing to any long-term accumulation of wealth in the property. Money saved on ownership can be invested in the operation, but methods besides land appreciation must be used to fund retirement.

Generally, a long-term lease is not used for security against borrowed money, although some lenders may consider it depending on the prospective borrower's other qualifications, and the length of the lease term.

EQUITY AND LEGACY PROVISIONS

Long-term leases can be inheritable. Long-term tenants do not build equity in the land or improvements unless



it is a ground lease in which case they hold equity in improvements (see "Ground Lease" section), or specific lease provisions allow the farmer to install improvements that the landowner buys back at termination, usually at a depreciated value.

CHALLENGES AND RESPONSIBILITIES

A good long-term lease will spell out who is responsible for what maintenance, repairs and improvements and whether these are required or rewarded. For example, who pays for a broken water line? New fencing? Typically, a long-term lease requires significant investment in the landlord-tenant relationship, which can be challenging if, for example, it's an absentee landlord family or a conservation organization with headquarters some distance from the property. Who is monitoring? Misunderstandings and disagreements are inevitable. People, conditions and objectives can change over time and adjustments need to be negotiated. A good lease will provide for revisions and negotiation procedures.

ADVANTAGES AND DISADVANTAGES

The clear advantage of a long-term lease is its relative security compared to a short-term lease. The longer the term, the more secure, assuming other lease provisions are similar. The farmer has a longer planning horizon. The farm operation can benefit from investments in the property during the term of the lease. For example, spending and depreciating $10,000 for a shallow well for irrigation on a 10-year lease might make good business sense, even if the farmer leaves after 10 years. Similarly, most farmers would more likely invest in soil-building with a longer lease term, confident that the return in productivity is worth it. A long-term lease can serve as a legacy to the next generation, assuming it is transferable and inheritable.

The clear advantage of a long-term lease is its relative security.

The disadvantages lie mainly in the complexity of the arrangement, and in the farmer not being able to recoup his or her investments through outright compensation for the costs. It's not always simple to get out of a lease. The tenant should strive for a reasonable early termination clause. The long-term commitment isn't for everyone. Farmers are often worried that a landlord could terminate them at any time, regardless of the lease term. A well-written lease would prevent that.

MOST APPROPRIATE

A long-term lease is appropriate for farmers who do not desire to own land (or all their land) and who are ready to make a commitment to that particular property. It can work well for farmers comfortable with the relationship with the landlord—those who have patience to work out the inevitable twists and turns in the agreement and relationship over time.

VARIABLES SCORE

M	**Security** The length and other terms of the lease will determine the extent of security offered to a farmer.
H	**Affordability** A long-term lease is more affordable than purchasing land, while providing many of the same advantages.
L	**Equity** Long-term tenants do not build equity in the land. A lease may provide a mechanism to compensate for improvements made on the farm.
M	**Flexibility** A long-term lease can offer a farmer a good deal of flexibility regarding decisions and plans for the farm. Transferring or terminating the lease is possible.
H	**Farming Requirement** A landlord may require certain farming practice, conservation standards and other conditions of use.
M	**Access to Capital** Options to borrow capital will be limited. USDA FSA has shown a willingness to lend if the length of the lease term is as long or longer than the term of the loan.

OWNERSHIP SCALE

3. GROUND LEASE

OVERVIEW

In an agricultural ground lease, a farmer leases the land ("ground") and purchases or builds and owns the buildings (and sometimes other improvements) on the land. A ground lease is an interesting hybrid—part tenancy and part "partial ownership interest" as described more thoroughly in the section covering that method. In this section, we focus on the tenancy aspect of a ground lease.

Typical agricultural ground leases allow for long-term security—up to 99 years, and renewable. The landlord is often a community land trust; private party agricultural ground leases are not common. While the farmer-tenant owns some or all the buildings, he or she is still a tenant on the land, including the ground under the buildings. A ground lease is a more complex document than "regular" leases, but many of the terms and conditions are similar. Equity Trust specializes in agricultural ground leases, offering its Model Agricultural Ground Lease and accompanying guide.

> The basic premise of the ground lease is to enable a farmer to build equity.

Refer to our section on "Partial Ownership Interests" for details about ground leases.

PARTIES AND STAKEHOLDERS

The primary parties involved in agricultural ground leases typically are the farming tenant and the non-profit conservation or community land trust that becomes the landlord. Private landowners, or legal entities such as an LLC or a cooperative could be the landlord.

LEGAL AND FINANCIAL ARRANGEMENTS

For all the reasons described in our section on "Partial Ownership Interests", a ground lease is a relatively

complicated lease document. Many of the lease terms are standard—but how they play out in a ground lease may be impacted by the fact that the tenant owns the buildings. For example, how are maintenance, repairs and improvements addressed? What about liability, or termination? Provisions for how the farmer sells his or her improvements will tie into the lease. So, a knowledgeable attorney is a must.

In terms of the finances, the tenant pays a lease fee (rent) for the land. In addition, it is not uncommon for the landlord organization to charge an additional fee toward their administrative and monitoring expenses. The tenant must come up with the finances to purchase the building(s) or to construct them at some point. So while it's less than purchasing a whole farm, more financial capacity is needed than for a straight lease. The tenant is also responsible for all costs associated with building ownership. So if the house needs rewiring or the barn needs a new roof, it's up to the tenant, not the landlord.

EQUITY AND LEGACY PROVISIONS

The basic premise of the ground lease is to enable a farmer to build equity in the house, farm buildings and/or other infrastructure on the leased land without the burden of having the upfront capital or securing the financing to purchase the land as well. When it comes time to sell the farmer's owned improvements, the resale value will hinge on ground lease terms. Most often the farmer is selling the improvements and terminating the ground lease, which would stipulate that the new buyer of the improvements is also the next tenant. So the market for the next farmer may by limited, and the price for the improvements conditioned by the ground lease itself.

CHALLENGES AND RESPONSIBILITIES

An agricultural ground lease is more complicated than a straight lease to execute and to manage over time. But more and more successful examples demonstrate that it's possible and rewarding. See, for example: Caretaker Farm, Roxbury Farm, and Scatter Creek Farm Conservancy. The challenges include securing a willing landowner, getting the lease details right, and finding a buyer (and a new tenant) if and when that time comes.

ADVANTAGES AND DISADVANTAGES

For the farmer, a long-term ground lease provides entre onto land without having to lay out the capital to purchase farmland in fee-simple. It also provides a level of security to make investments, and that investments in farm infrastructure and improvements will be recovered at the time the farmer elects to leave the farm. The disadvantages include the relative complexity of the agreement, and limited borrowing capacity compared to full ownership. It may be more difficult to terminate or transfer the leasehold interest, given that the farmer owns assets on the rented property.

MOST APPROPRIATE

The ground lease model is a suitable and appropriate fit for farmers who wish to build equity in their enterprise without needing to actually own the land that they farm. It can work for farmers willing to be in a non-traditional arrangement, and those amenable to navigating a relationship with an organization as landlord.

OWNERSHIP SCALE

VARIABLES SCORE

H	**Security** Based on a very long-term lease, this method offers high security
H	**Affordability** A ground lease is a more affordable than outright purchase because the farmer buys improvements, not the land. Overall "affordability" is also tied to lease fees and the costs of purchasing the improvements.
H	**Equity** This method enables the farmer to accrue and capture equity in the infrastructure--including a residence--owned and improved by the farmer. The sale of farmer-owned infrastructure may be subject to equity-limitation formulas per the lease agreement.
M	**Flexibility** Degree of flexibility depends on the terms of the ground lease. It may be more challenging to modify a ground lease, sell the farmer's owned improvements, and/or transfer the lease to the next owner/tenant.
M	**Farming Requirement** A ground lease will not provide as much autonomy over farming decisions as fee ownership. The degree of autonomy will depend on the terms of the ground lease.
M	**Access to Capital** The options to borrow capital are limited with a ground lease. Some lenders may be wary about lending based on a ground lease. Some alternative lenders and USDA FSA are willing, depending on the terms.

B. OTHER ARRANGEMENTS FOR LAND

1. LICENSE OR PERMIT

OVERVIEW

A farmer can occupy land and operate a successful operation without any "possessory interests" in the land such as ownership or tenancy. A license (or permit) is a "nonpossessory interest" in land. Simply put, this means that a farmer has the right to use the land granted by a license. A license is official permission; it grants a privilege to use another's property but does not confer an interest, like a lease does. Under a license or permit (used synonymously here), the legal owner retains ownership and possession. By comparison, a lease confers an exclusive leasehold interest in the real estate.

A license may be used to grant non-exclusive rights to use buildings or other infrastructure too.

This may sound like splitting hairs, but the distinction can be important. For example, public agencies may be empowered to grant licenses to use publicly owned land, but they may not be allowed to confer possessory interests in real estate. A license will spell out what is being licensed (in this case, use of real estate), the length of term, and conditions of use. A license has certain important limitations. It is generally revocable at any time by the licensor. A license does not run with the land, and cannot be assigned.

A license may be used to grant non-exclusive rights to use buildings or other infrastructure too, such as on-farm processing facilities, wash stations, cooling equipment, equipment sheds, haybarns or water sources. A landowner could grant a one-time permit to hold an event on the premises.

In one example, the Massachusetts Department of Agricultural Resources (MDAR) runs a State-Owned Farmland Licensing Program. Through this initiative, MDAR grants five-year licenses to farm state-owned parcels under their care and control. Most of these properties are on former state hospitals and institutions. MDAR licenses are bid out through a Request for Responses process. Available properties are posted online and in the MDAR e-news bulletin.

PARTNERS AND STAKEHOLDERS

The parties to a license are the licensor (the landowner) and the licensee (the farmer). The landowner can be private, public or institutional. Public entities may put land use licenses out to bid through an open, competitive process.

LEGAL AND FINANCIAL CONSIDERATIONS

A license or permit is a contract. It should contain specific legal language that details use rights and that distinguishes it from a lease. If it substantially looks like a lease, even if it is called a license, the courts will consider it a lease. Technically, a licensee is not a tenant, so tenant's rights would not apply.

A license should detail the permitted uses, and expectations regarding liability. Typically, the landowner is responsible for taxes, utilities and maintenance, but the license should spell these out. Legally, a farmer-licensee has fewer rights than a tenant. The licensor can terminate the permit at any time (unless the permit specifically says otherwise). The term of a license is usually relatively short, such as one year, although they could be renewed.

Legally, a farmer-licensee has fewer rights than a tenant.

The farmer pays a fee, not rent. The use fees for a license are at the discretion of the licensor. There is nothing inherent in a license that makes it more or less affordable than rent or a mortgage payment.

EQUITY AND LEGACY PROVISIONS

A license may be an expeditious and suitable method to get onto land. Since it does not confer any possessory rights, a license does not build equity and cannot be transferred.

CHALLENGES AND RESPONSIBILITIES

As with any land use agreement, the user is obligated to conform to the terms of the license. A license or permit is less secure than a lease.

ADVANTAGES AND DISADVANTAGES

One advantage of a license for farmland is flexibility. Another is being able to access land that is only available through a permit process. Disadvantages include insecure tenure and the related disincentive to invest in the property.

MOST APPROPRIATE

A license may be appropriate for a farmer for whom security is not paramount, such as farmers who have other secure land and don't mind taking the risk on an additional parcel. A license may be great in a situation where the location and facility are ideal, the landowner is supportive, and renewal is possible or unnecessary. A license works well for farmers to obtain use of facilities on other's land.

VARIABLES SCORE

L	**Security** This method offers relatively little security to the farmer.
H	**Affordability** A license is more affordable than purchasing the land and may be comparable to leasing.
L	**Equity** This method offers no opportunity to build equity in the land.
M	**Flexibility** The degree of flexibility will depend on the terms of the license.
H	**Farming Requirement** Since licenses are typically offered by public entities on public land, there may be significant requirements or restrictions on farming practices.
L	**Access to Capital** This method provides no collateral to support a loan.

OWNERSHIP SCALE

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2. AGREEMENT

OVERVIEW

An agreement is an understanding or arrangement between two or more parties. Depending on how it is conceived, it may or may not be enforceable as a contract. A formal agreement has the look and feel of a contract. To be a valid contract, a formal agreement must include an offer and acceptance and "consideration" (something of value exchanged). If not covered by a state's statute of frauds, it does not need to be in writing to be enforceable, although without a written document it will be more difficult to prove what was agreed to by the parties.

An informal agreement does not have to have "consideration" and does not have to be written. We all know of "handshake agreements" where adherence to the terms relies on tradition and the honor of the parties rather than any external means of enforcement. Common examples in farming are verbal agreements in which a landowner allows a farmer to harvest hay, tap maple trees or run a few cattle at no charge.

In certain circumstances, an informal, non-binding agreement is adequate. As mentioned, some handshake agreements are honored across generations; some parties are insulted by the idea of questioning the partnership by "making them" write it down. Friendly neighbors may be happy to offer less formal agreements for specific land uses. A farmer might be happy to forage for wild edibles on someone else's land, or store hay in a neighbor's hay barn without a formal contract. As long as both parties understand the conditions of an agreement, it can be mutually beneficial.

> An agreement does not need to be in writing.

PARTIES AND STAKEHOLDERS

The parties to an an agreement depend on the agreement. Typically these would be a landowner and a land user. The landowner could be a private individual, an organization or a public agency, for example. The user could be a farmer, a gleaning organization, or an educational group, for example.

LEGAL AND FINANCIAL CONSIDERATIONS

If the agreement is not construed as a contract, whether written or verbal, there is no need for legal guidance, but also no legal recourse should things go awry. If money or other consideration such as a service or farm product is exchanged, the agreement might slide into being a contract.

EQUITY AND LEGACY PROVISIONS

Formal or informal agreements do not provide any equity-building opportunities or legacy provisions. Some informal agreements between landowners and farmers run for years or even generations, which describes a legacy of sorts.

CHALLENGES AND RESPONSIBILITIES

An agreement provides the framework for an amicable understanding between the parties. Each party is

responsible for fulfilling his or her end of the agreement, even though there are no legal consequences for failing to do so (unless the agreement is construed to be a contract and legal action is taken). The social fallout from a failed agreement can be considerable.

ADVANTAGES AND DISADVANTAGES

The advantage of an agreement is also a disadvantage—that is its informality. For some farmers in some situations, agreements are adequate; they reflect a shared vision and mutual respect between the parties and the stakes are not too high. Or, it's a minor and temporary use. In other cases, farmers rely on informal, unwritten agreements because they are reluctant to push the landowner, or because the landowner is not inclined to "formalize" the arrangement with a lot of legal language. This may work out, but it is at the farmer's peril.

MOST APPROPRIATE

An agreement to use land is appropriate for those who are comfortable with a non-enforceable arrangement—where the land use might be temporary or incidental. It might be appropriate with trusted family members or supportive neighbors.

VARIABLES SCORE

L	**Security** This method offers very little security to the farmer.
H	**Affordability** By custom, these agreements are typically an affordable option to access land.
L	**Equity** This method offers no opportunity to build equity in the land.
M	**Flexibility** This method may or may not provide the farmer with flexibility regarding farming practices. These types of agreements are the easiest to get out of.
L	**Farming Requirement** Typically agreements do not include any or extensive farming requirements or restrictions.
L	**Access to Capital** This method provides no collateral to support a loan.

OWNERSHIP SCALE

RESOURCES

These online resources and organizations have been selected from among many that address various aspects of farm access and agricultural land tenure. These resources are primarily directed toward farmers. Most include references to still further resources. Some are more region-specific than others.

Toolbox for Farm Seekers, Land For Good
http://landforgood.org/resources/toolbox/toolbox-farm-seekers

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Access to Land, Farmland Information Center, American Farmland Trust. Fact sheets and links.
http://www.farmlandinfo.org/accesstoland

Affording Our Land: A Financial Literacy Guidebook for Young Farmers (and all Farmers), Greenhorns, 2013.
https://agrariantrust.org/wp-content/uploads/2013/05/AFFORDING-OURLAND-5-23-13.pdf

Agrarian Trust, a national land access advocacy organization
https://agrariantrust.org/

Cooperative Farming: Frameworks for Farming Together, Greenhorns.
https://greenhorns.org/wp-content/uploads/2018/07/Greenhorns_Cooperative_Farming_Guidebook.pdf

Farm Commons, a sustainable farm law organization
https://farmcommons.org/

Farmland Access Toolbox, Farm Answers, US Department of Agriculture
https://farmanswers.org/Toolbox/farmland_access_toolbox

Farmland Changing Hands, Washington FarmLink, 2011.
http://live-farmlink.pantheonsite.io/sites/default/files/u15/Farmland%20Changing%20Hands.pdf

Finding Land to Farm: Six Ways to Secure Farmland, ATTRA, the National Sustainable Agriculture Information Service, 2009.
https://attra.ncat.org/attra-pub/summaries/summary.php?pub=174

Guide to Financing the Community Supported Farm, University of Vermont Center for Sustainable Agriculture and UVM Extension, 2012.
http://www.uvm.edu/newfarmer/business/finance-guide/Intro.pdf

Growing on Solid Ground: A Farmer's Guide to Land Tenure, California Farm Link, 2017.
https://www.californiafarmlink.org/resources/growing-on-solid-ground-a-farmers-guide-to-land-tenure/

How to Determine the Right Farm Rental Rate, University of Vermont Center for Sustainable Agriculture, 2014.
http://www.uvm.edu/newfarmer/land/RentalGuide.pdf

Sustainable Agriculture Land Tenure Initiative, Drake University Agricultural law Center
http://sustainablefarmlease.org/the-landowners-guide-to-sustainable-farm-leases/

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