

6.0 Land Tenure Options

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Introduction: Land Tenure Options

UNIT OVERVIEW

Affordable and secure access to land is crucial for assuring both the economic viability of small-scale agriculture and the adoption and use of sound land stewardship practices. In order to help beginning farmers secure long-term land tenure in the face of development and increasing land prices, new and innovative options for land tenure must be explored. This unit introduces students to a range of strategies that may be used to secure long-term and affordable access to land for California farmers.

MODES OF INSTRUCTION

> LECTURE (2 hours)

LEARNING OBJECTIVES

CONCEPTS

- The importance of land tenure to the success of small-scale agriculture and sound land stewardship
- Advantages and disadvantages of various conventional and alternative land tenure options
- Mechanisms of various conventional and alternative land tenure options

Lecture Outline: Land Tenure Options

A. Land Tenure, Small Farm Viability, and Land Stewardship

1. Securing long-term land tenure is the foundation of economically viable small farming operations, but an expensive land purchase may not be practical or even advisable
2. Affordable access to land is crucial for ensuring both small farm viability and sound land stewardship. Without long-term tenure agreements, implementing sustainable farming practices on the farm or living wages for agricultural workers may be difficult to justify economically.
3. Land speculation/development has increased the selling price of agricultural lands to a level beyond the productive capacity of agriculture
4. High returns on the sale of agricultural land to development, high operating expenses, and low returns for agriculture products have resulted in widespread sale and conversion of prime agricultural lands to residential and commercial development. As a result there has been an associated decline in small-scale family farming businesses.
5. Many farmers can no longer afford to own the land they farm due to the price of land being based on a speculative real estate market and not the agricultural land value
6. In order to help beginning farmers secure long-term land tenure in the face of development and increasing land prices, new and innovative options must be explored

B. Land Tenure Options

1. Cash rental or lease
 - a. A long-term lease of 5 to 30 years may be the optimal tenure agreement for many farmers with limited financial assets. However, it is crucial to protect oneself to the degree possible from changes in ownership impacting the lease. In signing a cash lease, the beginning farmer is calculating that for the term of the lease he or she will be able to cover a fixed payment to obtain land tenure. The funds are due to the landlord regardless of whether the farmer has a good year, a bad year, or gets the operation going later than planned.
 - b. Essentials of lease agreements – While lease agreements can vary in terms of complexity, at a minimum they should address responsibilities for maintenance, repairs, and dispute resolution
 - c. Establishing a fair lease rate – Cash-rent leases can be negotiated based on agreed understanding of local agricultural market value. The California chapter of the American Society of Farm Managers and Appraisers provides an annual review of lease values by crop and land type for most California counties (see: www.calasfmra.com).
 - d. Factors influencing lease rates – Rates will depend not only on the quality of soil and availability of water, but also on outbuildings, irrigation systems, and other infrastructure
 - e. Today farmers establishing their own operations are often 30–40 years old or more. A 30-year lease is appropriate to meet their goals of farming until retirement age.
 - f. Long-term leases of up to 99 years are legal in some states. We are not familiar with leases longer than 51 years in California.
2. Crop-share defined: A crop-share agreement or share-rent is a means for compensating a landowner for use of their land while sharing the risk. Payment may include a share or percentage of crop, for example 20% of the walnuts harvested, or a percentage of the gross or net income.

- a. A crop share requires a level of trust between lessee and lessor that may include sharing financial or tax records. By agreeing to pay the landlord based on how much crop comes in, the beginning farmer will owe more if they have an abundant harvest and less if there is a poor yield.
 - b. Determining the percentage fair to both parties can be done based on knowledge of the “going rate” for leases or through worksheets spelling out the specific contributions of each party. Paying rent by committing a share of the crop may help entice a landowner to lease when the going rate for a cash rent is not significant. A crop-share lease looks almost identical to a cash lease except in the payment section, where the share is described rather than a fixed lease amount.
3. Cash-rent leases from private, governmental, and nonprofit entities
- a. Many governmental and nonprofit entities have significant farmable acreage, which they can lease to private individuals
 - b. These arrangements are often publicized only briefly or through their own established networks in the agricultural community
 - c. A proactive beginning farmer should call or write the offices of such organizations to enquire with appropriate program staff
 - d. While a significant waiting period may be required, once a lease is obtained an agreement running 2–5 years with the opportunity to renew may be possible
 - e. The availability of infrastructure including wells, barns, and fencing varies from place to place
4. Rent or lease with option to buy
- a. A clause in the lease giving the lessee the first option to buy if for any reason the property will be going on the market is important for protecting a young farmer’s investments in the land. First option to purchase can be included as part of a lease agreement, whether payment terms are cash or crop-share.
 - b. However, having an option means little if the beginning farmer has not positioned himself or herself to be able to exercise the option. In other words, having the right to buy the farm only makes a difference if one can get financing for purchase in time to exercise the option.
5. Fee-title purchase with conventional financing
- a. The standard means of purchasing a farm – This involves borrowing the money from a willing lender, making an offer on the land, and eventually purchasing the farm by making payments to the bank/lender
 - b. Why fee-title purchase with conventional financing is increasingly difficult for beginning farmers
 - i. As land prices increase it is becoming more and more difficult to support land payments from the proceeds of small-scale agriculture
 - ii. Lenders require a demonstrated track record of successful farm business management
 - iii. A track record of successful farm business management in conjunction with a credible cash-flow projection is used to determine whether or not to provide financing
 - iv. The lender will analyze the applicant’s ability to make an adequate income from the specific piece of land they seek to purchase
 - c. Variation on fee-title purchase suitable for purchases of relatively small acreage (i.e., 2–15 acres)
 - i. Seek financing assistance from a mortgage broker or bank as a single-family residence
 - ii. By demonstrating significant income from off-farm sources based on a track record of maintaining an off-farm job, the purchaser may qualify for a home loan
 - iii. This may allow the purchaser to obtain a lower interest rate. This also circumvents the hurdle of demonstrating significant farm management experience.

- iv. It is important to negotiate fees with either a realtor or lawyer in order to put together a purchase agreement that will pass legal muster
6. Fee title purchase through an installment sale/“owner financed”
- a. An installment sale or land contract sale is an agreement through which the seller (original owner) of the land agrees to finance the sale to a new buyer. The new buyer moves onto the land and begins making payments directly to the seller/owner based on an agreed-upon interest rate and other terms.
 - b. Advantages to new farmer – This approach can benefit a beginning farmer because they would not have to approach a commercial or governmental lender for a traditional loan, which is often difficult or impossible to secure for new and limited-resource farmers
 - c. Advantages to seller – The seller, in turn, benefits by limiting their capital gains and income tax liability. In addition, if the seller finances the sale (“carries the note”) through an installment sale and the beginning farmer defaults, the land goes back to the seller who can then select a new buyer.
7. Shared ownership models: Legal partnerships, Corporations, and Limited Liability Companies (LLC)
- a. In forming a partnership, corporation, or limited liability company (LLC) chief considerations include –
 - i. Which legal entity is best for shared ownership? Based on how various investors choose to share ownership of property, decision-making, and risk/liability, one can determine the best legal entity to hold title to the land.
 - Example: One group may choose to have “silent partners” who invest cash but do not have a say in day-to-day operations of the farm. Some partners may have more off-farm assets than others and therefore might be taking on an unequal level of risk if the farm were sued.
 - Comparative advantages can be explored through various Nolo Press publications or speaking with a lawyer
 - ii. The LLC – The LLC has become popular over the last several years as a means of meeting many goals of shared ownership while limiting bureaucratic requirements, liability, and costs. One option is for an LLC to own land and lease it back to a farm entity. This may offer several advantages –
 - Multiple investors can share ownership in the form of shares or stock in the land asset
 - With an LLC one owner can choose to sell his or her shares at any time and other members can either buy the departing shareholder out or find another investor to purchase those shares. This allows the land to continue to benefit LLC shareholders regardless of changes in the personal goals or financial situation of one individual.
 - By leasing land to the farming entity, the shareholders are assured the opportunity to gain equity, and to obtain income tax advantages from deducting mortgage interest
 - In addition, this type of entity can be used to separate decision making between active farm managers—who need to be involved in day-to-day production and marketing decisions—and absentee land-owning shareholders
 - Much of what is described here as benefits of an LLC can also be attributed to other forms of incorporation or partnership agreements
 - For additional descriptions and comparative advantages over other forms of incorporation or partnership agreements, see Nolo Press’s “Types of Ownership Structure.” Available online at www.nolo.com.
8. Limited liability corporation ownership with lease to nonprofit entity
- a. Many individuals in a new generation of aspiring farmers who did not grow up on farms or expect to inherit land have become interested in hybrid private/nonprofit farm entities. If educational tours and similar activities will be a core part of the business plan this strategy may have merit, as a nonprofit entity will typically find it easier to obtain grants for program expenses that include rent, but not capital expenditures for land.

- b. Farming and nonprofit administration require very different skill sets. For this reason it is crucial to keep priorities straight, as starting up either a nonprofit organization or a productive farm demand significant time and resources.

9. Fee title purchase and sale of conservation easement(s)

- a. Conservation easement defined (Catoctin Conservation District, 2004): "A legal agreement between a landowner and a land trust or government agency that permanently protects land while the landowner continues to own it. Donating the easement can result in reduced income tax and estate tax. It imposes limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property." The easement is recorded with the deed, and future owners are bound by its terms in perpetuity. The land remains privately owned and on the tax rolls. With an Agricultural Conservation Easement (ACE), a land trust or government agency maintains the development rights, while the farmer owns the farming and water rights and all other private property rights including exclusive use.
- b. How beginning farmers may benefit from the sale of conservation easements
 - i. Reduced out-of-pocket price paid to owner due to compensation by land trust for the sale of the ACE
 - ii. Reduced tax burden due to reevaluation of property value based not on speculative value of land but on productive agricultural value
 - iii. Reduced inheritance tax due to reduced appraised value of property
 - iv. Conservation of agricultural and/or wild lands in perpetuity
- c. Who supports the purchase of conservation easements? California Department of Conservation, USDA Farmland Protection Program, and various local government and private sector groups are supporting the purchase of conservation easements on agricultural lands (see Resources).

10. Community land trust and land pooling

- a. A community land trust (CLT) is a nonprofit organization that owns real estate to benefit the local community by enabling long-term low cost ownership. The organizations are democratically controlled and serve to provide long-term housing and farmland tenure.
- b. A CLT encourages good land stewardship and makes land more affordable because the common land is held by a trust as land designated for the broader community's use while individual families or farmers hold long-term leases on a plot of land
- c. Because CLTs are able to provide long-term leases, they have the ability to preserve affordability over a long period of time. Land is removed from the speculative real estate market and held in trust by a democratically structured nonprofit.
- d. The value created from the labor applied to the land (agriculture crops and buildings) is private equity and becomes a liquid asset to the persons who are investing time and resources in the infrastructure value. This asset is exchangeable in the market place with limited equity potential that is defined by each CLT.
- e. Generally a CLT is organized as a tax-exempt 501(c) 3 non-profit organization. In some cases a 501(c) 2 is established as a title holding company to administer property leaseholds that would jeopardize the tax-exempt status of the 501(c) 3.

11. Nonprofit owning land; farmer holding 99-year renewable ground lease and owning improvements

- a. The nonprofit owning the land may be a conservation/agricultural land trust (e.g., Genesee Land Trust in New York), a community land trust (e.g., Cold Pond Community Land Trust in New Hampshire), or other nonprofit (e.g., Equity Trust)

- b. Farmer has truly long-term tenure—even perpetual tenure—without having to purchase land; pays a ground rent based on agricultural value, not on value for other uses
- c. Farmer can purchase existing buildings and other improvements on the land at the commencement of the lease, often with the purchase price is based on the agricultural value of the improvements, not on their market value. The farmer can invest in and own other improvements over time. If the farmer wants to give up the leasehold, he or she can sell the improvements to another farmer for a price that is limited by the terms of the lease to an affordable level.
- d. In some cases, CSA farms have mobilized donations from CSA members to allow a nonprofit to purchase land that is then leased back to the CSA farmer. In other cases, CSA members have purchased a conservation easement with purchase option, while the farmer purchased the remaining farm value.

Resources

Please note: All land tenure agreements should be documented in writing and well understood by all of the parties involved in the transaction. This typically requires outside professional assistance.

PRINT RESOURCES

Conservation Easements as Part of Intergenerational Farm Transfers: A Professional Development Workshop. California FarmLink, 2000.

More than 100 pages of technical resources presented as part of a California FarmLink-hosted training workshop for attorneys, estate planners, land conservation specialists, and farm transition experts. Available through California FarmLink: www.californiafarmlink.org.

Creating a Life Together: Practical Tools to Grow Ecovillages and Intentional Communities, by Diana Christian. Consortium, 2002.

Several chapters dedicated to collective and cooperative land tenure models. Provides several thorough case studies on shared ownership models and guidelines on how to select the most appropriate legal entity for holding land titles.

Farmland Transfer and Protection in New England: A Guide for Entering and Exiting Farmers, by Kathryn Z. Ruhf. New England Small Farm Institute, Belchertown, Massachusetts, 1999.

Information on farm transfer and secure tenure for the next generation of New England farmers. Useful for farm families and service providers involved in farmland access, transfer, and protection. Email nesfi@igc.org.

Holding Ground: A Guide to Northeast Farmland Tenure and Stewardship. Intervale Foundation (VT) and the New England Small Farm Institute, 2004.

This comprehensive guide offers models and mechanisms, other than outright ownership, for securing tenure on farmland in any U.S. region. Holding Ground opens doors to new tenure models and provides practical information to help you craft innovative, successful tenure agreements that address the needs of both parties—and of the land itself.

Property and Values: Alternatives to Public and Private Ownership, edited by Charles Geisler and Gail Daneker. Island Press, 2000.

Brings together scholars, attorneys, government officials, community development practitioners, and environmental advocates to consider property rights issues and how to create new and more socially equitable forms of land ownership.

WEB RESOURCES

American Farmland Trust:

www.farmland.org

The web site for American Farmland Trust, a national organization working on farmland conservation models.

California chapter of the American Society of Farm Managers and Rural Appraisers:

www.calasfmra.com

While this site is designed for professional appraisers, realtors, and others, you'll find much valuable information including average costs of land for sale or lease. The information is categorized by crop and California county.

California Department of Conservation Division of Land Resource Protection—California Farmland Conservation Program:

www.consrv.ca.gov/DLRP

California Farmland Conservancy Program (CFCP) encourages long-term, private stewardship of agricultural lands through the voluntary use of agricultural conservation easements. The CFCP provides grant funding for projects that use and support agricultural conservation easements for protection of agricultural lands.

California FarmLink:

www.californiafarmlink.org

This site provides information about California FarmLink services and programs as well as case studies on farm transfer models and links to other helpful sites. Sample language from which to develop legal land tenure agreements are also available through California FarmLink and other organizations.

Conservation Fund:

www.conservationfund.org

Forges partnerships to protect America's legacy of land and water resources. Through land acquisition, community initiatives, and leadership training, the Conservation Fund and its partners demonstrate sustainable conservation solutions emphasizing the integration of economic and environmental goals.

Equity Trust Incorporated:

www.equitytrust.org

The Equity Trust Incorporated offers a number of programs that emphasize creative approaches to land tenure, including a CSA/Agriculture program that intends to "introduce a new constituency to alternative land tenure models, enroll them into partnerships with land trusts and raise the standards of agricultural land preservation to include better protections to keep farmland in active use and maintain its affordability to future farmers." Includes listing of resources.

Growing New Farmers:

www.growingnewfarmers.org

Growing New Farmers is a community of new farmers and service providers organized through the New England Small Farm Institute. This web site will assist the spectrum of beginning farmers, from those assessing whether they want to get started to those finalizing business plans. Though created for farmers in the Northeast it has a wealth of information for California farmers, including worksheets, articles, and a user-friendly question and answer section.

Institute for Community Economics:

www.iceclt.org/clt/

ICE, founded in 1967, is a national organization that promotes the just allocation of resources in communities in ways that address the needs of low-income families. Through technical assistance, financial support, and advocacy, ICE builds the capacity of a national network of community land trusts (CLTs) and other locally controlled organizations for permanently affordable housing and community economic development. Contains extensive resources on the Community Land Trust model of land and housing ownership.

Land Trust Alliance:

www.lta.org

The Land Trust Alliance web site will help you access local land trusts that may be of assistance in acquiring lands for lease or sale.

Marin Agricultural Land Trust:

www.malt.org

Founded in 1980 by a coalition of ranchers and environmentalists to preserve farmland in Marin County, California, MALT acquires agricultural conservation easements on farmland in voluntary transactions with landowners. The MALT web site contains many online articles on agricultural conservation easements, sample conservation easements, and multiple case studies of agriculture land preservation through the sale of conservation easements.

National Farm Transition Network:

www.extension.iastate.edu/nftn/homepage.html

This web site has links to many state and regional program that help connect beginning and aspiring farmers with opportunities to gain land tenure, connect with mentors.

New England Land Link Program:

www.smallfarm.org/nell/nell.html#pub

NELL is a program to help farmers and landholders locate and transfer farms in New England.

New England Small Farm Institute (NESFI):

www.smallfarm.org

Established to support beginning farmers and sustainable small-scale agriculture in New England, the NESFI provides extensive resources for the beginning farmer, including technical assistance and training programs; access to financial resources; access to land through the New England Land Link Program; and support in accessing markets.

Nolo Press:

www.nolo.com

Dedicated to helping people handle their own everyday legal matters or make more informed legal decisions, Nolo Press publishes reliable, plain-English books, software, forms, and up-to-date legal information covering almost any legal topic. Includes an extensive list of publications and online articles on the types of legal ownership structures that are available and do-it-yourself manuals on forming sole proprietorships; partnerships; limited partnerships; limited liability companies (LLC); nonprofit corporations; nonprofit cooperatives. Includes links to other helpful websites.

Sustainable Communities Network (SCN):

www.sustainable.org

The SCN is for those who want to help make their communities more livable. A broad range of issues is addressed and resources are provided to help make this happen.

United States Department of Agriculture Natural Resources Conservation Service (NRCS) Farmland Protection Program:

www.info.usda.gov/nrcs/fpcp/fpp.htm

The Farmland Protection Program provides funds to help purchase development rights to keep productive farmland in agricultural uses. Working through existing programs, USDA joins with State, tribal, or local governments to acquire conservation easements or other interests from landowners. USDA provides up to 50 percent of the fair market easement value. The USDA NRCS Farmland Protection Program web site provides resources on this federal easement program.

