Purchasing or Leasing Farmland

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Two Golden Rules of Land Contracts

1. **Get it in writing and signed, including modifications**
   - **Statute of Frauds**: Contracts for real estate that last one year or more must be in writing and signed by the person against whom enforcement is sought in court.
   - Both parties should sign.

2. **Get an attorney’s opinion.**
   - If you can’t get a lawyer to draft the document, at least have a lawyer review it before either party signs.
   - Read all contracts and amendments thoroughly.
   - Don’t sign it if you don’t agree with. Feel free to negotiate any terms in the document that are negotiable.

Good Practices

**Before Entering a Land Contract:**
- **Personal Track-Record:**
  - **Landlord**: Check the tenant’s credentials, including: experience, references, business plan, credit check.
  - **Tenants**: ask the landlord for references from prior tenants.
- **Establish a baseline for the condition of the property** that can be referred to at the termination of the lease. Both parties should walk-through the land & buildings and agree to overall condition of housing, infrastructure, and soil, water supply, etc.
  - If the parties cannot agree on the property’s condition, they should agree on an independent third party to do this.
  - **Create a document describing these conditions in detail and have both parties date and sign it!**
- Check county records for existing leases and easements.
- Check for zoning restrictions.

**After Entering a Land Contract:**
- Record the lease with the County Clerk. Not required, but good practice, especially if the landlord transfers title during the lease.
- **Communicate** regularly with the tenant!
- **Notify the tenant before inspecting** the property, unless the lease permits surprise visits, and/or you have good reason to suspect the tenant will try to hide egregious violations of the lease agreement.
- Keep good records of your performance, in case of challenges.

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Considerations in Crafting Contracts

- **Management**: How to share control over the land and the farming operation? Daily/strategic decisions? Property maintenance?
- **Farming Philosophy**: Certified Organic? Pesticide-free? Soil conservation? Crop rotations, including falling?
- **Estate Planning**: Consult an attorney about tax consequences! Consider a conservation easement or donate to a land trust.
- **Personality**: Take precautions and consult an attorney before signing, no matter who your tenant is. Relations between family & friends often change over time when money is involved. Consider prohibiting drugs, tobacco and/or alcohol on site.

Some Methods for Getting Farmers on Land

1. **Leases**
   - What’s included? Boundaries? Housing? Housing in a separate lease?
   - Setting rent payments
     - Fixed Cost: Rent is a set cash amount, paid on schedule
     - Crop-share: Rent is a share of the actual crop, not just a share of the gross revenue. Landlords usually contribute more work. The more work, the more likely the landlord will be considered “self-employed” by the IRS.
   - Variable cost: Cash payment is calculated by multiplying yield by either market price or gross sales or a function of both.
     - Set floor and ceiling payment.
     - Be sure to create provisions if you wish to adjust the rent for uncontrollable risks that affect yield or market value, e.g. drought.

2. **Right of First Refusal** - Common when one or both parties are hesitant to negotiate future sale at the time that the lease is created. Right of first refusal at least gives the tenant the option to own at some point in the unforeseeable future.

3. **Option to Purchase** - Purchase price is usually variable based on any advanced payments, and/or improvements that tenant has made before using the right to purchase.

4. **Lease-to-Own** - Have an attorney carefully draft this.

5. **Partnership/Investor**
   - Usually, the landholder provides the property & infrastructure, while the landseeker provides labor and some management.
   - The parties may elect in the contract to increase the landseeker’s responsibilities and rewards over time, so that the farmer’s role gradually shifts from near-employee, to successor to the farm.

6. **Creative/Barter** - The value of bartered goods is taxable income.

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Terms of a Land Contract

Identify the Parties: Name, address, phone.

Describe the Property as clearly as you can, especially lease-to-own, including:
- Acreage, borders, landmarks
- Name any property or buildings that are excluded from the lease.
- Mention all easements (including conservation easements) and co-existing leases.

Lease Term (Duration) - Include starting/ending dates, as well as the number of years.
- **1-2 Years**: Landlords with such a short lease should consider how they will promote the tenant’s confidence in investments in the property:
  - Reimburse tenant for reasonable and/or pre-approved improvements.
  - Such a short-term lease is not appropriate if the landholder wishes to begin the 3-year transition into Organic certification.
  - Create terms that reduce future transaction costs, e.g.:
    - **Automatic Extension without Notice to Terminate**: The lease is automatically renewed for the renewal term described in the lease (or else same as the first term), unless either party gives written notice for termination at least one year in advance.
    - **Indexing Extensions**: each new term of a fixed cash lease, the rent is adjusted by an index (e.g. market value of crops, changes in land appraisal, and/or cost of farm inputs.) The index should be in writing and include the market date and time for valuation.

- **3-10 Years**:
  - Does the lease contract allow the terms, especially rent, to be adjusted? Consider crop-share or variable cash, or using a rent adjustment index to adjust rent according to market prices (commodities mainly).
  - Consider what happens if the landlord transfers property.
  - Consider remedies for accumulative tenant breaches.
  - Consider who can enter agreements with third parties re: the property, e.g. easements, recreational leases, and conservation programs.
  - 3 years is the minimum duration for transition into Organic certification.

- **10+ Years**: Same considerations as 3-10 year, but especially:
  - Renewal and Termination
    - Include manner and timing for both.
    - Consider what happens if you don’t follow the terms of the lease regarding the manner and timing of renewal/termination. Does the lease automatically renew? For one year or for another lease term? Can the other party override the lease requirements and allow the renewal/termination? State law may apply.

- **Ground Lease (usually 99 years)**: The tenant owns the buildings and improvements, but must surrender them to the landholder at the end of the lease term. http://www.equitytrust.org/index.htm

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Terms of a Land Contract

What type of relationship is formed? Partnership, Investor or Landlord/Tenant. Many leases contain provisions stating that the lease does not create a partnership and that neither party has the authority to obligate the other without written consent.

Purpose: What activities are, or are not, authorized?
- **By Tenant:** Create provisions for:
  - Subletting for recreational uses
  - On-farm Marketing, or Agri-tourism. Consider:
    - Indemnification for 3rd-party liability
    - Licensing & health regulations
    - Zoning restrictions
  - Protecting certain parts of the property (conservation/permanent pasture)
  - Consider requiring tenant to carry insurance.
- **By Landlord:** Consider creating provisions addressing:
  - When, where, how often inspections are permitted.
  - When and what notice to give before entering to make repairs.
  - When may the landlord enter to prepare the land for the following year, if tenant has given notice to terminate?
  - Who has the right to grant easements, especially conservation and agricultural easements or easements to develop renewable energy sources?
  - Who has the right to enter the property or allow others to enter for recreational purposes? What permission/notice is required?

  • **Contributions to Expenses & Management** – carefully track these
    - Will parties be reimbursed/rewarded? How? When?
    - Crop-share leases usually require more of the landholder.

Responsibility for Repairs & Improvements:
- Typically, tenant is responsible for repairs not requiring specialized skill, and landlord is responsible for major repairs, but the longer the lease, the more tenant becomes responsible for larger repairs/improvements (e.g. installing tile line).
- What type of improvements must the landlord consent to beforehand?
- Will both parties contribute for improvements? Repairs? What is the split?
- How will the tenant be reimbursed for any undepreciated value of improvements left on the property at the end of the lease?
- At the end, may tenant remove any or all mobile improvements that tenant created?

Conservation: Can create clauses, or a plan.
- Tenant can only enroll in a federal program if the terms of their lease state that they will be in control of the property for the entirety of that contract (e.g. Tenant can’t enroll in permanent programs, like the Wetlands Reserve Program (WRP)).
- Does the lease agreement lay out who is responsible for compliance, and how the payments are distributed?

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Terms of a Land Contract, Continued

Growing practices:
- Courts will read an implied covenant of good husbandry into a lease. The duty is to return the land in roughly the same condition as it was when first leased, using common practices (those used in the general area.)
- Explicit provisions in a lease agreement may require:
  - Specific practices (fallow, lime, cover crop, contour farming, no-till, not using certain pesticides), and/or
  - Create certain benchmarks for soil samples to be checked at regular intervals (humus, pH, nitrogen).
- Consider requiring that the property be kept neat & tidy, but...
  - Include a clause recognizing that some conservation practices may increase presence and tenacity of weeds.
  - Landlord can agree to reduce rent in exchange for measurable improvements to the soil, or for using certain conservation practices.

Transfer of Interest: Consider provisions that...
- Prohibit tenant from subletting, or require landlord permission and approval
- Require the landlord to make the lease a condition of any sale or transfer of ownership during the lease term.
- Clarify that the lease is binding on the heirs and successors of the parties.
- Remember, parties can always negotiate an early termination. If an early termination clause is used it is particularly important to accompany it with a clause requiring reimbursement for the tenant’s unused portion of improvements.

Dispute Resolution Process (because no lease is water-tight!)
- **Binding Arbitration**: parties give up their right to sue in court
- **Alternative Dispute Resolution (ADR)** parties can sue if they can’t agree.

Remedies for Default: Statutory remedies may trump lease terms, especially for residence.
- **Termination of the lease**: Grounds for termination should be specified clearly.
  - Requirements for maintenance and benchmarks should be clear.
  - A lease may require the landlord to provide credit for any green manure left.
  - Courts may prohibit termination mid-season because of the undue hardship to the tenant, unless the violations are egregious.
- Consider giving the landlord the right to enter to care for and harvest the crop,
- Consider requiring a deposit fee for clean up after termination of the lease. Specify how fees for clean-up will be assessed.
- Consider provisions for liquidated damages in the event of a termination.

Landlink programs:
- **US Landlinks**: http://www.farmtransition.org/netwpart.html
- **iFarm Oregon** http://www.ifarmoregon.org. Email ifarm@friendsoffamilyfarmers.org for a landholder/seeker form and to begin contacting others for land to lease or buy.

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