Chapter III

Farmland Tenure

and Leasing

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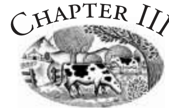


Land Tenure Patterns in Vermont

The latest U.S. Census figures indicate that nearly 40 percent of Vermont farmers lease land or operate under some other form of non-ownership tenure.[1] Thirty-three percent of the farms reporting in the 2002 Census in Vermont characterized themselves as "part owners" who own part of their farm and rent part of their farm. Six percent of the farms identified themselves as "tenants"[2] who rented all of their farmland.

In 2002, 295,082 acres of Vermont farmland were farmed under some form of non-ownership tenure — a great deal of it under an oral or written cash lease.[3] The Census doesn't include data on the terms of these leaseholds. Nationally, and perhaps in Vermont, an annual and oral cash lease that can be terminated at the will of the landowner is the norm. Vermont tenant farmers may fare better because in some instances, landowners must have a written three-year lease with a farmer to qualify for Vermont's agricultural land use value program, which is known as "current use."[4]

The terms of non-ownership tenure can have a tremendous impact on how property is cared for and used. Recent studies confirm what we all know intuitively — oral and year-to-year leases offer little incentive to use resource-conserving farming practices, while long-term leases that offer relatively secure tenure stimulate good management.[5]

Insecure tenure can either complicate the planning horizon of beginning and landless farmers or provide needed flexibility for a new operation just finding its niche. Whether help or hindrance, a short-term, oral lease is often the only way a beginning farmer can gain access to land. Rising land values — farmland valued on average at $1,138 an acre in 1988 was worth $2,704 an acre by 1999[6] — make leasing an essential start up strategy.

Beginning farmers are competing for land not only with established farmers but also with non-farmers who want to own a piece of rural Vermont. In 1999, USDA estimated that 30 percent of Vermont's croplands, pastures, and forested woodlands was owned by what they call "non-operators," landowners not involved in farming their property. In 1988, the figure was just 8 percent.[7] A significant share of Vermont's productive resource base is now owned by those who do not work it and worked by those who do not own it. This land tenure pattern — which is even more extreme in other parts of the U.S. — has consequences. It affects the way the land is used, the care it is given, and even extends into the quality of community life. Rural sociologists report that communities with high rates of farm tenancy have weaker social institutions than communities characterized by farm ownership.[8]

Giving beginning farmers a chance of success has always required a public investment. The Farm Services Agency has historically provided credit to farmers who were starting out and who were "unable to obtain credit elsewhere." Since the 1930s, FSA has been the lender of last resort and, as such, has made farm ownership a reality for thousands and thousands of farm families. However, the current level of public commitment to providing economic opportunity and entry into agriculture leaves much to be desired. In 1997, FSA's share of lending in the Northeast had dwindled to 6.7 percent — not much ahead of implement dealers as a source of credit. Annually, FSA in Vermont makes an average of one to two direct farm ownership loans to beginning farmers. Some FSA funds allocated for guaranteed loans for beginning farmers — where FSA bears 90 to 95 percent of the risk of default for commercial lenders — have gone unused.

Rising land values, a dearth of credit, and the narrow profit margins earned by conventional farming have conspired to make leasing or some other form of non-ownership tenure a fact of life for most beginning farmers.

Vermont's Land Use Value Program (Current Use)

Vermont's land use value[9] program, most often referred to as Current Use, provides tax incentives aimed at keeping the Vermont landscape in active agricultural use.

For qualifying farm and forest land, there are several tax benefits:

- Farmland enrolled in current use is valued for property tax purposes as if it were "required to remain henceforth in agricultural or forest use" rather than at its highest and best use or as property that could be developed.
- Farm Buildings on enrolled land are valued at zero for property tax purposes.
- Transfers of property enrolled in the property pay the transfer tax at a lesser tax rate than other property if the property remains enrolled for three years.[10]

To qualify, agricultural land exclusive of a two-acre home site must be at least 25 acres in size, with one exception described below, and must be in "active" agricultural use. The land is presumed to be in agricultural use if it is owned by a farmer or is leased to a farmer under a three-year lease. A "farmer" is anyone who earns at least 50 percent of gross income from farming.

Farmland, including parcels less than 25 acres, may qualify under an income test as well. Smaller parcels that produced an annual gross income from the sale of farm crops of at least $2,000 in one of two, or three of the last five calendar years can qualify. Larger parcels – more than 25 acres – must generate an additional $75.00 per acre for each acre over 25 or a total of $5,000, whichever is less. In recent years, the legislature has amended the current use statute to include a broader definition of "farmer" and "farm crops." For example, the statute now provides that a farmer is also one who produces farm crops that are processed on the farm and whose gross income from the sale of processed products, when added to other gross farm income, is at least one-half of all of his or her gross annual income. Seventy-five percent of the processed product must be produced on enrolled land.

Farm crops now include animal fiber, cider, wine, and cheese processed from products produced on the farm as well as the more traditional crops of hay, cultivated crops, pastured livestock, fruit trees, and maple syrup production.

The definition of farm buildings has also expanded to include not just those structures actively being used in the farming operation, but also up to $100,000 in a farm facility used for processing farm crops, provided a minimum of 75 percent of the crop is produced on the farm.

When land that has been enrolled in current use is developed or subdivided, a land use change tax is imposed upon the owner. As of July 2006, the tax is equal to 20 percent of the full fair market value of the land that is changing use or 10 percent if the land has been enrolled in current use for 10 years. If only a portion of the land is changing use, the fair market value is prorated. There is a provision for the reduction of the land use change tax if the change in use was the result of the death or incapacity of the farmer.[11]

Vermont's land use value program seems to undergo legislative revision on a regular basis. It's important that you look at the current statute rather than materials that may be out of date. The general information available on the Vermont State Department of Taxes Website on current use, for example, hasn't been updated since 2002.

The Value of a Lease

The relationship between the landowner and the farmer is always more important than the written document, but a written agreement can give the relationship a more solid footing. If the relationship sours, a written agreement can settle some of the many disputes that can arise.

Many farm states in the Midwest have landlord-tenant statutes that govern farm leases. Many of these statutes dictate how and when a lease may be renewed. Some grant the landowner a lien on the tenant's crop to secure the payment of rent. Nebraska even gives an income tax break to non-farming landowners who rent to beginning farmers. These statutes serve to keep disputes out of court by filling in the gaps when the parties have only an oral or "handshake" agreement. Vermont doesn't have a special statute governing farm leases. Nor does it have a beginning farmer tax break or a landlord lien. Most of Vermont's law governing the landlord-tenant relationship – with the significant exception of residential leases – is governed by judge-made law or case law.

In the absence of a written lease, the courts look to certain statutes and previous cases to settle a dispute. It's much simpler and much, much less expensive to have a written lease.

Get it in Writing

Vermont law, as well as laws of most other states, requires that certain kinds of agreements be in writing. These laws are known as the "statute of fraud," and they almost universally say that agreements regarding real estate are unenforceable in court unless they are in writing and are signed. The Vermont statute of frauds[12] has been interpreted by the courts to apply even in cases where the other party admits that there was an oral agreement.[13] If the agreement isn't in writing, a Vermont court will not enforce it.

The statute of frauds applies not only to the original lease but also to any significant amendments to the lease agreement. Amendments to the lease must also be in writing. If the lease is signed by an agent of the landowner, the authorization from the landowner must also be in writing.

Agricultural Lease Checklist

1. Who are the parties? Is there evidence of ownership and authority to act if the landowner is an entity such as a Partnership, LLC or Corporation rather than an individual? Is the tenant an individual or an entity? Will the lease also bind the heirs or future purchasers of the property?

2. What is the lease term? Will it terminate on a specific date or will it end at the will of one or either party? If terminable "at will," how much notice will be given to the other party?

3. Is the lease renewable? Is renewal automatic? Do both parties have the option to renew or not renew? What is the procedure for renewing the lease?

4. Does the lease include an adequate description of the property – land, farm structures, residence, equipment, and livestock – that is to be leased?

5. How much and what type of rent will be paid and how and when must it be paid?

6. If the agreement includes a residence, is there a separate residential lease?

7. What are the allowable and prohibited uses of the property under the lease? Does it allow interns to be housed on site or a farm stand operation?

8. How will the landowner and the land user allocate responsibility for repairs and maintenance of the property?

9. How will the landowner and farmer allocate responsibility for capital improvements? If the land user invests in capital improvements, how will he or she be compensated at the end of the lease? Or, does the rent reflect those capital investments?

10. Who will be responsible for obtaining and maintaining insurance – liability, casualty, and crop?

11. What actions by either party will constitute a default under the lease? Will the non-defaulting party have the right to terminate the lease or withhold rent until the default is cured? Will the lease include an alternative dispute resolution procedure such as mediation or arbitration?

Essential Terms of an Agricultural Lease

Parties to the Lease

The lease must effectively bind the actual owner of the property. If the land is owned by a limited liability company, for example, the lease must be signed by a member of the LLC with the authority to bind the company. If the land is held in a trust, the lease must be signed by the trustee of the trust. You can find out who owns the property by looking at the deed in the town records. Tenants who are organized as limited liability entities may be asked to sign the lease as individuals and to be personally liable for the rent.

Parties to the lease may also bind the "heirs and assigns" of each party, meaning that the lease will remain in effect even if the landowner passes away or the property is sold to another. To effectively bind third party purchasers, however, the lease or

a memorandum summarizing the lease must also be filed in the town land records.[14]

The Lease Term

A lease term that allows a farmer to reap the benefits of soil-saving or other conservation practices can benefit both the landowner and the farmer. A lease term of at least three years will also ensure eligibility under Vermont's Current Use program.

If the lease is to be terminated at the will of the other party instead of a definite term, an appropriate notice period should be included in the lease. A six-month notice period seems typical for most farm leases but may not be adequate given the nature of the farm and the farm business. A six month notice allows the tenant time to find a suitable replacement property.

Renewal terms and methods of notice of intent to renew or not renew should also be specified in the lease.

Setting the Rent and Types of Leases

Many factors can help to determine a rental rate for Vermont farmland or farm buildings. Facility rent – a dairy barn, for example, is frequently set on a per head or per stall basis and not surprisingly, rises and falls with the price of milk. Dairy barn rental rates, however, haven't risen much since the 1970s in Vermont and still hover around $10 to $15 per stall. Whole farm rent may be based on the landowners' desire to cover all or a large portion of their land costs—real estate taxes, insurance, repairs, and depreciation. A common formula to determine rent is "DIRTI" or Depreciation, Interest, Repairs, Taxes and Insurance. Some landowners set a whole farm rental based simply on the residential rental value of the property or what they could get by renting to a non-farmer commuter with no interest in using the farmland. Rent can also be set based on the market rental rates for comparable farm land in the area or a combination of all these factors. Extension agents and local farmers will have an idea of average land rents in their area.

Some landowners will accept a lower than average rental amount because of their belief in the social benefits of local food production or providing an opportunity to a beginning farmer. Others accept a lower rent if the farmer can help them meet stewardship goals for the property. For example, allowing a farmer to hay a meadow for free can save a landowner the expense of mowing it and putting livestock on pasture can control weeds, add nutrients, and improve the property.

Most Vermont leases are straight cash leases – in return for a specified payment, the farmer has use of the property for a specified period – but there are many alternatives to the cash rent lease, as discussed below.

Crop/Livestock-Share Rent

In a crop- or livestock-share rent, the farmer and landowner share both the expenses of bringing the crop to market and the profits. A share lease, for example, may split the production costs and profits 50/50 or by some other negotiated split. Crop-share leases are more common in the Midwest, but their advantages for beginning farmers are equally applicable in Vermont. A crop- or livestock-share arrangement can significantly reduce a farmer's annual outlays in cash rent, interest, and other production expenses. A share lease also shifts some of the risk of profit or loss to the landowner.

Flexible Cash Rent

Flexible cash rents are a hybrid between a straight cash lease and a share lease. A "base" cash rent is set that assumes low production and a low commodity price. If actual production and prices exceed the base, the landowner receives a share of the additional profit. The base rent can be set to just cover the landowner's fixed costs or the fixed costs plus a modest return. Flexible cash rent can reduce the risk for the farmer and reward the landowner in good years.

Net-Share Leases

In a net-share lease, the landowner is entitled to a specified share of the farm's crop in payment as rent. If the farmer has a good year, so does the landowner. However, the farmer bears most of the production expenses. Net-share rent options are most often associated with cash-crop farming, but they can also be used in dairy, fruit, vegetables, and hay.

Taxation of Rental Income

The IRS treats rental income from farmland differently than it does other kinds of rental income. The difference is that landowners who **materially participate** in the production of crops or the management of the farming operation must include the rental income in earnings subject to self-employment tax. However, landowners who do not materially participate do not have to pay a self-employment tax on that rental income. Government payments that a landowner receives as a result of a crop-share tenant's participation in a government program may also have to be included in self-employment income.

Definition of Material Participation
According to the IRS 2002 "Farmer's Tax Guide," a landlord materially participates if the arrangement with a tenant specifies the landlord's participation and he or she meets one of the following tests:

The landlord does any three of the following.

- Pays, using cash or credit, at least half of the direct costs of producing the crop or livestock.
- Furnishes at least half the tools, equipment, and livestock used in the production activities.
- Advises or consults with the tenant.
- Inspects the production activities periodically.
- The landlord regularly and frequently makes, or takes an important part in making, management decisions that substantially contribute to or affect the success of the enterprise.
- The landlord works 100 hours or more, spread over a period of 5 weeks or more, in activities connected with agricultural production on the rental property.
- The landlord does things that, considered in their totality, show that he or she is materially and significantly involved in the production of the farm commodities on the rental property.

Landowners who provide production financing or a significant percentage of the tenant's equipment and who periodically inspect the property to ensure that agreed-upon farming practices are being followed are more likely to be considered material participants.

Residence on the Farm

When a residence is included in the rental agreement, a farm lease necessarily takes on both commercial and residential elements. Vermont law regulates residential rental agreements to ensure safe and habitable living conditions for tenants. The Vermont statute sets certain minimum standards that cannot be modified by a lease. The law requires that the premises be safe, clean, and fit for human habitation. For example, residences must have adequate heat, hot and cold running water, and comply with applicable building housing and health regulations.[16] By the terms of the statute, any lease that tries to avoid this duty shall be unenforceable and void. Farm leases are not exempted from complying with the residential rental agreement statute. Farm tenants, therefore, have the same rights to safety and habitability as other tenants, no matter what the lease says.

Allowable and Prohibited Uses

The lease should specify any uses of the property that may be permitted, prohibited, or conditional. Landowners may want to specify whether the land is to be limited to certain types of production, e.g., only pasture or hay land, or if there are other restrictions or requirements regarding uses appropriate to the soils or topography of the farm. It's

appropriate to attach a map to the lease indicating where certain practices are allowed or prohibited or indicating a preferred crop rotation.

Farmers should include specific authorization in the lease to conduct those activities essential to the success of their operation. If a farm stand, housing interns, or making and selling compost from the farm property is part of the farm plan, be sure that it is part of the lease.

Leases often "incorporate by reference" statutory or regulatory prohibitions of certain farm practices. For example, leases typically require the tenant to adhere to Vermont's accepted agricultural practices. A lease for land that has been "conserved," or protected by an easement or "conservation restriction," is likely to include a provision requiring the tenant to comply with the terms of the easement. Landowners may also require compliance with USDA/NRCS farm conservation plans or those of another USDA program. Leases for farms enrolled in Current Use Real Estate Tax Abatement programs typically require that the tenant refrain from any practice that would jeopardize eligibility for the program.

Landowners may also ask tenants to refrain from activities that would trigger Act 250 jurisdiction or go beyond the agricultural exemption from zoning. (See Water Quality and Environmental Regulation, Chapter VI, page 113.)

Repairs and Maintenance

In practice and at common law, the farm tenant is most often held responsible for routine repairs and maintenance. The landowner, however, is often responsible for major repairs, rehabilitation, or replacement of farm structures or systems such as:

- Structural components including barns and fences
- Exterior siding
- Roofing
- Water supply systems
- Waste treatment systems
- Heating and ventilating systems

The tenant is frequently responsible for necessary routine maintenance and repair of systems, such as annual servicing, repainting, or staining, in order to prevent their deterioration.[17]

Repairs and maintenance are fertile ground for disagreements and disappointments between landowner and farm tenant. The landowner wants the property to remain in good repair. The tenant with a short-term lease isn't motivated to make investments that may primarily benefit the landowner. A longer lease, an annual "walk around" with a check list, and an annual limit on expenditures expected of the farm tenant may minimize some of the problems that can arise in this area.

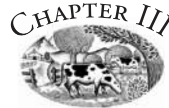
Capital Improvements

Capital improvements include everything from constructing or renovating permanent farm structures, installing soil conservation structures, erecting permanent fencing, and tiling fields to practices or soil amendments that build long-term soil fertility. Vermont farm land or farm buildings left idle for long periods often require a significant investment of labor and money to bring back into productive and profitable use. These are the properties most commonly available to beginning farmers. Properties leased under year-to-year leases for many years can share some of the same characteristics as property that has gone unfarmed for many years.

Properties that require significant capital investment before profitable farming can even begin require special caution. Beginning farmers, many of whom are so excited about their first opportunity to farm that they can't wait to "improve the place" need to make a realistic assessment of the economics of farming a property that requires a significant investment of human or financial capital.

Permission

Tenants should never undertake a capital improvement without the consent of the landowner. Ideally, needed capital improvements should be discussed on an annual basis along with repairs and maintenance. Farmers should describe the needed improvement—its location, construction methods, and other important factors—in writing and ask the landowner to sign this document to indicate agreement. The document should also indicate the landowners' and farmers' respective shares on the expense and labor as well as ownership of the improvement at the end of the lease term.



Severence

In instances where the tenant wants to construct a removable structure such as a greenhouse, the lease can allow the tenant to remove the structure at the end of the lease period. The lease needs to be specific about the tenant's owning the structure because at common law, any structure on the property, regardless of who bears its construction costs, belongs to the landowner at the termination of the lease. Provisions that name the tenant as owner of a structure and also permit the tenant to remove it at the end of the lease period typically require that the tenant bear the costs of removal and restoring the land to its former condition. The lease may also provide that instead of removal, the tenant has the right to sell the structure to the next tenant.

Permanent Structures

For more permanent structures that cannot be removed, the landowner may be willing to pay for construction or renovation if it will increase the value of his property and provide a long-term financial return. The Use Value Appraisal program in Vermont helps to encourage landowners to keep farm structures on their property in active agricultural use. The Current Use Statute provides significant real estate tax advantages on farm structures. Farm structures on enrolled farms under a three-year lease to a farmer can receive a "use value appraisal" on the farm building of ZERO percent of its fair market value.[18] A landowner can construct a new farm building or make major renovations to an existing structure without suffering a big jump in the real estate tax bill. Farm buildings include farm improvements used as part of the farming operation including up to $100,000 in value of structures used for processing the farm's crops and housing for farm labor. It does not include the farmer dwelling, however.

A tenant may be willing to pay for construction if the lease term is long enough to allow earning an appropriate return on the investment. A lease term that runs for the useful life of the investment would allow the tenant to earn a return on the investment. The lease may commit the owner to pay the tenant the depreciated value of the structure at the end of the lease period. The lease may also provide that in the event the landowner sells the land to the tenant, the depreciated value of the structure or other capital improvements be deducted from the purchase price. You can use the applicable IRS depreciation rate for the particular kind of property involved or devise your own based on the property's useful life.

Improving Soil Productivity

Farm tenants continually struggle with whether and how much to invest in the long-term productivity of a leased property. Many farm tenants express frustration that their contributions toward

Repair vs. Capital Improvements—According to the IRS

What's the difference between repair and maintenance and a capital improvement? The IRS has a useful test to help you decide if an expenditure is a deductible repair or a capital improvement. Generally, a repair is an expenditure that keeps the property in its ordinary, efficient, operating condition or restores the property to its original operating condition. A capital improvement, on the other hand, materially enhances the value of the property or substantially prolongs its useful life. Adapting a property to a new or different use is also considered a capital improvement.[19] The tenant can deduct the cost of repairs from annual income when calculating taxes. In contrast, the landowner's costs for any capital improvements are added to his or her tax basis in the property.

Repair generally includes: painting, replacing broken windows, fixing the plumbing or wiring, replacing belts or other equipment parts, repairing feeders or waterers, replacing fence posts, and mending fences. Capital improvements include: replacing an engine, installing new plumbing or wiring, removing and replacing asphalt roofing shingles, installing fencing, or original painting of a property.

improving or sustaining the long-term productivity of the farm's soil go unrecognized. Landowners, on the other hand, sometimes express frustration with their tenants' lack of concern over erosion, water quality, wildlife habitat and the consequences to the soil of planting the same crop in the same field year after year.

Without a doubt, the most important factor affecting stewardship on rental land is the length of the lease. In a 2001 study conducted in Iowa, researchers examined the relationship between farm practices and renting farmland. They concluded that farming on rented land "often presented additional barriers to the adoption of sustainable agriculture."[20] Not surprisingly, sustainable agriculture was defined in various ways, but a common denominator was "a set of managerial practices to limit resource depletion [or to] preserve or sustain the resources."[21]

In some cases, the landowner was reluctant to consider practices such as reducing herbicide use because he wanted the land to look "neat and tidy" or he was worried about lower yields that would mean lower crop-share income or a crop failure and subsequent non-payment of rent.

On the tenants' side, the prevalence of year–to-year, annual rentals posed the biggest barrier to adopting soil-conserving farm practices. The study noted, for example, that "sustainable techniques of production, such as conservation and organic methods, require long-term investments in management and sometimes equipment. The instability of tenure inherent in rental arrangements, communication issues, and conflicting goals for the land may lead to difficulties in adoption even when one or both parties in the landlord-farmer relationship wishes to implement sustainable techniques of production."[22]

Many production and resource conservation practices, such as building the soil's organic matter and establishing riparian buffers, can be time consuming and costly to a farmer. It makes no economic sense for a tenant to invest in a practice that won't show a return until after the agreement has ended. Most farm operations are a complex interaction of economic, environmental, and human systems. In many instances, integrating these systems in a way that balances income and other needs with resource conservation goals is an ideal that can take years to achieve. The longer the agreement, the more incentive there is to perform "sustainable" practices or install conservation measures.

Stewardship and the Farmer's Bottom Line

For some farmers, farming practices that eliminate or minimize the use of chemicals on the farm and protect soil and water resources may lead to increased farm profitability. Farmers who can substitute labor and resource management for purchased inputs will fare better over the long term. Good stewardship, however, can also impose short-term costs and negatively impact the farmer's bottom line. Unfortunately, there are few models for farm tenants who want the lease to reflect these costs or for landowners who want to incorporate stewardship standards into a lease. As described below, the Countryside Initiative[23] developed a model for an income-based approach and a new NRCS program is developing an incentive-based approach to addressing the costs of good stewardship.

Income-Based Incentives

The Countryside Initiative is an effort of the Cuyahoga Valley Countryside Conservancy (CVCC) that is designed to bring idle farm homesteads in the Cuyahoga Valley National Park back into active production. In an effort to provide park and recreation opportunities for the urban dwellers in Akron and Cleveland, the farms were purchased in an aggressive land acquisition effort in the Cuyahoga Valley that began in the 1920s.

CVCC is offering 25-year leases for these farms. The leases set tough stewardship standards, provide income incentives for farmers if they adopt certain farm practices, and encourage enhancing the productivity of the farms. The lease takes a

pro-rata, or proportional, share of the farmer's gross farm income for rent. The pro-rata share increases over time as the farm productivity increases along with farm income. In recognition of the time required to establish markets and build the income and productive capacity of the operation, the pro-rata share rises by half a percent over the course of the first ten years of the lease. If the farmer achieves organic certification, the pro-rata share paid to the landowner is reduced by one percent.

A more detailed description of the CVCC initiative in the Cuyahoga Valley National Park along with links to their model lease and requests for proposals are available on line here: http://www.cvcountryside.org/Website/countryside_initiative/cvnp_farming.htm.

Incentive and Cost-Based Approach

Another possible model for rewarding stewardship can be found in a new program created in the 2002 Farm Bill called the Conservation Security Program (CSP). As of the 2006 program year, the CSP is available only in certain watersheds in Vermont; the Otter Creek and West River Watersheds and the Hudson-Hoosic Sub Watershed Basin. It is expected that the CSP will be expanded each year until it is available throughout the state.

The CSP will make payments to farmers who enter into five to ten-year contracts with the Natural Resources Conservation Service, promising to undertake certain resource-conserving farming practices on working lands – cropland, grassland, pasture and forestland that is part of a farming operation. These practices address either soil or water quality resource concerns. Unlike many conservation programs, the CSP does not require farmers to take land out of production. The program also favors farmers who are already using these practices and have already achieved a certain minimum level of conservation. The CSP seeks to "reward the best and motivate the rest." A CSP fact sheet is available on-line at: http://www.nrcs.usda.gov/programs/csp/pdf_files/csp_fs3_05.pdf.

Depending on the contract and the number of resource issues addressed and practices undertaken, CSP payments will include a 5 percent (Tier I), 10 percent (Tier II) or 15 percent of a "base payment" for farmers who are meeting certain minimum conservation standards. The base payment is tied to the average rental rates for the area. In addition to the base payment, the program provides a cost share payment for implementing and maintaining the conservation practices of 75 percent, or 90 percent for beginning farmers. In addition to the base payment and the cost share payment, farmers may also receive certain "enhancement payments" for practices with conservation results that exceed the minimum standards set by NRCS for each respective tier.

For example, a dairy farm in Vermont might receive a Tier 1 base payment for testing soils and manures to manage nutrients, for adopting a rotational grazing system, or for incorporating green manures —all of which will result in the farm's meeting the minimum level of soil and water quality protection set by NRCS on just a part of the farm. Tier II payments might be made available for implementing several practices over the entire farm that reach the higher standard of resource conservation for Tier II payments, as set by NRCS, and agreeing to adopt at least one additional practice by the end of the contract. Tier III payments would be made to farmers who have addressed all of the farm's soil and water conservation concerns to standards set by the NRCS Field Office Technical Guides for Tier III. Cost share and enhancement payments would be made where the farmer exceeded the minimum NRCS standards for each Tier.

Eligible practices include crop rotations, cover crops, tillage practices, prescribed grazing, providing adequate wind barriers, using filter strips, terraces, grassed waterways, managed access to water courses, and nutrient and pesticide management.

The CSP is still evolving and payment formulas and other aspects of the program are likely to be modified as NRCS and farmers gain experience with the program. The program's relevance in the leasing context is that the CSP strives to put a dollar value—the base payment—on meeting certain measurable conservation standards set by the NRCS. It also tries to quantify the costs and benefits of maintaining a particular conservation practice and to reward additional conservation efforts through enhancement payments. A table of stewardship payments for the West River watershed for example, can be found at: http://www.vt.nrcs.usda.gov/programs/CSP/CSP_2005/Stewardship%20Payment%20Rate%20West%20River.pdf.

A table of costs for implementing and maintaining certain enhancement practices in Vermont can

be found at: ftp://ftp-fc.sc.egov.usda.gov/VT/Programs/CSP/CSP_2006/Vermont_2006_CSP_Cost_List.pdf.

The CSP's relevance in the leasing context is that it tries to place a value on the farmer's efforts to conserve soil and water. However, the CSP program is complex and payments will be based on actual conservation performance as measured by NRCS professionals. But its tables and rates may provide at least a basis for negotiation between a landowner and conservation-minded tenant as they set a rent which rewards and compensates the farmer for contributions to soil and water conservation. In conjunction with NRCS conservation plans that aim for a Tier I, Tier II, or Tier III level of conservation, the various rate tables might be more meaningful – and measurable.

Avoiding "Waste"

The case law or judge-made law in Vermont imposes certain minimum stewardship standards on farm tenants. Under the common law, farm tenants in Vermont have an implied duty to farm in a "good and husbandlike manner" and to return the property to the owner in substantially the same condition as when their occupancy began, reasonable wear and tear excepted. Tenants who breach this duty can be held liable for "waste," which is damage done by the tenant beyond ordinary wear and tear through unreasonable or improper use, abuse, or mismanagement. The courts in Vermont have found a tenant liable for waste where alfalfa was overgrazed and damaged, where water lines were left to freeze, where equipment was not maintained, and where fences were not kept in good repair.[24] Because this duty of good husbandry is implied under the common law, a tenant can be held liable for waste without a written lease.

Insurance and Liability Issues

The rules governing the landowner's and the land occupier's responsibilities to third parties are complex. Vermont follows the traditional approach to landowner liability that imposes varying standards of care depending on whether the injured third party was a "business invitee," a "social invitee," or a trespasser.

The law imposes liability on the "possessor" of the land, or the party who occupies or controls its use and maintenance. In farm lease situations, the tenant is usually in control of the premises. If the tenant is keeping livestock and is responsible for maintaining the fences, he or she will be held liable if the fences fail and cause damage. However, in some cases landowners have been held liable if they agreed in the lease to keep the premises in good repair and the tenants or their guests suffered injury as a result of the landowners' failure to competently honor that commitment. But most often, owners have been held liable in a residential rather than a farm lease situation. Landowners have also been held responsible for "common areas" that are under their control and are used by all tenants. In the final analysis, both landowner and tenant need to exercise reasonable care.

Liability insurance is a business necessity. The farm lease should clearly specify the party responsible for obtaining and maintaining insurance, including premises liability, building and equipment casualty, and losses of both growing and stored crops, and at what level each should be insured. Often, the landowner requires evidence of the tenant's insurance coverage and that those policies "indemnify" the landowner for any losses he or she might suffer. By the terms of the lease, a failure to carry such coverage would most often be considered a default and grounds for termination. The lease may also require the landowner to use insurance proceeds to rebuild in the event that a structure essential to the farming operation is destroyed by fire or other casualty loss.

Recreational Uses and Liability

Vermont limits liability for landowners or tenants who make their land, streams and ponds available to the public for recreational uses. As long as the landowner doesn't charge for recreational uses, their duty to land users is no greater than that owed to a trespasser. In

other words, the landowner owes no duty at all except to avoid willful or wanton misconduct. [29]

The liability shield, however, does not extend to equipment, machinery, or structures unless the recreational user does not have actual permission to use the equipment or structures.

Landowner Liability in Vermont

Business Invitees

A "business invitee" is a person invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings.[25] Customers of a farm stand, farm suppliers, and members picking up their CSA shares are all "business invitees." Landowners have a duty to keep the premises free from unreasonable risks to business invitees. The premises must be kept in a safe and suitable condition so that a business invitee is not "unnecessarily or unreasonably exposed to danger."[26] This is the highest standard of care imposed under Vermont law.

A Social Invitee

A "social guest" is one who enters or remains on land with the consent of the landowner. A landowner will be liable to a social guest only when the guest suffers injury as a result of active or affirmative negligence.[27]

Trespasser

A "trespasser" is one who enters or remains on land without consent or other privilege. In Vermont, a landowner or lessee generally owes no duty of care to a trespasser, except to avoid willful or wanton misconduct.[28] Vermont has also not recognized the attractive nuisance doctrine, meaning that no special duties are owed to trespassing children.

Crop and Creditor's Liens

In the case of nonpayment of rent, many states have statues that provide the landowner an automatic lien on a tenant's crop. In Vermont, however, there is no statutory lien for landlords. A crop is the personal property of the tenant and the landlord has no interest or right to the crop for non-payment of rent. To obtain a lien, the lease must explicitly reserve one. A landlord without a consensual lien in the lease has no right to seize property of the tenant, to sell it, or to hold it as security for unpaid rent. In the absence of a lien, the remedy for unpaid rent is to go to court for an ejectment and a judgment for the amount of rent in arrears. Language in a lease that provides that a crop is not to be sold or removed until the rent is paid is inadequate to give a landlord title or a security interest. The language must specifically grant a lien, and the landlord would be wise to file a financing statement with the Vermont Secretary of State's Office putting others on notice of the lien.

Default Provisions in a Lease

A lease should spell out what constitutes default and the consequences of default on the part of either the tenant or the landowner. Default means that one of the parties to the lease has violated a term, either by failing to do something or by doing something not permitted by the lease.

Default provisions typically trigger a process that allows the landowner or the tenant an opportunity to "cure" the default within a particular time frame. For example, a tenant who misses a rental payment is given notice and a thirty-day period to make the payment.

Typical defaults under a lease involve failure to pay rent, failure to maintain liability or casualty insurance, or failure to comply with state and local regulations. Default may also involve failure to keep the property in good repair or engaging in a use prohibited by the lease.

A lease may provide several options for dealing with a default. It may allow the landowner to draw from a pre-paid deposit or to bill the tenant for hiring someone to do the work or repair the problem. The lease may also provide that if the problem persists, the landowner may give notice of intent not to renew the lease or terminate it.

A landowner may also default under a lease. For example, a landowner's failure to meet obligations under the lease with respect to repairs and maintenance is a default. In the case of landowner default, the lease may give the tenant the right to withhold rent or to pay the cost of providing the repair and deduct that cost from the rent. And again, if the problem persists, the lease may allow the tenant to give notice of intent to terminate.

A lease may also include a dispute resolution process to be followed in the event of a default. Mandated dispute resolution approaches may range from a shared commitment to negotiate differences at regular meetings between the parties to a more formal mediation or arbitration process. Because of the time and expense associated with contract disputes, most commercial leases now contain a clause to allow the parties to mediate the dispute prior to litigation.

Eviction and Ejectment

Landlords in Vermont may not enter and forcibly remove a tenant who has failed to pay rent or who has stayed beyond the lease term. A landlord who does so – it's called "entry or detainer with force" – may be held liable for restitution, court costs, fines, and treble, or triple, damages.[30] If the tenant fails to pay rent or refuses to peaceably leave the premises, the appropriate course for a landowner is to go to court to seek an ejectment. A court may issue a "writ of possession," an order to pay rent into the court. Landlords may also obtain a judgment for damages and costs including attorney's fees if the lease provides that attorney's fees are to be paid by the losing party.[31]

Recording of Leases

Vermont's real estate conveyance statutes require that leases be signed by the Lessor and by one or more witnesses and be "acknowledged" by the Lessor before a town clerk or a notary public.[32] An acknowledgement is a statement at the bottom of the document in which the person signing acknowledges before a notary public that signing the document is his or her "free act and deed." A copy of the lease, or if the lease is for a term of more than one year, a memorandum of the lease, must be filed in the land records of the town in which the property is situated.[33] The memorandum of lease must provide the names of the parties, the lease term, renewal rights, if any, and other summary information. The memorandum of lease puts third parties — potential purchasers, for example— on notice that others have rights in the property. The lease will have no effect against anyone but the Lessor unless it is properly acknowledged and recorded.[34] **See Appendix for Sample Lease Agreement (page 154) and Memorandum of Lease (page 160).**