

FARM LEASES: TWELVE IMPORTANT THINGS TO CONSIDER



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The following checklist is meant to act as a guide to various lease terms and provisions specific to farm leases. However, each lease is specific to the parties involved; accordingly, some of the items addressed below may not be relevant to a given lease. Similarly, the below list does not attempt to address all matters that may be addressed in a given farm leasing arrangement.

1. Description of the farm

- ☐ Do you have an accurate survey or legal description? Is there an USDA/FSA number associated with the farm?
- ☐ Is the rent being charged by "cropland" acres?
- ☐ If so, do you have an accurate survey of the cropland acres? (Who decides what is cropland?)

2. Length of the lease

- ☐ Is this an annual lease?
- ☐ Multi-year lease?
- ☐ Does the tenant have the right to renew the lease?

Note that leases involving permanent crops are often for longer terms (tied to the growth cycle of the permanent crops); leases involving row crops or pastureland are often one year in length.

Practice tip: In order to make a farmland development arrangement economically viable for permanent crop tenants, lease arrangements often have

terms that address the timeline necessary to plant the crops and install any initial irrigation infrastructure. Further, depending on the type of crop, the lease term will correspond to the viable life of the crop (noting that certain permanent crops have harvest lives ranging from 25 to 50 years). Extension rights allow a tenant to continue to harvest should the orchard or vineyard continue viability beyond the initial contemplated life of the crop.

3. Land use

- ☐ Is the tenant required to submit a cropping plan? Does the landlord have approval rights over the cropping plan?
- ☐ Also, is the tenant required to maintain a fertilizer plan to address soil fertility?
- ☐ Does the landlord require conservation or low-till practices?
- ☐ Farming on the contour?

Practice tip: Similar to a commercial ground lease, a ground lease will provide for permitted (or prohibited) uses. A farm lease may restrict types of crops (e.g., no cannabis, wine grapes, or tobacco); alternatively, it may allow a type of crop (e.g., any orchard crop; any row crops).

4. Rent

- ☐ Is this a cash rent lease, in which the landlord gets paid once or twice a year (usually on a dollar/acre basis)?

- ☐ Is this a flex rent lease, where the landlord may receive rent tied to certain yield factors or other performance metrics?
- ☐ Is this a crop-share lease, where the landlord is to receive rent in the form of crops?
- ☐ If this is a crop-share lease, consider how to detail the various cost obligations for both parties (and the resulting percentage of crop that is to be shared by each party following harvest); also consider if the tenant is to deliver the landlord's crop to a certain grain elevator or produce facility in performance of "paying" its rent obligation.

5. Grain bins, storage buildings, and other structures

- ☐ Does the leased premises include any storage facilities, grain bins, shops, or other buildings?
- ☐ If so, what obligation does the tenant (or landlord) have to maintain these buildings?

With respect to grain bins, these have specific safety concerns and may warrant a separate lease specific to the tenant's maintenance and operation obligations.

- ☐ Consider whether or not the tenant may be allowed to store its crop on a short-term basis following harvest (even after the term of the lease expires, perhaps on a license).
- ☐ Consider, further, whether a new tenant has to accommodate a prior tenant's right to store crops following harvest (usually for a short time frame).

Finally, if the grain bins (or other buildings) are not included in the farm lease, make sure to carve those out of the legal description. Be mindful that any residential structure on the property should be separately leased (co-terminus with the farm lease), to provide for residential landlord/tenant provisions.

6. Operator duties and obligations

Here is a sample provision setting forth tenant obligations or duties during the term:

Tenant shall:

1. Operate the Property in an efficient and workmanlike manner, and cultivate and maintain the Property at all times in accordance with practices of good husbandry generally common to farming operations of this type, and possess at Tenant's expense the essential farming machinery needed to plant and harvest the Property.
2. Control weeds in fields, fencerows, road ditches, building lots, and all areas of the Property by mowing or spraying and do all things reasonably necessary to prevent the introduction of any noxious or undesirable weeds.
3. Protect all desirable vegetation, such as grass, field borders, grass waterways, shrubs, and trees; also not to plow or otherwise disturb pastureland or permanent vegetation without the written consent of Landlord.
4. Keep the Property in a neat and tidy condition and in as good condition as reasonable use will permit.
5. Not commit waste nor permit waste to occur to or on the Property.
6. Perform labor necessary in making minor repairs and improvements.
7. Perform labor necessary to maintain and repair fences at the direction of Landlord.
8. Remove no forage or crop residues, including straw and stalks, grown on the Property, nor sell or burn it except by written permission of Landlord.
9. Assist with erosion control and maintenance and establishment of grass waterways, including not plowing or disking through grass waterways or other low places that would permit open ditches eroding across fields.
10. Not permit the obstruction of drainage ditches or watercourses.
11. Incur no expense for or on account of Landlord without first obtaining Landlord's written consent.

12. Permit no livestock to trample soft fields or allow no hogs to root in fields or lots.
13. Investigate broken or inoperative tile and report same to Landlord. Provide labor for minor repairs to broken tile and keep intakes and outlets open.
14. In the event of damage to crops, buildings, or improvements by any natural or man-made disaster, notify Landlord by telephone or in writing within 24 hours of Tenant's knowledge of such damage.
15. Not store any fertilizer, pesticide, or other hazardous substance on the Property except in compliance with all applicable laws and regulations and in an amount not to exceed that contemplated to be used on the Property.
16. Not dump, abandon, or bury any chemicals, trash, containers, or machinery on the Property.
17. Not erect or permit to be erected any structure, sign, well/pump, or building.
18. Not add electrical wiring, plumbing, or heating to any building.
19. Not reside, or permit or encourage any other person to reside on any portion of the Property (except as otherwise provided in a separate written rental agreement, entered into between Landlord and such resident).
20. Not engage in any trade or business, or permit any other person to engage in any trade or business on the Property, other than farming and related activities.
21. Not cut or harvest trees without Landlord's prior written approval.
22. Not suffer, permit, encourage, and/or invite any other person to use any part or all of the Property for any purpose or activity not directly related to its use for agricultural production.
23. Not house or store vehicles on the Property.
24. Comply, and cause all Tenant's employees, agents and contractors to comply, with all local, state, and federal laws and regulations in the use and operation of the Property, including those pertaining to groundwater contamination and agricultural chemical, pesticide, petroleum and/or hazardous waste storage or disposal and to follow label directions in the handling and application of all chemicals used on the Property.
25. Pay all electrical bills, and any other utility bills payable due to Tenant's activities on the Property.
26. Not take any action that might cause a mechanics' lien or other lien to be imposed on the Property.
27. Control rats and other rodents in and around buildings by baiting.
28. Not permit or cause any nuisance to exist on the Property.
29. Read, understand, and follow the stewardship requirements, including applicable refuge requirements for insect resistance management, for the biotechnology traits expressed in the seed planted on the Property.
30. Except as otherwise specifically provided herein, have sole responsibility for all costs associated with the farming operation on the Property including, but not limited to, all labor, machinery, and operating expenses necessary to properly plant, cultivate, grow, irrigate, harvest, store, and market crops on the Property.

7. Government programs

- ☐ Does the tenant have the option to participate in various government farming programs?
- ☐ Can the landlord require the tenant to participate in certain programs (for example, programs that promote certain conservation or environmental concerns)?
- ☐ Finally, is the farm enrolled in certain programs that require the tenant to conduct its farming operations in a certain way (or risk causing the landlord to lose program qualifications)? For example, certain programs create acreage bases or set-aside areas that affect long-term crop planning for the applicable farm.

Practice tip: Consider whether the tenant is planning to raise cannabis or other regulated crops. In the event the tenant defaults in the lease, then the landlord has a crop on the property that cannot be cultivated without a legal license. These licenses generally are not transferable; the landlord cannot simply continue the cultivation and harvest of the regulated crop.

8. GPS/yield input and data

- ☐ Does the landlord have the right to require the tenant to use precision agricultural practices?
- ☐ Does the tenant have to share that data with the landlord?
- ☐ Is the tenant allowed some control on the sharing and dissemination of the data? For example, can the landlord share that data with potential purchasers of the property, to show historic yields and soil conditions?

9. Irrigation

- ☐ Is the property irrigated?
- ☐ If so, make sure to clearly define the maintenance, repair, and replacement obligations for irrigation equipment.
- ☐ Also, state whether the tenant has the right to install its own equipment (and if so, track the equipment by serial number and GPS location should tenant have the right to remove post-term; otherwise, it will be hard to segregate the landowner's equipment from the tenant's equipment).

Finally, if this is a term for years (perhaps for permanent crops), consider how capital improvements are to be shared by the parties:

- ☐ Does the tenant pay a portion of the cost for any new wells or irrigation systems?
- ☐ Is the landlord obligated to make certain capital expenditures during the lease term?

Also, if the property obtains water from a water district, irrigation company, or other third party, consider whether:

- ☐ The "utility" cost for the water is to be paid directly by the landlord (presumably recovered in the cost of the rent) or is to be paid by the tenant;
- ☐ If the tenant pays, make sure to address the landlord's cure rights for any non-payment (to preserve its water rights and good standing with the water district).

10. Natural resources

- ☐ The landlord should consider disclaiming any guaranty of a continuous or adequate water supply.
- ☐ Also, the landlord should address any third-party mineral operators (and provide that the tenant will cooperate with any surface use terms or agreements); consider also having the landlord expressly exclude any mineral rights from the leasehold interest.

Finally, given that many farms often provide hunting, fishing, or other recreational opportunities:

- ☐ The landlord should clearly state whether the tenant has such hunting, fishing, or other recreational rights (including camping);
- ☐ If not, then the landlord should expressly exclude those activities from the lease.
- ☐ If the landlord elects to separately enter into hunting or fishing leases with third parties, address the rights of access for those third parties in the farm lease (i.e., shared road, non-exclusive rights to use surface water ponds or lakes, etc.).

11. Landlord's lien

In many states, landlords have a statutory lien right over tenant crops. This lien right acts as security for rent (and in certain states, security for other tenant acts or obligations). Additionally, landlords may

elect to file UCC liens with respect to their interest in tenant's proceeds from the sale of crops grown on the farm.

- ☐ The farm lease should reference landlord's security interest and right to lien.

Practice tip: In order for a tenant to get financing for its improvements (crops, irrigation infrastructure, etc.), the tenant will likely need to obtain financing. It is not uncommon for tenants to ask landlords to subordinate their landlord lien in the crops; also, for longer-term leases, for landlords to allow the tenant to obtain leasehold mortgages.

12. End of term

Consider what rights (or obligations) the tenant has to remove improvements made to the farm.

- ☐ For example, certain permanent crops such as grapevines will have structures and supports; if the lease ends prior to the end of the life-cycle for certain permanent plantings, the landlord will likely want the tenant to leave the support structures in place for the next operator.
- ☐ The lease should also address whether the tenant will get any credit or refund for soil inputs or amendments that have a carry-over effect into the season (or seasons) following the end of the lease term.
- ☐ For example, will the tenant get any refund for fertilizer carry over at the end of the term?
- ☐ Will the tenant get credit for lime application (if so, is there a rate of reimbursement that accounts for the rate of depletion during the term of the lease)?

Practice tip: If the landlord is planning to develop the land for commercial (non-agricultural) use, then the landlord should consider how to protect the long term value of the property once it ceases farm-land production. For example, consider whether the tenant should be required to remove any underground irrigation infrastructure; alternately, consider whether the tenant should be required

to install sleeves over the irrigation pipelines that would allow for roadways over the pipeline. Also, for any pipelines that may be abandoned or left in place, consider a minimum depth to have the pipes installed (to allow for later surface development). 📌