



FARM COMMONS

Land Matters Module:

Legal Curricula for Beginning
Sustainable Farmer Education

www.farmcommons.org

This resource is provided for educational and informational purposes only and does not constitute the rendering of legal counseling or other professional services. No attorney–client relationship is created, nor is there any offer to provide legal services by the distribution of this publication. Always consult an attorney regarding a specific situation.

TABLE OF CONTENTS

Objectives	5-3
Information Outline	
Land Acquisition Legal Process	5-4
Due Diligence for Land Purchase	5-7
Due Diligence for Land Lease	5-10
Slides	5-14
Video	5-19
Activity	5-21
Discussion	5-23
Further Resources	5-29

Objectives for the Land Matters module

Beginning farmers should know the following:

1. Understanding the characteristics of the farmland one is acquiring is a very important first step from a legal perspective- this process is called due diligence.
2. Coming to an agreement about the acquisition is the second step of the legal process for farmland acquisition.
3. The written document- the purchase agreement or lease- is the memorialization of the first two steps.
4. Many model loan agreements, land contracts, and leases are available, but the best legal document is the one that takes an individual's specific situation into account.

Beginning farmers should be able to do the following:

1. Start the due diligence process for purchasing farmland
2. Begin to draft lease terms for leasing farmland

Land Matters Legal Process

Whether buying or leasing farmland, the commitment is tremendous. In addition to the financial commitment, the farm also represents the cultural heritage of an area, the local traditions, and the food community as a whole. Many farmers are entrepreneurial risk-takers by nature, and it's easy to fall in love with a piece of land or a certain farm. In an eagerness to dive into farming and all its responsibilities, beginning farmers can't lose sight of the goal. We want farms that will last long into the future. Take the time to carefully investigate exactly what is being acquired and set a foundation for success.

From a legal perspective, land matters follow a few basic principles. First, a person needs to know exactly what the person is getting. Whether leasing or buying, farmers need to know the precise nature of the land and the agreement between the parties. Discovering the precise nature of the land can be summarized with the phrase “due diligence.”

In legal terms, the process of investigation is called “due diligence.” Although it's a catch phrase, it's accurate. Diligence is required to explore every aspect of the purchase: values, issues, problems, and opportunities. Although less commonly referred to, the process is also important for leases. The process can be long, depending on the nature of the acquisition. However, the farmer will emerge with a deeper understanding of the resource, how it will be profitable, and how to contribute to the community long into the future.

The due diligence process shapes whether and at what price a buyer is willing to move forward. It can also influence the terms of the resulting agreement. The beginning farmer might change his or her mind about timing or even the type of farming planned for the location. The due diligence step is perhaps the most important step in the process because it shapes everything else.

Second, the buyer/seller or the landlord/tenant need to come to an agreement about the terms of their relationship. From a legal perspective, this step comes

after the due diligence. Folks need to know the land's characteristics before they know what they are willing to pay for or do on the land. However, it's often the first thing that springs to a beginning farmer's mind: "How will I pay for this?"

Farmers are arriving at many different strategies to afford buying or leasing farmland. For purchases, traditional options includes financing the farm as a new homeowner through a bank loan. Where such financing isn't available, many farmers use financing through the Farm Services Agency (FSA). FSA offers loans for the purchase of home and farm assets. Some farmers work directly with borrowers and do not involve any financing institutions in their farmland acquisition. These farmers may use seller financing. Seller financing is where the farmland's present owner either loans the purchase money to the buyer or where the seller offers a purchase via land contract. Land contracts (also called contracts for deed) are easiest to explain as a "rent to own" for land. Buyers simply make monthly payments towards the total purchase price of the land. Some farmers are even using crowd funding – small donations from family, friends, relatives and even strangers- to collect enough start up money for their farm operation. Where cash is not an option, some beginning farmers create arrangements to work rather than pay for their acquisition of farmland. Some sellers are more than happy to trade labor for land assets.

The right financing path is very much dependent on the seller's goals. Whether the exiting farmer is financing retirement, lessening potential estate taxes, or simply moving on to a new venture, the departing farmer's needs vary. The beginning farmer may find that some financing is only available for specific purchases. Beginning farmers may find that their options don't match the farmer's needs, and the process simply can't move forward. Although there is no need to rush this step without investigating the purchase, the deal can change or fall apart here. This is also the stage where buyer and seller (or landlord/tenant) settle on the final dollar value of the transaction. What is the sale price? If a person contributes sweat equity, exactly what is given and received? There are very few "right" answers during the negotiation stage.

The precise legal aspects of the various land financing strategies are outside the scope of this curricula. However, the most important legal principle across all these strategies is that of clear communication and written documentation.

In a relationship as important to the farmer as that involving farmland, the details must be clear and permanent. There are several documents that should accompany the final deal. It's not the signatures that make things work- it's the process of coming to a clear, full agreement between buyer and seller. Signatures are about memorializing a well thought out agreement.

Taking a broader look at the farmland acquisition process, a buyer/tenant has explored the potential site, done all the due diligence, discussed all aspects of the arrangement with the seller/landlord, and arranged some kind of financing, if necessary. These steps have probably led to several important elements of the deal. Perhaps the seller has agreed to replace the well because it's too shallow. Maybe the buyer is agreeing to forgo a cash salary for one year. These terms all need careful integration into the final deal.

Many land matters arrangements will have several legal documents that outline specific aspects of the agreement. At the minimum, a landlord and tenant need a clear lease between themselves. The due diligence checklist below outlines the many issues that should be memorialized in a lease. For a purchase or financing arrangement, more complex legal documents are needed. A land contract purchase needs a detailed land contract. If a seller is financing the sale by loaning the purchase price, buyer and seller need a promissory note or loan agreement, plus a security agreement if the seller is keeping a security interest in the land. If traditional financing is involved, banks will have more say over the final loan agreements than any other party. Likewise, if title insurance is involved, the existing policies are unlikely to change based on private agreements. Farmers need to know what issues are negotiable and which they are obligated to comply with if they utilize financing and insurance mechanisms. For those working outside the box, it may be easier to negotiate on all points of the agreement. But, that ability also comes with a lot more work- every point needs to be negotiated. Farmers using a work-barter as financing need a very clear written agreement as to what is being acquired, the precise metrics for the labor given, and an objective means of measuring the inputs.

Models can be found online and in books. But, remember that no model will accommodate the specific needs and wishes of the two parties to the deal. These documents are not legal boilerplate where one size fits all. Consider meeting with

a farm-experienced attorney after you have everything lined up. An attorney can be useful as a facilitator during the negotiation process. Attorneys can help review the legal documents provided by financing institutions, sellers, title insurance companies and the many other entities involved. Attorneys are also excellent at helping buyers think through the due diligence process and performing due diligence themselves. Attorneys may also have experience with local standards for pricing, although real estate agents and appraisers are also sources for such information.

Due Diligence for Purchasing Land

Due Diligence is the research process to determine the costs, benefits, and potential terms that accompany an endeavor. The objective of due diligence is to gain as much reliable information as possible in order to make a sound decision and to outline the terms of the purchase or lease.

When it comes to a farm asset purchase, such as land or a tractor, the following are several elements of the due diligence process. This non-exhaustive list does not address due diligence for a home potentially located on the farm property, among other things.

Soil and Water

- Is there a well? What is the capacity? Is its use regulated by water rights and, if so, what is the status of those rights? What is the condition of any associated equipment such as a pump or water lines?
- Can you irrigate? Even if you use a well, is irrigation regulated by water rights? If so, exactly what are the contours of that right? What is the irrigation capacity and is any irrigation equipment included? What is the condition of it?
- Has the water source been tested for heavy metals, chemical residues, and bacterial contamination?
- Is there a water recapture or disposal system (septic system, for example) and what is its condition?
- Is the slope of the land acceptable for farming?

- What soil types are located on the property?
- Has the soil been tested for heavy metals, contaminants, fertility, or organic matter?
- Is the soil subject to erosion? What erosion control methods have been used and were they successful?
- Is the land currently leased for farming and if so, what are the terms of that lease?

Farm Buildings

- Are buildings attached/included? What is their condition?
- Will the electrical supply to the buildings support your proposed usage?
- Will the plumbing and water disposal system meet your needs and capacity?
- How are the roofs?
- If you intend to add buildings, look at the building permit process, requirements, and expenses

Parcel Characteristics

- Carefully analyze the title description, location, and boundaries to determine the precise size and boundaries of the parcel. Look at Google Earth and compare with county assessor's maps. Talk with neighbors about property boundaries. Do not assume fences indicate property lines. If there is any doubt at all about the precise location or size, do further research. If the issue cannot be resolved fully, consider having the property surveyed.
- Is the fencing permanent, attached, and sold with the property?
- What is the zoning classification of the parcel? Does the property currently conform to its zone? Do your future planned uses conform?
- What is the long-range county or municipal plan for the parcel? Is re-zoning contemplated?
- What is the tax classification of the property and does the use or zoning meet the tax classification obligations?
- Is the property in a floodplain?
- Does the property have wetlands or endangered species and are the

legal implications of their presence acceptable with future uses?

- Have any rights associated with the land, such as mineral rights, been sold or leased? Has the land been leased for wind energy generation?
- Look at the title report in detail for easements and encumbrances. In addition, look at the usage of the land itself- is anyone else using the property who may have established a legal right to continue that use?
- Is there road access to the parcel? If not, will local permitting authorities allow an access point to be installed?
- If the access road is shared, is there a written maintenance agreement between the users? If so, is it followed?
- Are there any environmental risks on the property such as an old dumping or trash area?

Can you get the telephone, cellular, and internet access you need?

If a farmer is looking at buying into an existing business:

All of the above factors are important for the assets that the business itself owns. In addition, the buyer should do due diligence on the business itself. This includes considering the following:

- Is the entity in good standing with the state? If not, you may want to see those corrected, first.
- Does the business have written bylaws and shareholder agreements (for a corporation) or an operating agreement (for an LLC)? Is the document followed? If none exist or they are not followed, assess willingness to get that done.
- Are there any meeting minutes or records of decisions made? Whether or not the business adheres to formalities may be important to a new owner.
- Who has an ownership stake in the business? Are they people with whom the new farmer can work with?
- Who has the authority to enter into commitments relating to the business? Does the person with whom you are negotiating have

the power to sell or give you what he or she is offering?

- Does the entity have any written leases or contracts with significant business connections? If the leases or contracts are essential to the business, the buyer should read the agreements to determine their stability.
- View financial statements for at least three years back, including detailed lists of assets, accounts receivable, liabilities, and expenses. Financial statements can speak volumes about a business' viability.
- Has the farm protected its name or brand? If the name is significant, this could be a problem down the road.
- Look at tax returns for the last three years. Are there any red flags? Do you potentially need to shield yourself as a new owner from past tax liabilities?
- Look at sales tax returns, if required. Are there red flags?
- Assess product lines, marketing outlets, and pricing strategy. Is this the business you envision going into?
- View a business plan, if available. Does the owner's plan for growth match your own wishes?

Due Diligence for Leasing Land

These questions raise issues that should be discussed, agreed upon, and incorporated into the final lease.

Basics:

- Parties involved
- Location of land
- Start date
- End date
- Price, frequency of payment, method of payment
- Fees for late payment

- Who is responsible for property taxes?

What rights does the lease grant?

- All legal uses of the property?
- Agricultural use of the property? What are we considering “agriculture?” Are agritourism events allowed? Processing?
- Is this also a residential lease? (Should be handled separately to the farmland lease.)
- Can the tenant sublease?

Production-related issues

- Any limits on the type of production allowed? Crops and livestock? Methods such as organic?
- Is the landlord granting an exclusive right to use, or will the landlord also be using the leased premises?
 - If so, what potential conflicts might arise, and how should we manage them? Schedules of use? Types of use?
 - If conflicts do occur, such as damage to property or lost revenue because of the other party’s actions, should we compensate the party who loses?
- Are there any land stewardship practices the parties would like to require of each other? Do those come with costs, and if so, who pays?
- If the tenant’s voluntary conservation practices increase the value of the land, should the tenant’s rent be reduced accordingly? Or, another way to reward the tenant?
- Specific standards for weed or disease control for either party?

Facilities

- Does the tenant get use of any equipment?
 - If yes, how are we handling equipment breakage and maintenance? Who pays for it and when does it need to be performed?
- Does the tenant have access to any equipment or

supplies storage? Associated terms?

- Does the tenant have access to pack shed facilities or food storage?
- Is water provided in the lease? How, and how much? If unlimited, what is the expected capacity of the well/water supply? If there are volume limits, do we have a way to measure usage?
- Who coordinates and pays for any utilities to the property? Electric, trash, etc.

Renewal

- Does the lease renew automatically?
- When and how does either side give notice that they don't want the lease to renew?
- If the tenant decides not to renew, are there any duties he or she must fulfill? i.e. planting cover crops.
- If the landlord decides not to renew, when and how is the tenant compensated for increased land value? Or, does the tenant have the right to remove improvements? If the latter, what conditions exist?
- Can the lease be terminated? This often happens on "default," which means either party does something specific, which allows the other party to terminate the lease. A "termination" often follows different, less beneficial procedures than a non-renewal. Are there acts that you would like to designate as triggering a "default?" For example, using certain chemicals or practices.

Communication

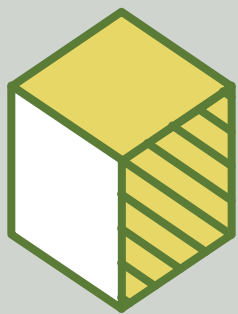
- Are annual or quarterly meetings appropriate? What things should be discussed at meetings?
- Are there specific issues that the parties agree to communicate to the other? Machinery? Animal health? When specific practices will be undertaken?

Long-Term Considerations

- Is the property currently mortgaged? If so, and a default occurs, what are the parties' wishes for transferring the lease?
- Is the property part of an estate plan, such as in a will or trust? If so,

what are the parties wishes upon transfer, should the landlord die?

- If the lease is expected to survive death of landlord, do we have any assurances that the appropriate documents are/will be in place?
- If the tenant dies, does the lease transfer or terminate? Does the tenant's estate get anything for termination of the lease or appreciation of land value? (Tenant needs to know if documentation is in place to assure the money will be available and payments made.)
- Can tenant transfer the lease during tenant's lifetime? Any conditions on transfer?
- Are we contemplating any "right of first refusal" if the landowner decides to sell? Is this convertible to a land contract?
- Are landlord/tenant going into business to make a shared profit together at all? (Additional concerns arise here.)
- Is the tenant added as an additional insured to landowner, or does tenant need own insurance? If landlord provides, are there any coverage thresholds desired by tenant?
- How should we manage conflicts over the long term? Would the parties like to create a dispute resolution committee of neutral third parties to hear disputes and help create a pathway to resolution?
- Do we have any potential concerns about re-zoning of the property or neighboring development? Have we checked the comprehensive plan for the municipality?
- Long-term control of invasive weeds. Required? By whom and how?
- Is the tenant contemplating specific long-term improvements such as building a pack shed or hoop house? Should we put in provisions that create assurance such improvements will be allowed?
- Who is responsible for large-scale capital improvements to the land? For example, who is responsible to maintain access roads? When and how will it be done? Are costs shared?



Land Matters Module Powerpoint Slides

These slides may be used as a template for a presentation on legal land matters for beginning farmers.

Legal Process

- Know exactly what you are getting: Do due diligence.
- The objective of due diligence is to determine the following:
 - Do you want the land/access to the land?
 - What are you willing to pay for it?
 - Are there any conditions you wish to attach?

Due Diligence for Purchase

- A few key issues, specific to farmland:
 - Does the soil and water hold necessary capacity?
 - Is there enough or the proper buildings for operations?
 - Are there any potential neighbor or zoning issues?
 - Are utilities available?

Due Diligence for Leasing

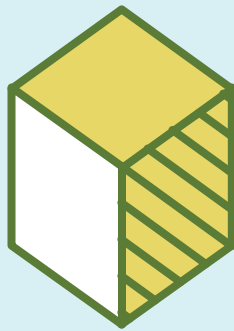
- A few key issues for farmland lease due diligence:
 - What uses, exactly, is the landlord allowing: just production, ag sales, or agritourism?
 - Is water included? If so, what flow rate, volume, timing... is provided?
 - Does equipment use or storage come with lease?
 - Any required land use practices?
 - How should conflicts be resolved?

Agreements

- After doing due diligence buyer/seller and tenant/landlord should craft very clear agreements.
- Models are useful as models, only. The best agreement is the one specific to each individual situation.

Agreements

- When traditional financing, FSA financing, or other business entities are involved, there is much less flexibility in crafting an agreement.
 - Still, farmers should read and understand the agreements they must sign to receive financing.
- The tradeoff for more flexibility is more work. Farmers who draft their own agreements should seek attorney guidance.



Land Matters Module Videos

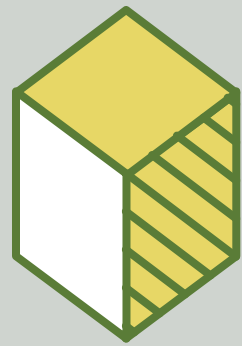
These videos discuss farm financing opportunities through the Farm Services Agency and considerations for a successful farmland lease.

FSA Funding Resources Video

[Follow this link](#) to a 16-minute presentation by a Farm Services Agency employee who explains FSA's financing options. The presentation is focused on opportunities for beginning farmers to access FSA's loans. The segment also has a question and answer section at the end. The sound volume is unpredictable at the end. Facilitators may wish to turn the volume down just a bit at the end of the presentation.

Leasing and Financing Video

[Follow this link](#) to a 12-minute video discussing the process for and elements of a successful lease. The presentation covers the basics, as well as a few non-traditional leasing situations such as sublets of greenhouse space and long-term leases with land trusts and other preservation entities. The segment ends with a question and answer session. The question and answer portion also answers questions relevant to farm financing, including land contracts.

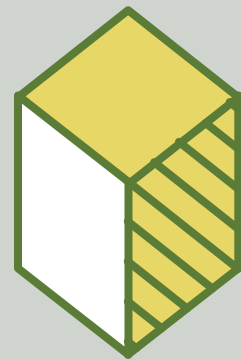


Land Matters Module Activity

This homework activity is to help farmers find and become acquainted with zoning codes.

Activity: Facilitator's Guide

Please see the Activity or the Discussion for the Events Module. Either is a terrific activity for the Land Matters Module, as well. Learning to understand the zoning code is an essential skill for a farmer whether the farmer purchases or leases farmland.



Land Matters Module Discussion

The objective of this discussion is to show that the lease is a perfect opportunity to think through problems that might develop and to put solutions in place to prevent those problems before they start.

Discussion: Using Leases to Stop Problems Before They Start

Objective

Often, farmers see leases as nothing other than a formality with a small side benefit of protection if the landlord tries to evict the farmer. A lease has so much more potential than that. If farmers wish, the lease is a perfect opportunity to think through problems that might develop and to put solutions in place to prevent those problems before they start.

To truly create a lease that resolves problems in advance, farmers need to think through the details of their lease arrangement. Especially these days, many landowners want the idea of a local farmer on the land. These landowners may not be prepared for the realities of vegetable or animal production. Farmers might discover that after it's too late to correct misimpressions.

This discussion is designed to put one often hidden, but always crucial, problem front and center: access to water. The problems form the motivation to draft a more effective lease. For this case specifically- a malfunctioning water pump- the potential solutions are endless. Farmers and landowners can dream up dozens of possible strategies to assign financial responsibility or make repairs. The only “right” answer is the solution that works best for the individual parties involved. Some farmers think that there are standard answers to these kinds of problems- that's not true. Creativity is a good thing when it comes to leases that prevent problems.

A secondary objective of this exercise is to give farmers practice in translating plans and intentions into formal, enforceable language. Thinking up a system is one thing. Writing that system down in words is another thing. If farmers only make it as far as thinking up a solution, they've only gotten half way. Writing things down can be hard because it forces the person to be precise. The effort is well worth it. Things are forgotten; memories fade. A lease needs to be written to ensure its enforceability.

Ways to use this discussion

- Role Playing: This discussion can be a little more exciting if students do some role playing. The reading can be given to one individual beforehand. Ask them to prepare a dramatic reading for the rest of the class. This works well if the facilitator knows the class and can pick a good person for it.
- Silent reading: If role playing simply isn't the class's style, this is just as easy to host by asking students to spend a few minutes reading the story beforehand.
- Group or entire class: Students are often more eager to share with just 2-3 other people so small group discussions can be ideal. The discussion would also work well in a large group. Especially when time is short, whole group discussions are easier. The facilitator can move the group along and there's no need to take time with each group reporting back after the discussion.
- Homework activity or in-class discussion: Because of the writing element, this discussion would translate well to a homework activity.

Facilitator's Discussion Points

The following are a few potential discussion points for facilitators.

What has caused August's problems with Bob?

- The most obvious problem is that August and Bob didn't assign responsibility for pump repairs ahead of time.
- Bob and August did not communicate about the water infrastructure or pump capacity ahead of time.
- Because the capacity and repairs weren't discussed ahead of time, August may not be able to make the repairs himself. He has to rely on Bob, but Bob has no motivation to complete the job. Without a clear understanding of who should pay for the task, neither person can move forward with confidence.
- August and Bob didn't have a procedure for handling conflicts in advance.
- Going farther back, Bob may not have understood the nature of vegetable production ahead of time. Bob is accustomed to alfalfa, which has much

different demands in terms of soil, water, and cultivation. He may not understand the threat the lack of water is to vegetable production.

- A deeper problem might be that the low rent makes Bob feel like he's doing August a favor. It could be that Bob feels he doesn't owe August anything further. In reality, the lack of water makes Bob's generosity useless to August.

If August and Bob had thought about this potential issue ahead of time, what systems might they have created to make the process easier? For example, might August and Bob have communicated differently? Or, maybe a different fee structure would have helped? Brainstorm ways this problem could have been prevented.

- August and Bob could have agreed that Bob is providing land and access to a specific volume or flow rate of water for \$100. If the water is a part of the lease, Bob would be responsible for timely access to the water.
- August could have offered Bob more rent in return for a commitment to complete repairs within one week. If Bob does not make essential repairs within one week, August could have the authority to arrange for repairs himself, with the cost to be deducted from August's rent.
- August and Bob might have agreed to split the cost of all repairs upfront.
- A conflict resolution committee might have been planned to resolve this dispute. Conflict resolution committees are often a group of 3 or 5 individuals who agree to listen to all sides of a conflict before recommending a resolution. The parties to the conflict agree to follow the resolution proposed by the committee.
- August could have prepared a short summary of his infrastructure needs for Bob ahead of time, and specifically asked Bob if his acreage could meet those needs. This might have alerted Bob to the differences between alfalfa and vegetables.
- August could insist on paying market rate for the farmland rental. This would create a more professional relationship between August and Bob, which might help Bob realize that he's working with a business owner, not doing someone a favor.

Discussion Handout: Using Leases to Stop Problems Before They Start

One day, you go to lunch with an old friend, August. You ask August how his farming career has been going. This is his response:

“After spending 3 years working for other farmers, I finally started my own thing this year. I found a family with 10 acres just outside of town- it’s a weekend property for them. I worked mostly with the fellow, his name is Bob. Bob was renting it for alfalfa, but he wanted to see some veggies this year, so I got him to lease me 2 acres. And, since Bob and his family care about local farmers, they gave me an awesome deal- just \$100 for the whole year. I jumped on the opportunity. Except would you believe what they did? It’s early July, the heat is starting to come on and the plants look like they are really coming into their own. It hasn’t rained very much, but that’s fine because I’d prefer to water. Well, just then the well pump breaks. It has been three weeks and they haven’t done a thing to fix it. Bob now says I have to pay them back when they get around to it. They think this is my fault because the pump isn’t used to being run so much! I don’t have the money right now. The timing is terrible! If my crops aren’t watered this week, I won’t turn a profit at all. I’ll be surprised if I can afford even the \$100 for the lease. This isn’t worth the trouble.”

Now as it happens, you are an attorney and you specialize in writing leases. You tell August that although things have gone terribly this year, a good lease will help iron out these problems well in advance, next time. You offer to help August write a good lease and he takes you up on it. To begin, you need to talk in more detail about the water situation.

Discuss:

1. What has caused August’s problems with Bob?
2. If August and Bob had thought about this potential issue ahead of time, what systems might they have created to make the process easier? For example, might August and Bob have communicated differently? Or, maybe a different fee structure would have helped?

Brainstorm ways this problem could have been prevented.

3. Pick one problem and potential solution. Draft some language you might put in the farmland lease between August and Bob to prevent the problem in the future.



Land Matters Module Further Resources

Land Matters Further Resources

Sustainable Farm Lease

This website offers valuable resources for creating a farmland lease that respects the principles of sustainability. It's geared to landowners but can be just as effective for farmers. From the farmer's perspective, these points may be bargaining tools for more affordable rates or longer lease terms.

www.sustainablefarmlease.org

Ag Lease 101

This website is managed by a group of Extension agents. It provides model leases drafted for traditional or conventional farm operations. The models provided do not address the unique circumstances or flexibility of direct-to-consumer farm operations. But, the models are a useful place to start with reference to valuation and payment strategies.

www.aglease101.org

**End of Land
Matters Module**
