



Agricultural Leasing and Farmland Purchases in Delaware

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Introduction

According to the 2019 Census of Ag, leased farmland in Delaware accounts for approximately 31 percent of all farmland. Leases for agricultural real estate can provide an easy mode of entry for beginning producers. Many lenders require new producers to lease farmland in order to develop and demonstrate the skills necessary to take the big step of purchasing their own farm. For many producers, the goal may be to eventually own farmland.

This publication provides an overview of various land leasing issues facing agricultural landowners and land tenants, raises issues important from both a landowner's and tenant farmer's perspective, and gives a brief overview of issues involved in purchasing land. The economics of whether to purchase or lease land will not be discussed; please check your own financials with your banker to determine if purchasing farmland is the right step for your farming operation.



A large wheat field in the spring on a local farm in Clayton, Delaware

What Is a Lease?

A lease is a legally enforceable contract allowing the owner of real property, equipment, and/or livestock

to convey the right to use that property to a person in exchange for rent. The lease defines the rights between the landlord and the tenant and defines how the landlord/tenant relationship will operate.

A lease needs four essential elements to be considered valid: 1) a valid contract; 2) a payment provision or "how much rent is owed"; 3) the transfer of rights to use, possession, and control of the property to the tenant; and 4) intent to transfer rights to use, possession, and control of property back to the landlord when the lease terminates.

A lease demonstrating these four elements is considered valid. Note that "written" is not a necessary element; while this issue will be further explored, a written lease does provide a record of the terms agreed to in the lease.

Types of Leases

Landlords and tenants have a variety of lease types from which to choose, depending on their goals. The three common arrangements between landlords and tenants are the *cash lease*, the *flex lease*, and the *crop-share lease*. Both landlords and tenants will want to pick the best arrangement to suit their needs.

Under a *cash lease* or a *fixed cash lease*, the tenant pays the landlord either a cash sum per acre or a lump sum for the rights to use the land and other farm resources. Landowners under this type of lease need not concern themselves over the types of crops grown or the amount of production costs, nor about price and yield fluctuations. A cash lease provides an incentive for the tenant to reap the highest yields possible and allows the tenant to make all the management decisions and retain windfall profits from yield or price increases.^[1] Worksheets available

through organizations such as AgLease101.org can aid both parties in calculating a fair rental rate.^[2]

A hybrid cash rent lease is a *flexible cash rent lease* or a *flex lease*. A flex lease is like a cash lease in that the landlord charges the tenant an amount per acre. Unlike a cash rent lease, rent under a flex rent lease can fluctuate up or down depending on crop yield, market price, or a combination of both.^[3] A flex lease allows the landlord to gain when market prices or crop yields increase during the crop year. But in return for the possible increase in rental payments, a landlord also loses when market prices or crop yields decrease. Under a flex lease, the tenant also benefits from the possibility of lower rent payments during low-yield or low-price years. The tenant is required to share gains, however, during high yield or high prices years through higher rental payments. Again, worksheets are available through AgLease101.org to aid in calculating a fair flex-cash rental rate.

Under a *crop share lease*, a tenant pays the landowner a certain percentage of harvested crops. In return, a landlord allows the tenant to use the land and may pay a percentage of certain input costs. The percentage of both crops and selected expenses are usually based on local custom. For example, the tenant agrees to crop-share rent on the landlord's farm for corn production. Terms of such a lease might require the tenant to give the landlord 25 percent of the corn crop produced on the landlord's farm in exchange for use of the farm and the landlord paying 25 percent of the drying and herbicide costs.

Written v. Oral Leases

Written leases are mandatory in limited cases under Delaware's Statute of Frauds. This law requires leases of more than 1 year in duration to be in writing and signed to be valid Del. Code Ann. tit. 25, § 6702 (West).

Delaware case law does not cite any exceptions to the Statute of Frauds, which may render an otherwise invalid oral lease enforceable; rather, the statutory language addresses the lease period is 1 year for both oral and written lease contracts (*Title 25 Property, Chapter 67: Agricultural Leases*).

For example, Sallie and Charlie have an oral lease to rent Sallie's farm for 5 years. Charlie takes over the farm, and pays rent on time, and Sallie accepts the rent. As such, Sallie would not be able to argue the

oral lease is invalid under the Statute of Frauds. A written agreement, however, provides both landlord and tenant greater legal certainty, especially when the term exceeds 1 year, because parties do not want to rely on a court to find their lease an exception to the Statute of Frauds.

Lease Termination

Parties can specify in the lease how the lease will be terminated. This is especially important if the tenant needs more time to vacate the premises than state law allows. If the lease specifies how it is to be terminated, that exact procedure must be followed; courts are traditionally not forgiving of parties that do not follow the proper notice termination procedures.

Under § 6703(a), "[every] written lease of agricultural land, which by its terms is for a definite period, the lease shall terminate on the expiration date thereof; provided, however, the landlord or tenant gives the other party notice in writing at least 4 months in advance of the expiration date thereof that the landlord or tenant intends to terminate the lease at the expiration date thereof. If no such notice is given by either party, the lease shall become a year-to-year lease renewing itself yearly under the same terms and conditions until the herein-mentioned notice requirement is met by either party desiring to terminate said lease."

When a lease contains no termination process, the parties must follow state law. Delaware law § 6702 addresses verbal and term leases in which no term is expressed. A verbal lease or written lease in which no term is expressed shall be deemed to be a lease having a term of 1 year, terminating on December 31 next occurring unless the lease is entered into after September 1, in which case the lease shall terminate on the second December 31 next occurring. However, the landlord or tenant must give the other party notice in writing at least 4 months in advance of the expiration date if the landlord or tenant intends to terminate the lease at the expiration date. If no notice is given by either party, the lease shall become a year-to-year lease, renewing yearly under the same terms and conditions until the notice requirement is met by either party desiring to terminate a lease.

Leases of Tenant Houses on Poultry Farms

Delaware makes specific provisions for leases of tenant houses located on poultry farms, in which no term is expressed. When a lease is terminated by either the landlord or the tenant, the terminating party has 14 days to notify the other party that the lease of the house is terminated (25 Del. Laws, c. 67 § 6702(d)). However, this subsection does not apply to tenants who are not involved with managing or supervising the poultry operation.

Growing Crops

What happens if the lease terminates and the tenant has not had the opportunity to harvest crops on the leased property? This question can be answered in multiple ways depending on the type of crops being grown, language in the lease, and other factors. The best way to resolve this issue is simply to include in the lease language, which allows a tenant a reasonable time to harvest growing crops after the lease terminates, or similar language allowing the tenant time to come back on the leased property to harvest growing crops after the lease has terminated.

If the lease is silent as to a tenant's rights to growing crops after lease termination, then the tenant's rights to the growing crops would depend on how the lease terminates. When a lease is for a term of years, and the tenant knows the date the lease will expire, a tenant will **not** be able to harvest crops maturing after the lease expires. (Am. Jur.2d Crops § 27, 2014). For example, Christie's lease will terminate on December 31, and she plants a wheat crop to be harvested in June, 6 months after the lease has terminated. Because Christie knew the date the lease terminated, traditional rules would not allow her to harvest the wheat crop.

Under Delaware statute, in the absence of a written contract to the contrary, no tenant, nor a landlord, shall injure crops while the crops are growing, and the tenant shall remove or carry over crops as is the custom in the community at a reasonable time so future crops may be sown (25 Del. Laws, c. 67 § 6708).

There is an exception, however, to outgoing tenants producing corn. When a tenant surrenders possession of premises planted in corn, and the surrendering tenant does not harvest that corn, the incoming tenant may harvest that corn and allocate harvest expenses to the crop (25 Del. Laws, c. 67 § 6709).

Improvement/Fixtures

A *fixture* is personal property attached to the land, which is regarded as a non-moveable part of the real property. Examples of a fixture would include a shed, cattle lots, or below-ground-level diesel and oil storage tanks. In Delaware, unless the lease specifies otherwise, tenants have the right to remove those tenant's fixtures that are necessary to the operation of his/her business at the end of the lease so long as those fixtures can be removed without damaging the fixture or the property (*Warrington v. Hignutt*, 1943).

Of course, a tenant does not have the right to remove fixtures that the landlord has placed on the property. Before adding fixtures to the leased property, tenants should draft an agreement making clear which fixtures are the tenants, that the tenant will remove the fixtures at the end of the lease, and the condition the property will be returned to when a fixture is removed. Drafting this agreement early could save issues down the road.

Good Husbandry Practices

Generally, agricultural leases include the implied duties that the tenant uses good husbandry or good farming practices on the leased property. Good husbandry practices conserve the fertility, usefulness, and value of the soil. For example, Billy is using the leased property for vegetable production and uses tillage practices that cause soil erosion and loss of soil fertility.

In this example, Billy does not meet the requirements for good husbandry practices. But if Billy is using proper tillage practices and follows a nutrient management plan on the leased property, then he would do his duty requiring good husbandry practices. Both parties should clearly define in the lease what will be considered good farming practices to limit potential disputes down the road.

Repairs

Questions often arise as to who is responsible for repairs or maintenance required to keep up the rented property. Ordinary repairs are those necessary to keep the leased property in working condition. Under this traditional view, a landlord is not required to make any repairs to a leased property during the life of a lease, and a tenant would only be required to make

those repairs necessary to keep the leased property in working condition—all at the tenant’s own expense.

This traditional view can be altered by the lease agreement. The landlord and tenant can specify the types of repairs the landlord will be required to make and the level of maintenance required of the tenant. For example, a lease could specify that the landlord is required to replace broken fences and that the tenant is required to keep all roads passable. The lease agreement could also specify how the tenant would be compensated for necessary repairs, such as whether the tenant receives a rent deduction for making repairs or whether the landlord is required to provide supplies for repairs and the tenant contributes the labor.

Entry During the Lease Period

One big issue which can arise is when the landlord (or someone on the landlord’s behalf) may or may not enter on the leased property. Both tenants and landlords should work to clearly define the situations when a landlord may enter the leased property. This right of entry could be limited to reasonable times when the landlord wishes to view tillage operations, planting, or harvesting. The tenant may want to allow the landlord reasonable times to enter the property to make repairs. At the same time, landlords may want to preserve rights to the property for occasional recreational use such as hunting, fishing, or hiking.

One consideration for both parties in the lease termination process is allowing new tenants on the property after harvest but before the current lease has terminated. This allows a new tenant to begin tillage or fertilizing prior to the existing lease terminating. Many landlords may want to include such a provision in any lease to smooth the transition between tenants. Although landlords and tenants may not realize it when entering into a lease, leases may terminate with both parties upset with each other. Including a provision upfront allowing new tenants the right to enter under limited situations is one good way to address and ease the situation, especially if both the current tenant and landlord are not communicating.

Insurance

Both parties need to carry liability insurance on the leased property. This is good business practice and protects both landlord and tenant from liability claims. The landlord should carry insurance on all structures located on the leased property to protect against loss. The tenant should carry insurance on his/her own personal property, such as tools and equipment, located on the leased property.

Crop insurance coverage will depend on the type of lease the landlord and tenant share. If a fixed cash rent lease or a flex rent lease is used, the tenant will be responsible for ensuring the crop. A landlord may want to include a clause in the lease to ensure the tenant carries a minimum level of crop insurance coverage to guarantee the tenant can pay the rent. Using a crop share lease requires the landlord and tenant to split the cost of crop insurance coverage based on the percentage of the crop owned by each party. With a custom farming contract, the landowner needs to ensure the entire crop.

Failure to Pay Rent

Delaware law allows for all of a tenant’s non-exempt personal property on the leased property to be sold to recover unpaid rent (25 Del. Laws, c. 67 § 6705). The property must belong to the tenant, and the tenant must be behind in the payment of rent. The tenant’s property can include growing crops. Property to be sold must be appraised and sold at a sheriff’s sale. If the lease has not been terminated and the tenant is not paying rent, then the landlord must go through a judicial process to gain the right to sell the tenant’s personal property on the leased premises in order to collect unpaid rent.

A process for failure to pay rent should be spelled out when developing the lease. The process should include specific language addressing when rent is considered late; is it late after 1 day or after 1 month? Both landlords and tenants should include language requiring mediation or arbitration to settle these disputes; doing so, in many cases, can resolve disputes more quickly than the court system.

Should the tenant fail to pay rent, Delaware law applies a preference of remedy:

1. A quantity of grain or other produce equal to the amount of rent due is

- applied to the rent before it is applied to any other tenant debt.
2. Any remaining produce is then applied to other debts.
 3. If rent is to be paid in a particular crop, whatever amount of that crop harvested is first applied to rent.
 4. If crops are planted and growing yet not ready for harvest at the time the rent is due, the person executing the lease rent due is responsible for cultivating and caring for those crops.
 5. Before grain or produce may be removed from land with rent due, the landlord or other person entitled to rent must be paid the amount in arrears first.

Rental Fees

What to charge or pay for rented land hinges on many variables. Many times, a landlord will hear what the tenant is paying for other land leases and feel they should charge a higher fee. The fees the producer can afford depend on several factors. These include, but are not limited to:

- Distance from the home farm
- Amount of land within the lease
- Previous use of the land
- Soil type, structure, and topography
- Access to irrigation or rights to water.

The closer a producer is to their home farm or base has a direct bearing on the value of the land. Moving farming equipment over public roads takes time. Agricultural tires are not designed for road use, and they will wear out much quicker when traveling on paved roads. If the producer needs to travel several miles with their equipment, the land may not be as valuable to the producer.

Having 100 contiguous acres to rent is more appealing to agronomic crop producers than 20 to 30 acres unless the land borders other rented land. For a horticultural crop producer, 10 to 20 acres may be ideal if there is access to water for irrigation.

For someone planning organic production, the previous use of the land is critical. To become certified organic, the land can have only approved pesticides used for a period of 3 years. If the producer must produce organically for 3 years before becoming

certified, the land may not be nearly as valuable as land with no unapproved pesticides previously used.

Knowing the soil type, structure, and topography may impact the potential rental value. If the topography slopes enough that the land is only suitable for grazing, the rent may not be as high as more level land suitable for horticultural crop production.

Communication between landlord and tenant regarding rental fees is critical to successful long-term relations. If either party is dissatisfied with the other's performance, talking through the issues can result in both parties agreeing to terms, thus preserving the relationship.

Buying Property

When deciding to go from leasing to buying farmland, first find a quality farm real estate agent. A good farm real estate agent will know what you need to consider when purchasing farmland, will have an idea of what to expect, will be less stressed in the process, and will catch things you might not notice. Do not be afraid to utilize a good farm real estate agent.

Some may not need the real estate agent to help find farmland; the property you want to buy may become available, and you just need to know the process to follow to purchase the property on your own.

First, do your homework. Does the property have the soil to support your operation? Consider reviewing the soils at the local Natural Resource Conservation Office to look at a soil survey of the property or go online at <http://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm>

Have you looked at your financials to make sure you and your lender can support buying the property? Consider requesting the last few years of the seller's Schedule F to get an idea of the costs and revenues to help you and your accountant determine the land's profitability. Does the property match your goals for your farm operation? What kind of neighbors will you have? Is the property in a good location for you, near your home or the market you hope to supply? Does the property have access to water?

Next, are there use restrictions that impact your use of the farm? On a trip to the local planning and zoning office, you should be able to find out if zoning regulations allow your proposed farming practices and any value-added production and sales you want to

pursue. The zoning office should also know if the property is enrolled in a land preservation program. Next, visit the local soil conservation district to find out if current or previous owners have enrolled part or all of the land in a state or federal conservation program, which may impose temporary restrictions on the land's use.

Once you have considered these and other questions you or your realtor might have, hire an experienced title attorney to review the property's title. This is not a step you can skip or even attempt to do on your own. You will need someone who has checked the title before to determine what temporary or permanent land uses, easements, rights-of-ways, or other restrictions/limitations could exist on the property. You need to know if the property has clear right-of-access or if a neighbor has an easement to use the property you are considering to access their own property. You will want to know if a drainage easement crosses the property or if an existing conservation easement could limit how you can use the property. Never take the seller's word as to what restrictions exist. A good title attorney will search the chain of title (all the deeds, easements, and other restrictions that would have been granted by previous owners) back to the original grant to the first owner. A good title attorney will be able to tell you if the current owner also owns the mineral estate or if a previous owner has retained ownership.

You should also ensure that you get an appraisal of the property to help you determine how much to offer for the property. Once you have the appraisal and are ready to make an offer, work with your attorney on terms you want to be included in the purchase contract. Will you need the seller to make certain repairs? Will fences need to be fixed, or a barn, or some other equipment? Clearly define what stays on the property when you buy it, especially if equipment on the property is also conveying.

If the buyer accepts your offer and any additional requirements, then you will close on the property. Working with an attorney will help ensure that the proper closing documents are prepared, such as the deeds, any state-required documents, mortgage documents, loan notes, and the like. Once all the documents are signed, notarized, and the deeds filed with the county, then the sale is complete, and you are the proud owner of your own farmland.

Sample Termination Letter

Date:

To:

You are being given notice of an intent to terminate the lease on agricultural property described as: _____ . This tenancy will terminate on the first day of _____, 20____.

You will therefore take notice to govern yourself accordingly.

Sincerely,

Print Name

Signature

References

Hamilton, Neil D. Adjusting Farm Tenancy Practices to Support Sustainable Agriculture, 12 J. of Agric. Taxation and Law 226 (1990).

Internal Revenue Service, *Publication 225: Farmer's Tax Guide* (Oct 1, 2013) available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>

North Central Farm Management Extension Committee, *AgLease101*, available at <http://aglease101.org>

North Central Farm Management Extension Committee, *Crop Share Rental Agreements For Your Farm* (Dec 2011), available at <http://aglease101.org/DocLib/docs/NCFM-EC-02.pdf>

North Central Farm Management Extension Committee, *Fixed and Flexible Cash Rental Agreements For Your Farm* (Dec 2011), available at <http://aglease101.org/DocLib/docs/NCFM-EC-01.pdf>

Legal References

21 Am. Jur.2d *Crops* § 27 (2014).

Warrington v. Hignutt, 42 Del. 274 (1943).

Del. Code Ann. tit. 25, § 6702 (West).

25 Del. Laws, c. 67 § 6702(d). (West, 2021).

25 Del. Laws, c. 67 § 6705. (West, 2021).

25 Del. Laws, c. 67 § 6708. (West, 2021).

25 Del. Laws, c. 67 § 6709. (West, 2021).

Note: This publication provides general information about legal issues regarding agricultural land leasing and real estate purchases and should not be construed as legal advice. It should not be cited or relied upon as legal authority. State laws vary, and no attempt is made to discuss the rules of states other than Delaware. For advice about how the issues discussed may apply to your individual situation, please consult an attorney.

[1] For a more detailed review of the advantages and disadvantages of a cash lease for either party, see North Central Farm Management Extension Committee, Fixed and Flexible Cash Rental Agreements For Your Farm (Dec 2011), available at <http://aglease101.org/DocLib/docs/NCFMEC-01.pdf>.

[2] See North Central Farm Management Extension Committee, Fixed and Flexible Cash Rental Agreements for Your Farm (Dec 2011), available at <http://aglease101.org/DocLib/docs/NCFMEC-01.pdf>.

[3] For information on how to set a flexible rental rate, see North Central Farm Management Extension Committee, Fixed and Flexible Cash Rental Agreements for Your Farm (Dec 2011), available at <http://aglease101.org/DocLib/docs/NCFMEC-01.pdf>.

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