

Tackling the Tenure Problem: Promoting Land Access for New Farmers as Part of a Climate Change Solution

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*Don't undertake a project unless it is
manifestly important and nearly impossible.*
— Edwin Land

*Access to land is one of the biggest challenges facing agricultural producers,
particularly beginning farmers.*
— Mary Bohman, USDA Economic Research Service Administrator

I. INTRODUCTION

Academics, environmentalists, scientists, and pop culturists have claimed for nearly two decades that humans have entered a new epoch in the Earth's history, due in part to the scale at which we have altered the face of the planet through agriculture.¹ The human footprint on the global environment has become so deep that some scientists have urged the redesignation of our moment in geological time.² Paleoclimatologists have coined the term “Anthropocene” to signify the start of this new epoch.³ The role of humans in causing climate change is a hallmark of the Anthropocene.

Climate change is the result of an increased amount of chemicals in the Earth's atmosphere; this chemical buildup blocks infrared radiation (generated from the Sun) from reflecting off the Earth's surface back into space.⁴ As a result, heat that no longer reflects

1. See Will Steffen et al., *The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?*, 36 *AMBIO* 614, 614–21 (2007); see also Elizabeth Kolbert, *Enter the Anthropocene—Age of Man*, *NAT'L GEOGRAPHIC*, Mar. 2011, at 61.

2. James Ming Chen, *Anthropocene Agricultural Law*, 3 *TEX. A&M L. REV.* 745, 755 (2016).

3. Kolbert, *supra* note 1.

4. See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 *CORNELL L. REV.* 1153, 1161 (2009).

back into space remains trapped in the Earth's atmosphere, creating a rise in temperature akin to how a greenhouse operates. Thus, scientists have dubbed these heat-trapping chemicals greenhouse gases ("GHGs").⁵

Climate change is "unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level."⁶ Accordingly, to the extent that a "climate change debate" still exists in parts of the world, the discourse has largely shifted beyond whether climate change exists to how we should combat the threat.⁷

One course of action involves examining our modern industrial agricultural practices, as they contribute to climate change in staggering ways. The main GHG contributors to climate change are carbon dioxide (CO₂), methane (CH₄), and nitrous oxide (N₂O).⁸ Twenty-five percent of GHGs produced in industrialized nations result from agriculture.⁹ Livestock production alone is responsible for eighteen percent of GHG emissions—the equivalent of 7.1 billion tons of carbon dioxide.¹⁰ Even more significant, livestock generates sixty-five percent of human-related nitrous oxide and thirty-five percent of methane, which have 296 times and 23 times the global warming potential of carbon dioxide, respectively.¹¹ In addition, some estimates predict that changes in land use to raise more livestock (i.e., clearing forests to provide pasture for animals) result in global emissions of carbon

5. *Id.*

6. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, at 30 (2007).

7. Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1531 (2009).

8. See *Causes of Climate Change*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/climate-change-science/causes-climate-change> [<https://perma.cc/BJG5-SRHJ>] (last visited Apr. 4, 2017).

9. See Jason J. Czarnetzki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263, 263 (2011) (citing Elisabeth Rosenthal, *To Cut Global Warming, Swedes Study Their Plates*, N.Y. TIMES, Oct. 23, 2009, at A6).

10. HENNING STEINFELD ET AL., FOOD & AGRIC. ORG. OF THE U.N., LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS, at xxi (2006).

11. *Id.* at 82.

dioxide to the tune of 2.4 billion tons per year.¹² What we eat impacts the amount of GHGs we emit.¹³

With population projections reaching 9.7 billion by 2050,¹⁴ determining how to feed the world in the face of climate change has led scholars and researchers to dub it a “super wicked problem.”¹⁵ While agriculture is a main contributor to climate change, it can also be part of the solution if we can capitalize on agriculture’s mitigation potential.¹⁶ For example, agriculture can assist with removing carbon dioxide from the atmosphere via carbon sinks—a process called soil carbon sequestration.¹⁷ Through photosynthesis, plants assimilate carbon and return some of it to the atmosphere through respiration, but the remaining carbon resides in plant tissue and returns to the soil when the plants die. Experts have recognized that building the capacity of soils to continue storing carbon (through the use of cover cropping, crop rotation, and other organic practices) can be an important ally in battling climate change.¹⁸ Soil sequestration could substantially relieve our atmospheric impact, with some estimates predicting that soils have the capacity to mitigate climate change by matching anthropogenic emissions at an equal rate for

12. *Id.* at 90.

13. Roni A. Neff et al., *Yesterday’s Dinner, Tomorrow’s Weather, Today’s News? US Newspaper Coverage of Food System Contributions to Climate Change*, 12 PUB. HEALTH NUTRITION 1006 (2009).

14. *See World Population Projected to Reach 9.7 Billion by 2050*, U.N. DEP’T ECON. & SOC. AFF. (July 29, 2015), <http://www.un.org/en/development/desa/news/population/2015-report.html> [<https://perma.cc/T5MQ-KR2X>].

15. Lazarus, *supra* note 4, at 1158–59 (citing Horst W. J. Rittel & Melvin. M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCI. 155, 160–69 (1973) (coining the phrase “wicked problems” to describe the particularly difficult-to-solve social policy problems)).

16. *See The Mitigation of Climate Change in Agriculture (MICCA) Global Program*, WEADAPT (Dec. 14, 2012), <https://www.weadapt.org/knowledge-base/synergies-between-adaptation-and-mitigation/mitigation-of-climate-change-in-agriculture-micca> [<https://perma.cc/Y8XZ-RRYC>].

17. *See generally* FRANCESCA FELICANI ROBLES, FOOD & AGRIC. ORG. OF THE U.N., CLIMATE CHANGE AND FORESTRY LEGISLATION IN SUPPORT OF REDD+ (2015).

18. *See* U.N. CONFERENCE ON TRADE & DEV., WAKE UP BEFORE IT IS TOO LATE: MAKING AGRICULTURE TRULY SUSTAINABLE NOW FOR FOOD SECURITY IN A CHANGING CLIMATE (2013); *see also* Press Release, U.S. Dep’t Agric., Agriculture Secretary Tom Vilsack and Senior White House Advisor Brian Deese Announce Partnerships (Apr. 23, 2015), <https://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2015/04/0109.xml> [<https://perma.cc/C9N9-QLDR>].

the next forty years.¹⁹ Such predictions demonstrate that a key solution to climate change could include investing in and promoting local, small scale, organic, diversified farming operations that can employ climate change mitigation techniques.²⁰

Healthy, functioning ecosystems mitigate climate change with the vegetation they support, which absorbs carbon dioxide and sulfur dioxide and releases oxygen, thereby regulating GHGs.²¹ The benefits of employing farm management techniques that replicate natural systems include

improving the watershed by increasing and improving wetlands, water quality, flood control, and ground water recharge; greenhouse gas reduction and climate change impact control; soil and erosion control; delivery of nutrients to and from riparian vegetation; pollination; food provision; and they may involve expansive umbrella habitats to augment biodiversity.²²

On the other hand, large-scale conventional agriculture that relies on monocultures and synthetic inputs causes soil degradation and thereby contributes to climate change, as degraded soils have less ability to absorb carbon.²³

Scholars have recognized the problems embedded in the current modern industrial agricultural complex as advocates strive to promote a different system. Some argue for abandoning the conventional system of agriculture in favor of a “civic agriculture”—a system that “embodies a commitment to developing and strengthening an economically, environmentally, and socially sustainable system of agriculture and food production that relies on

19. DANIEL KANE, NAT'L SUSTAINABLE AGRIC. COAL., CARBON SEQUESTRATION POTENTIAL ON AGRICULTURAL LANDS: A REVIEW OF CURRENT SCIENCE AND AVAILABLE PRACTICES 22 (2015).

20. Indeed, prominent climate organizations regard sustainable agriculture initiatives, including those focused on land tenure, as a key aspect of addressing climate change. *See, e.g., Adaptation Committee*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/adaptation/groups_committees/adaptation_committee/items/6944.php [<https://perma.cc/9MZJ-4BFP>].

21. *See* Keith H. Hirokawa & Charles Gottlieb, *Sustainable Habitat Restoration: Fish, Farms, and Ecosystem Services*, 23 FORDHAM ENVTL. L. REV. 1, 35–36 (2012).

22. *Id.* at 16.

23. *See* Shelley Welton, Michela Biasutti, & Michael B. Gerrard, *Legal & Scientific Integrity in Advancing a “Land Degradation Neutral World,”* 40 COLUM. J. ENVTL. L. 39, 50 (2015).

local resources and serves local markets and consumers.”²⁴ While civic agriculture holds great promise for combatting climate change and building a healthier, more resilient food system, there are several barriers to employing such a solution. The most “widely acknowledged barrier to entry” new farmers face is access to land.²⁵ If small scale, sustainable farming operations are one goal from the menu of possible climate change mitigation strategies, then the challenge of land access and the quest for achieving stable land tenure must be squarely addressed.²⁶

A confluence of different factors has created the current barriers to land access, making it difficult for farmers—especially new farmers—to engage in the types of practices that would mitigate climate change. The landscape of American agriculture has changed drastically in the last fifty years. The number of farms has been steadily shrinking, dropping from six million farms in 1935 to approximately two million farms in 2012.²⁷ Two centuries ago, the majority of Americans farmed and produced most of the food they ate.²⁸ Today, less than two percent of Americans farm.²⁹ In addition, the number of new farms has been steadily decreasing for the last three decades.³⁰ Furthermore, sixty percent of farm operators own their land and are fifty-eight years old on average, but do not have a succession plan for their farms upon their

24. THOMAS A. LYSON, *CIVIC AGRICULTURE: RECONNECTING FARM, FOOD, AND COMMUNITY* 63 (2004).

25. Mary C. Ahearn, *Theme Overview: Addressing the Challenges of Entry into Farming*, CHOICES, 4th Quarter 2016.

26. See JULIA FREEDGOOD & JENNIFER DEMPSEY, AM. FARMLAND TRUST, *CULTIVATING THE NEXT GENERATION: RESOURCES AND POLICIES TO HELP BEGINNING FARMERS SUCCEED IN AGRICULTURE* 11 (2014).

27. Roberto A. Ferdman, *The Decline of the Small American Family Farm in One Chart*, WONKBLOG (Sept. 16, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/16/the-decline-of-the-small-american-family-farm-in-one-chart> [<https://perma.cc/ACS4-RVK5>].

28. Stanley Lebergott, *Labor Force and Employment, 1800–1960*, in *OUTPUT, EMPLOYMENT, AND PRODUCTIVITY IN THE UNITED STATES AFTER 1800*, at 117, 118 (Dorothy S. Brady ed., 1966).

29. *Fast Facts About Agriculture*, FARM BUREAU, <http://www.fb.org/newsroom/fastfacts> [<https://perma.cc/2NCG-W9ZS>] (last visited Apr. 3, 2017).

30. Ahearn, *supra* note 25 (citing NAT’L AGRIC. STATISTICS SERV., U.S. DEP’T OF AGRIC., AC-12-A-51, *2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA* (2014)). A new or beginning farm is one whose principal operator has been operating the same farm for ten years or less. According to the U.S. Department of Agriculture’s 2012 Census of Agriculture, less than twenty-two percent of all farms are new farms.

retirement.³¹ When these aging operators try to sell their land to retire, they are met with a market of new farmers who cannot afford to buy due to the cost-prohibitive environment of rising prices for prime agricultural real estate.³² The average cost of farmland in the United States is \$3020 per acre.³³ Because purchasing land at such prices is often not an option, most new farmers choose to lease the land they farm. Nearly forty percent of farmers in the United States lease the land they work.³⁴

For those who advocate on behalf of both farmers and the environment, several legal issues emerge from this picture. First, advocates must learn how to promote land access while preserving farmland as part of supporting a diversified and secure local food system in the face of climate change.³⁵ A second related issue that arises from this scenario involves farmland succession. For many farmers near the age of retirement, their land value may be their primary asset and, therefore, critical to funding their retirement. The need for retiring farmers to seek maximum value for their land confounds the ability of new farmers with limited capital to acquire property. Finally, given that most new farmers are unable to purchase land, advocates must determine how to create affordable and stable access to land for those who rent it. Therefore, the primary challenges that advocates face today in transitioning our food system toward a civic agriculture as part of a climate change solution is determining how to use the law to (1) promote land access and preserve farmland, (2) facilitate succession, and (3) ensure equitable and stable land tenure arrangements for new and retiring farmers.

Tenure essentially means “to hold.”³⁶ Land tenure is a culture’s “perceived institutional arrangement of rules, principles, procedures, and practices, whereby a society or community defines control over, access to, management of, exploitation of, and use of

31. *2014 Tenure, Ownership, and Transition of Agricultural Land (TOTAL)*, U.S. DEP’T OF AGRIC., https://www.agcensus.usda.gov/Publications/2012/Online_Resources/TOTAL/index.php [<https://perma.cc/JCN9-N93Z>] (last updated Sept. 8, 2015).

32. FREEDGOOD & DEMPSEY, *supra* note 26, at 11.

33. See NAT’L AGRIC. STATISTICS SERV., U.S. DEP’T OF AGRIC., LAND VALUES—2015 SUMMARY, at 4 (2015).

34. *2014 Tenure, Ownership, and Transition of Agricultural Land (TOTAL)*, *supra* note 31.

35. Solving this problem is crucial, as local and diversified operations help protect the food supply against extreme weather events associated with climate change.

36. HENRI DEKKER, IN PURSUIT OF LAND TENURE SECURITY, at 1 (2006).

means of existence and production.”³⁷ One of the most pressing legal and governance challenges in responding to the threats of climate change involves increasing opportunities for land access and stable tenure so that farmers can engage in small scale, sustainable agriculture. Innovative combinations of various legal instruments and practices have potential to address the challenges of feeding a growing population locally and globally. Models in New England can be scalable and replicable across diverse sectors for more sustainable development nationwide and globally.

This Article explores the different legal tools that can be used to create innovative land tenure arrangements that mitigate the effects of climate change, examining such arrangements through the use of case studies. This Article seeks to disseminate information that allowed for five different successful land access arrangements in the hopes that other farmers who find themselves similarly situated might be able to replicate portions of these arrangements to become part of the climate change solution, rather than contributing to the problem. Part II of this Article discusses the legal tools—limited liability companies (“LLCs”), leases, and conservation easements—that farmers and their advocates are using in innovative ways to preserve farmland, facilitate succession, and achieve equitable and stable tenure so that civic agriculture can play a prominent role as a partial solution to climate change. Part III examines these legal innovations in depth through the lens of five separate case studies. The Article concludes that such legal innovations are an instrumental part of responding to the challenges posed by climate change and should be replicated where possible to contribute to the welfare of robust and resilient local food systems.

II. LEGAL INNOVATION AS PART OF THE LAND ACCESS SOLUTION: LLCS, LEASES, AND CONSERVATION EASEMENTS

The legal tools discussed in this Part are innovatively combined to create opportunities for new farmers to access farmland to sustainably grow food. These combinations create a synergistic effect, resulting in land access for new farmers, a secure exit for retiring farmers, and sustainable stewardship of the land for future generations in the face of climate change. LLCs are examined first

37. *Id.*

as a mechanism for facilitating farm succession, followed by an analysis of how conservation easements can be used to create affordable access to farmland. This Part concludes with a discussion of how long-term lease arrangements, such as ground leases, can allow for stable and equitable land tenure for new farmers as an alternative to fee simple ownership.

A. Using LLCs in a Farm Succession Plan to Allow Land Access for Beginning Farmers

A limited liability company is a business structure that is a separate legal entity created under state law, comprised of people who own and control the business.³⁸ The LLC has its origin in partnership law, but encompasses some advantages from corporate law as well.³⁹ In a corporation, equity owners are referred to as shareholders, but in an LLC, the equity owners are often called “members.”⁴⁰ Members own “interests” in the LLC, in contrast to shareholders who own shares in a corporation.⁴¹

An LLC is so named because it advantageously limits the liability of its members.⁴² A member’s liability is often limited to investments the member made into the company and does not usually extend to the member’s personal property.⁴³ Another advantage of creating an LLC is the tax treatment LLCs are afforded. LLCs are eligible to receive “pass through” taxation.⁴⁴ Thus, the business does not pay income tax and there is no need to file a corporate tax return. Rather, LLC members report and pay tax on their business profits through their personal tax returns.

38. Ann K. Wooster, *Construction and Application of Limited Liability Company Acts—Issues Relating to Formation of Limited Liability Company and Addition or Disassociation of Members Thereto*, 43 A.L.R. 6TH 611 (West 2009); *see also* 51 AM. JUR. 2D LIMITED LIABILITY COMPANIES § 2 (West 2017).

39. Wooster, *supra* note 38.

40. Precise terminology often varies by state. *See, e.g.*, N.Y. LTD. LIAB. CO. LAW § 402(c)(1) (McKinney 2016) (discussing LLC owners as members and the interests owned).

41. *Id.*

42. *See* FAITH GILBERT, *COOPERATIVE FARMING—FRAMEWORKS FOR FARMING TOGETHER* 26.

43. For example, if an LLC member owns a car personally—meaning not associated with the LLC business—and the LLC defaults on a loan, the bank usually cannot take possession of the car because the car is personal property and not property of the business. Liability for the loan would be limited to the property in the LLC.

44. *See* GILBERT, *supra* note 42, at 26.

As a means of promoting access to land and facilitating succession, creating an LLC can assist in transferring farmland from one retiring generation to the next without requiring new farmers with limited capital to take out a loan or mortgage.⁴⁵ For example, suppose that a retiring farming couple creates an LLC and transfers the farmhouse, barns, hoop houses, equipment, and land to the LLC. For purposes of this example, assume the retiring farmers structure the LLC to have one hundred interests (although they could realistically choose any number of interests they wish). The retiring couple finds a new farming couple interested in purchasing the farm, but the new farmers do not have substantial start-up capital. To begin the ownership transition, the retiring farmers—as senior farmers—each own forty-five interests. Collectively, they own ninety interests, or ninety percent of the LLC, which typically means they receive ninety percent of the farm's profit. The new farmers—as junior farmers—each purchase five interests of the LLC with their start-up capital. Collectively, the junior farmers own ten percent of the LLC, which means they will receive ten percent of the farm's profit. As the junior farmers work the land, grow their business, and begin making larger profits, they purchase additional shares of the LLC and thereby earn increasing percentages of the farm's profit until eventually they purchase all the interests and own the entire business.⁴⁶

Junior farmers can increase the number of interests they own in a variety of ways.⁴⁷ One option is to structure the LLC so that the junior farmers pay rent to the LLC to use the property, with the rent constituting payment toward the purchase of LLC interests. In this way, the LLC effectively functions as a lease-to-own arrangement where rent payments count toward the purchase price of the farm, allowing the junior farmers to build equity with each passing year. Within the operating agreement—the document that outlines the rules by which the members of the LLC will abide—the parties can agree that the junior farmers will be expected to purchase a set number of interests each year. Alternatively, the parties may state in their operating agreement that the junior farmers will receive interests in exchange for working the land—an

45. This makes an LLC an attractive option for new farmers who are unable to secure a bank loan for their farming operation or who would like to avoid carrying a heavy debt load.

46. See GILBERT, *supra* note 42, at 37.

47. *Id.* at 26.

arrangement sometimes called “sweat equity”—rather than by making monetary payments to the LLC. The parties to this type of arrangement would determine ahead of time how many interests a certain amount of farm labor is worth. In either arrangement, an appraiser should assist in assigning value to the LLC and determining the amount of each share.

In order to create an LLC under state law, any person (or group of persons) can form an LLC for any lawful purpose by filing a certificate of organization with the appropriate office (often the secretary of the state) and paying a filing fee.⁴⁸ The parties then need to determine whether the LLC will be a member-managed LLC (where the members determine the day-to-day operations of the business) or whether the LLC will be manager-managed (where there is a designated manager who is the person responsible for running the day-to-day operations of the business).⁴⁹ The members of the LLC also draft the operating agreement, which should include provisions regarding profits, voting rights, meetings, procedures for transferring ownership, and rules/procedures for approving special matters.⁵⁰ Because LLCs are largely governed by their operating agreements (which are drafted by the members) and state statutes do not contain many rules for how LLCs should be managed, LLCs are flexible business structures that allow the members wide discretion in how to arrange the different classes of membership and manage the business.⁵¹

Although there are many advantages to forming an LLC and using this legal entity as a method of farm succession (such as limiting personal liability, pass-through taxation, and flexibility in governance), both senior and junior farmers should carefully consider whether forming an LLC is right for their situations.⁵² For senior farmers, LLCs are attractive because LLCs allow them to issue interests of the business and transfer them in a measured, incremental way so they can relinquish ownership of the land gradually.⁵³ Additionally, senior farmers who desire their land be

48. See 51 AM. JUR. 2D LIMITED LIABILITY COMPANIES § 4 (West 2017).

49. See Wooster, *supra* note 38.

50. See UNIFORM LIMITED LIABILITY COMPANY ACT § 105 (UNIF. LAW COMM’N 2013).

51. See GILBERT, *supra* note 42, at 15.

52. See ANNETTE M. HIGBY ET AL., A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 11–14 (2006).

53. For example, the junior farmers might be required to collectively purchase ten shares a year for ten years until the ownership transfer is complete.

used in certain ways or expect that new farmers will employ certain conservation and environmental stewardship practices may create rules in the operating agreement that other incoming members must follow (such as requiring the use of certain climate change mitigation strategies like cover cropping, crop rotation, and buffer zones to prevent soil erosion and water pollution).

New farmers who are contemplating entering into an LLC arrangement to take over an existing farm should know that it allows them to begin gaining equity, as opposed to simply leasing land from the retiring farmers. If the new farmers ultimately decide not to purchase the farm, they can sell the interests they have acquired. However, the acquired interests could be burdensome if the senior farmers do not wish to buy them back, as another new farmer must then be found to purchase the interests and agree to the terms of the operating agreement. New farmers should also be aware that they will be subject to the LLC's operating agreement and therefore must abide by whatever conservation measures the senior farmers set forth in the agreement. However, senior farmers should understand that once they sell the business and are no longer members of the LLC, the remaining LLC members (the junior farmers and any new farmers the junior farmers allow to join) can redraft the terms of the operating agreement; any conservation measures or environmental practices could be subject to change based on the desires of the new LLC members. Thus, while an LLC can be a useful farm succession tool and a means of providing land access for new farmers, it alone cannot guarantee the permanent use of conservation measures.

B. Using Conservation Easements to Reduce Cost Barriers

If farmers wish to transfer their land via an LLC but are also concerned with permanently protecting land from development and ensuring that certain conservation, agroecological, or mitigation practices be used, then conserving their land with an easement provides that assurance. A conservation easement is "a voluntary legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in

order to protect its conservation values.”⁵⁴ The landowner will sell or donate the conservation easement while still retaining the right to own, sell, and devise the land to any heirs. Essentially, the landowner sells to the land trust (or other entity) the right to develop the land⁵⁵ because the conservation easement is often worded in such a way that it prohibits subdivision or development of the property.⁵⁶ Some states allow for landowners to sell affirmative agricultural easements, which not only prohibit development on the land but also require that the land be kept in agricultural use, meaning it must be farmed.⁵⁷ Thus, depending on the drafted terms, an easement can, among other things, permanently protect farms from future development, promote the agricultural uses of the farms, safeguard prime agricultural soils, preserve the quality and quantity of groundwater on the farm, and support biological diversity.

Conservation easements can be written to contain myriad conditions to mitigate the effects of climate change. For example, they can be drafted to require the use of certain agricultural practices (e.g., organic or agroecological practices, use of regenerative soil conservation measures, or maintenance of wetlands, surrounding forests, or other buffer zones) while also prohibiting other practices (such as the use of synthetic chemicals typical in conventional agricultural operations).⁵⁸ Conservation easements could also mandate the use of specific climate change mitigation measures, such as cover cropping to build organic

54. *Questions?*, LAND TRUST ALL., <http://www.landtrustalliance.org/what-you-can-do/conserv-your-land/questions> [<https://perma.cc/QC6D-7P4E>] (last visited Mar. 26, 2017); *see also* Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 168 (2007).

55. *See* 34A AM. JUR. 2D FEDERAL TAXATION ¶ 143,900 (West 2017); *see also* I.R.C. § 2031(c)(5)(D) (2012).

56. A conservation easement may cover all or part of the land and can encompass wetlands, land used for wildlife habitat such as woodlands, as well as the land that is farmed or pastured.

57. *See, e.g.*, ME. STAT. tit. 33, § 467 (2016); MD. CODE ANN., REAL PROP. § 2-118 (West 2016). *See generally* Jane Ellen Hamilton, *Beyond Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, LAND TRUST ALL., Summer 2013, <http://www.landtrustalliance.org/news/beyond-agricultural-conservation-easements-ensuring-future-agricultural-production> [<https://perma.cc/QLY5-CAAN>] (last visited Apr. 26, 2017); Kendra Johnson, *Conserving Farmland . . . But for Whom?* (Mar. 2008) (master's thesis, University of California, Davis), http://www.thegreenhorns.net/wp-content/files_mf/1364840037kj-mastersthesismar08.pdf [<https://perma.cc/35EA-N5S4>].

58. *See* Mary Jane Angelo et al., *Small, Slow, and Local: Essays on Building a More Sustainable and Local Food System*, 12 VT. J. ENVTL. L. 353, 398–99 (2011).

matter in the soil, crop rotation to maintain soil health and fertility, and the use of buffer zones to prevent nutrient runoff and soil erosion during times of heavy rain.⁵⁹

Aside and apart from its environmental benefits, a conservation easement can also be a means to promote access to land because selling a conservation easement can dramatically reduce the purchase price of a farm for new farmers while still providing a means of generating income to fund the senior farmers' retirement.⁶⁰ For example, assume that a retiring couple's equity is tied to their farmland, which has a real estate market value of \$400,000. A new farm couple wants to buy the farm but cannot afford such a high purchase price. The retiring farmers can sell a conservation easement to a land trust for \$250,000, which represents what the development rights to the property are worth. Because the farm can no longer be used for development due to the conservation easement, the market price of the farm drops to its agricultural value, which is \$150,000—an amount that the new farmers can afford. Thus, in this scenario, the retiring farmers receive the full value of their property (the land trust pays them \$250,000 for the conservation easement and the new farm couple pays them \$150,000 for the agricultural value of the farm) while the beginning farmers gain access to land at an affordable price that would otherwise be unavailable but for the placement of a conservation easement on the property.

For landowners, there are several advantages to selling a conservation easement. First, the sale can help generate income that can be used to partially fund retirement. Second, the conservation easement ensures that the land will be permanently protected against development. Unlike the operating agreement in an LLC, which is only binding on current owners, a conservation easement is binding on all current and future owners of the property. If the retiring farmers want to ensure the use of additional climate change mitigation practices, they can include those practices in the conservation easement, which then become binding on all future owners of the farm. Finally, when landowners

59. For more information regarding the types of conservation easement programs the federal government administers, see generally MARGARET KROME & GEORGE REISTAD, BUILDING SUSTAINABLE FARMS, RANCHES, AND COMMUNITIES: A GUIDE TO FEDERAL PROGRAMS FOR SUSTAINABLE AGRICULTURE, FORESTRY, ENTREPRENEURSHIP, CONSERVATION, FOOD SYSTEMS, AND COMMUNITY DEVELOPMENT (2016).

60. See Hamilton, *supra* note 57.

are willing to sell the development rights to their land, they may become eligible to receive income, property, and estate tax deductions.⁶¹

While the conservation easement is an important legal tool for creating land access, some experts believe that “the most important mechanism in these arrangements is that the holder of the easement is given a purchase option at the agriculturally-restricted market value.”⁶² Known in Vermont and New Hampshire as an Option to Purchase at Agricultural Value (“OPAV”), this mechanism requires a landowner who decides to sell to first offer the option to purchase the land to the easement/OPAV holder, such as the land trust. The owner of the OPAV has a right of first refusal to buy the property at its agricultural value, rather than its development value. Often, a land trust will hold the OPAV, exercise the option, and then sell the land to a new farmer at an affordable rate.⁶³ An OPAV operates to maintain the affordability of farmland by limiting a farm’s resale price to that of its agricultural value.⁶⁴

Massachusetts was the first state to begin using OPAVs in 1979.⁶⁵ The state-administered Agricultural Preservation Restriction Program oversees the sale of OPAVs in the state.⁶⁶ Under this program, the state will offer to pay a landowner the difference between the “fair market value” of the property and the “agricultural value” of the property in order to prevent developers from purchasing prime agricultural land.⁶⁷ An OPAV is triggered when land is offered for sale to anyone other than a family member. If a prospective non-familial buyer can demonstrate that he or she intends to keep the land in agricultural use, the OPAV-holder may waive the option to purchase the land. The Vermont Land Trust began purchasing OPAVs and incorporating them into

61. See Richardson, *supra* note 54, at 168.

62. Angelo et al., *supra* note 58, at 399.

63. See *id.*

64. See KENDRA JOHNSON ET AL., CAL. FARMLINK, CONSERVATION AND AFFORDABILITY OF WORKING LANDS: NINE CASE STUDIES OF LAND TRUSTS WORKING WITH NEXT-GENERATION FARMERS 19.

65. See JoAnne L. Dunec, *Conservation Easements*, NAT. RESOURCES & ENV'T, Fall 2009, at 60.

66. *Agricultural Preservation Restriction Program (APR)*, MASS. OFF. ENERGY & ENVTL. AFF., <http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html> [https://perma.cc/HT5T-MZND] (last visited Apr. 3, 2017).

67. *Id.*

conservation easements in 2003.⁶⁸ In Vermont, an OPAV is triggered when land is offered for sale to anyone other than a family member or qualified farmer (defined as a person who currently earns at least half of his or her income from farming, or who has farming experience and plans to operate the property as a farm).⁶⁹ In New Hampshire, the first and only OPAV in existence was used in a conservation easement to help transfer Wingate Farm in 2015 to the next generation of farmers.⁷⁰ Because OPAVs are so new in New Hampshire, there is not yet a statewide program or land trust that oversees the use and sale of this tool throughout the state.

OPAVs are significant as mechanisms for promoting climate-friendly agriculture in that they provide an additional layer of protection against farmland falling into the hands of developers. Moreover, when the owner of the easement and the OPAV is a land trust, the land trust can exercise its option to purchase the land and then vet potential buyers to ensure the land is sold to a farmer with a demonstrable commitment to sustainable, climate-friendly agriculture. When that new farmer wishes to retire and transfer ownership of the land, the land trust can again exercise its option to purchase under the terms of the OPAV to ensure the land remains in the hands of farmers committed to employing climate mitigation practices in their operations.

C. Innovative Leases that Promote Stable, Equitable Land Tenure

For those farmers who still cannot afford to purchase land even if an LLC is used as a transition mechanism and/or if a conservation easement is placed on the property to decrease the purchase price, leasing land is often the only available option. A farm lease is a legally enforceable contract between a landowner and a farmer in which the landowner grants the farmer the right to use the designated property during a set time period in exchange for

68. See Dunec, *supra* note 65; see also Katie Hannon Michel, *Landless: Legal & Policy Tools for Transferring Vermont Farmland to the Next Generation of Stewards and Food Producers*, 39 VT. L. REV. 461, 481–82 (2014); *Vermont Farmland Conservation Program*, VT. HOUSING & CONSERVATION BOARD, <http://www.vhcb.org/farmland-conservation.html> [<https://perma.cc/HK5Z-XV7W>] (last visited Apr. 3, 2017).

69. See *The Affordability Option: Keeping Farms Affordable for Farmers*, VT. LAND TRUST, <http://www.vlt.org/opav> [<https://perma.cc/27Z7-JCE7>] (last visited Apr. 4, 2017).

70. See *infra* Section III.D.

rent.⁷¹ Leasing is not an inherently innovative way to access farmland and is rarely as secure as a long-term arrangement such as outright ownership.⁷² From the farmer's perspective, a leasing situation is not as secure as full ownership because the year-to-year short-term leases that are typical in many agricultural leasing arrangements run the risk of not being renewed at the end of the season. Without assurances of longer-term access to the land, little incentive exists for farmers to implement vegetative buffer zones, incur the expense of cover cropping, or cultivate organic matter in the soil if there is no guarantee of remaining on the land for the next growing season.

However, there are certain kinds of lease arrangements that provide unique and valuable benefits to farmers and the land, including the opportunity for new farmers to build equity in the leased farm or the incentive to implement environmental conservation measures in a farm management plan by creating long-term, stable tenure situations.⁷³

A "ground lease" is an innovative way for new farmers to access land because it affords them the opportunity to build equity in a secure leasing arrangement.⁷⁴ Ground leases may benefit farmers who have enough capital to buy a farmhouse but not enough to buy the surrounding farmland. In a ground lease, the incoming farmer purchases and owns all of the buildings and structures on a property but pays rent for the farmland on a long-term basis.⁷⁵ Typically, the farmer would also own any improvements he or she makes to the house, barn, or other structures on the land.⁷⁶ The main benefit of a ground lease arrangement is that the farmer holds and builds equity in the buildings or structures and owns any improvements he or she makes to the buildings or structures, despite the fact that he or she could not otherwise own the farmland. Many ground leases allow for long-term, stable tenure

71. See Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 753 (1988).

72. See Edward Cox, *A Lease-Based Approach to Sustainable Farming, Part I: Farm Tenancy Trends and the Outlook for Sustainability on Rented Land*, 15 DRAKE J. AGRIC. L. 369, 373–74 (2010).

73. *Id.* at 391–92; see also Angelo et al., *supra* note 58, at 393.

74. For an excellent example of a model ground lease, see EQUITY TRUST, PRESERVING FARMS FOR FARMERS 31–63, and see also related commentary in *id.* at 65–78.

75. GILBERT, *supra* note 42, at 39.

76. 2 REAL ESTATE LEASING PRACTICE MANUAL ch. 57, Summary (West 2017).

situations that provide security approximating fee simple ownership.⁷⁷ For example, a ground lease could run for a lease term of ninety-nine years and contain a provision that the lease is both inheritable upon the lessee's death and/or assignable to a new tenant if the lessee chooses to relocate.⁷⁸ Ground leases may also contain a rolling provision, whereby the lease states that a new ninety-nine-year lease term automatically begins upon the expiration of the first ninety-nine-year lease term. Moreover, land trusts or other conservation-minded organizations are often the lessors executing a ground lease and therefore hold title to the underlying land. Thus, a farmer who purchases a farmhouse and barn on land rented from a land trust would not worry about a landlord breaking the lease to sell to a developer proposing a lucrative deal, because such a sale would violate the land trust's mission and purpose.

III. MODELS FOR SUCCESS: CASE STUDIES DEMONSTRATING INNOVATION IN ACTION

Although LLCs, conservation easements, and ground leases are each individually helpful means of accessing land, their true value is in their collaborative strength. When employed together, these tools can allow for access to farmland for the purposes of creating a civic agriculture that can mitigate, rather than exacerbate, the effects of climate change. The following case studies describe how such an effect is achieved.

A. Windswept Farmstead Cooperative, LLC: A Farm Succession Story Using an LLC⁷⁹

*To do this kind of arrangement, everyone has to be willing to give up
something to get something.*

— Eric Rector

77. See, e.g., 2 LA. PRAC. REAL EST. § 18:33 (2d ed. West 2016).

78. Angelo et al., *supra* note 58, at 399.

79. This Section relies on March 2015 telephone interviews with Eric Rector of Windswept Farmstead Cooperative, LLC, on file with the author. See also GROWING A FARMSTEAD COOPERATIVE, <https://farmsteadcooperative.org> [<https://perma.cc/ZL3X-ET5D>] (last visited Apr. 4, 2017).

1. Introduction

Eric and Alison Rector moved to Monroe, Maine on a 120-acre piece of farmland in 1990. Since that time, they have used the land as homesteaders to grow much of their own food while engaging in a variety of other enterprises. After the Rectors turned fifty in 2010, they began thinking about retirement and devising an exit strategy while still maintaining their lifestyles as homesteaders. Although the Rectors never farmed the land for a profit, they grew much of their own food using sustainable methods without the use of synthetic pesticides and fertilizers, and they wanted to see the land remain agriculturally and economically viable for future generations.

The Rectors wanted to stay on the land in a limited capacity while backing away from the various parts of the farm that were more physically intensive. To that end, they wanted to take on a less intensive role in maintaining their gardens, orchards, and livestock. They also wanted to build a smaller house on the hill on their property and vacate the farmhouse. They began wondering if there was an opportunity to allow a younger couple to take on bits of the farm work that they no longer wanted to engage in—and, if so, how they could create an equitable arrangement for the new farmers.

Eric realized that growing a strong farming business requires expending significant time and energy maintaining and improving the soil. As Eric puts it, “[y]ou are constantly working today for tomorrow and the next day and ten years from now.” Eric did not want to simply lease the land to new farmers because he wanted to transfer the farm in a way that allowed for new farmers to begin building equity—something a typical lease arrangement usually does not contemplate. Eric and Alison also wanted to provide an opportunity for new farmers to access land for a farm business without needing a mortgage.

2. Meeting the Right Match

The Rectors posted a listing for their farm on Maine Farmland Trust’s FarmLink matching site.⁸⁰ They received ten different responses to their posting, including one from James Gagne and

80. See ME. FARMLINK, <http://www.maineфарmlink.org> [<https://perma.cc/YY7Y-X9A2>] (last visited Apr. 4, 2017).

Noami Brautigam. For each farm couple they met, Eric and Alison hosted a lunch or dinner at the farm, gave a farm tour, and discussed what each person desired in a future arrangement. Eric said James and Noami most closely matched what they were looking for. Noami had ten years of farming experience already and a business plan, and James enjoyed farming as well, although he worked full-time as a program manager for a veterans housing services organization.

Eric created a limited liability company for the farm as a transition tool that would set forth the terms of the parties' understanding in an operating agreement and in a separate purchase and sale agreement ("PSA"). During a two-year transitional leasing period, the LLC essentially operates as a landlord, with Noami and James paying rent for the farmhouse and access to the land and equipment owned by the LLC. Rent is set at the cost of maintaining the assets being rented.

3. The LLC Arrangement

Eric wanted to create an LLC that would own all of the farmland (including the orchards) and also own all of the infrastructure on the eighteen-acre property (the farmhouse and barn). He notes that there are many different ways to structure such an arrangement; the key idea is that all parties agree to whichever method is ultimately chosen. In Eric's case, he enlisted an independent appraiser to obtain a fixed price for the entire LLC property. This would be the price of all the interests to be transferred over time, so long as the parties adhered to the scheduled buyout timeline. Eric structured the LLC so that it would contain 23,000 interests. Eric and Alison each individually owned fifty percent of the units (115,000 units each). Noami and James owned zero units to start.

At the end of a two-year leasing period, Noami and James became shareholders of the LLC as part owners and began buying Eric's and Alison's shares. At this point, Noami and James write two checks each month: one to Eric and Alison to buy shares, and the other to the LLC to pay for leasing the parts of the LLC (farmhouse, barn, field, equipment) that they use. As Noami and James gain LLC units via purchase or work hours, Eric and Alison decrease their ownership percentage. Thus, Eric and Alison can slowly release control over the land while still living on the farm

(they have since built their new house on the hill) and while receiving help maintaining the property and structures.

During the two-year trial leasing period, either party can back out of the deal (with three months' notice) and the money paid into the LLC at that point would simply be considered rent. At the end of the two years, and for additional years thereafter, the money or sweat equity Naomi and James have paid into the LLC then counts toward a purchase of LLC units (and therefore the ultimate purchase price of the LLC).

The two-year engagement period ended in March 2017, and Eric describes the parties' experience as "so far so good." The separate PSA provides that at the end of the two-year leasing period, the next phase of the farm transfer will occur during which the junior farmers purchase interests of the LLC over a twenty-year period until full ownership is transitioned to the junior farmers. The PSA contains an early buyout provision in case the junior farmers wish to purchase the LLC faster and have the capital to do so. If at any point James and Naomi no longer wish to farm, they can sell the shares they have accumulated back to the Rectors or to new farmers, provided those new farmers agree to abide by the terms of the LLC, which requires—among other things—the use of sustainable farming methods.

4. Why an LLC?

Eric chose an LLC as a farm succession tool because he wanted to issue and transfer units of ownership in a measured way according to a schedule provided in the operating agreement so that the new farmers had the option to build equity and would be more likely to see a return on their investment of time, energy, and money than in a typical leasing arrangement. Eric appreciated that an LLC allowed him to transfer the farm bit by bit while allowing him a measure of control and oversight regarding how the land was used. On the other hand, Eric admits that the arrangement is not perfect. He recognizes that he and Alison will not see the full value of their investment in the land for twenty years. Eric further recognizes that while an LLC offers the potential for equity for the junior farmers, they are required "to deal with" the senior farmers and the terms provided in the operating agreement. Thus, Eric comments, "to do this kind of arrangement, everyone has to be willing to give up something to get something." Senior farmers

must be willing to give up a fast return on their investment in the land while junior farmers must be willing to give up a certain amount of control over how they use the LLC's land. However, for senior farmers who wish to transition slowly and junior farmers who lack access to land and a mortgage, the arrangement has the potential to accommodate the needs and desires of all parties.

Eric also admits that this type of arrangement could cause the parties to “run into unanticipated stickiness,” which is why “good will and good nature is important.” Eric also cautions that it is “important to be honest about mistakes and how things came up and were settled.” Eric further cautions that this arrangement “isn't necessarily great for land that is used [as funding] for retirement—but it might be if you start twenty years prior to when you want to retire.”

Eric also appreciates the amount of flexibility an LLC allows. The parties could arrange to have the new farmers buy any amount of interests in the LLC each month to maintain the terms of the PSA. Once the land is appraised and the price of the land is determined, new farmers can buy interests at set prices—and the PSA could contain a clause allowing for the land to be revalued every five years and the prices adjusted accordingly. According to Eric, “all kinds of choices can be made” in terms of how and when the farm transition occurs.

Although not the case here, Eric appreciates that an LLC arrangement could also be used to create opportunities for multiple farmers to use a piece of land and maintain a multi-owner situation. If any of the LLC-member-farmers decide they need to move and sell their assets, they would have LLC units to either sell back to the landowners or to another farmer who could become a new member of the LLC.

B. Caretaker Farm: A Successful Farm Transition with a Conservation Easement and a Ground Lease⁸¹

We are living our dream. Dreams are a lot of work!
— Don Zasada⁸²

81. Except where otherwise noted, this Section relies on telephone interviews in May and June 2015 with Bridget Spann of Caretaker Farm, on file with the author.

82. See *About Us*, CARETAKER FARM, <http://www.caretakerfarm.org/about.html> [https://perma.cc/XN8D-BUGN] (last visited Mar. 30, 2017).

1. Introduction

Don Zasada and Bridget Spann met in Chile while volunteering as community organizers in a rural village. After their volunteer commitments concluded, the couple moved to Boston. Don served as the Director of Agriculture for The Food Project, where he worked on a twenty-acre farm parcel in Lincoln, Massachusetts (just outside of Boston) that aims to engage young people in sustainable agriculture.⁸³ The food raised on the farm is sold through community supported agriculture (“CSA”)⁸⁴ programs and farmers’ markets and is also donated to various hunger relief organizations. Don loved the work, but he was living as a commuter farmer and there was no opportunity to live and farm onsite. Meanwhile, Bridget worked as a domestic violence advocate at Massachusetts General Hospital. When their daughter was born in September 2003, Don had been working at The Food Project for over five years and they began discussing moving away from the city and finding a long-term farming situation. Don gave The Food Project a one year notice that he was leaving so that the organization could plan for his replacement and so that he and Bridget could search for land in an open way.

Throughout the 2003 winter and the 2004 spring, the couple searched for property in Maine. In late 2004, they saw an advertisement in *The Natural Farmer*,⁸⁵ a quarterly newspaper publication of the Northeast Organic Farming Association, an

83. See *What We Do*, THE FOOD PROJECT, <http://thefoodproject.org/what-we-do> [<https://perma.cc/XN8H-YHMQ>] (last visited Mar. 30, 2017).

84. Community supported agriculture is “a farm philosophy and marketing strategy with surging popularity across the United States.” A. Bryan Endres & Rachel Armstrong, *Community Supported Agriculture and Community Labor: Constructing a New Model to Unite Volunteers and Employers*, 43 SW. L. REV. 371, 371 (2014). The U.S. Department of Agriculture defines a CSA as “a community of individuals who pledge support to a farm operation so that the farmland becomes, either legally or spiritually, the community’s farm, with the growers and consumers providing mutual support and sharing the risks and benefits of food production.” *Community Supported Agriculture*, U.S. DEP’T OF AGRIC. NAT’L AGRIC. LIBR., <https://www.nal.usda.gov/afsic/community-supported-agriculture> [<https://perma.cc/E8XP-5Z69>] (last visited Mar. 30, 2017). CSA members usually pledge monetary support in advance of the growing season in order to cover the anticipated costs of seeds, labor, and other inputs. Essentially, a CSA pledge allows members to pay for a share of the harvest in advance of the growing season, thereby remedying many farmers’ cash flow challenges—since farming requires a significant expenditure of funds up front without seeing any return on the investment for several months.

85. NATURAL FARMER, <http://thenaturalfarmer.org> [<https://perma.cc/42KY-RU3E>] (last visited Mar. 30, 2017).

umbrella organization encompassing different state chapters that organize conferences, workshops, and educational materials for gardeners, farmers, consumers, and other stewards of the land.⁸⁶ Sam and Elizabeth Smith, a farming couple in Berkshire County, Massachusetts, were interviewing successors to take over their farm, Caretaker Farm. Don and Bridget had never thought to look for land in Berkshire County because they believed they “never could afford” the price of land there. However, the arrangement the Smiths were proposing would have allowed Don and Bridget to have access to affordable land with healthy soils in an area with direct marketing opportunities. The arrangement was complicated, took time to develop, and ultimately involved a community land trust, a conservation easement, two ground leases, and both couples living on the land in separate farmhouses.

2. Becoming Successors to a Farm in Transition

Don was already familiar with the Smiths, having visited their farm some years ago when he was an apprentice in the Collaborative Regional Alliance for Farmer Training program.⁸⁷ Once he saw the paper advertisement, he arranged to visit the Smiths and interview for the successor position. The first interview occurred in June 2004 and consisted of a farm visit and tour; the second interview later that summer involved the Smiths visiting The Food Project in Lincoln to see Don’s work there and to have another meeting with both Don and Bridget. Don and Bridget then scheduled another weekend visit at Caretaker Farm for Don to work with the crew there for a day and for an additional opportunity to meet with the Smiths. By August 2004, the Smiths had narrowed down their selection for a successor to three candidates and ultimately offered the opportunity to Don and Bridget. Don and Bridget moved to the farm in December 2004, and Don worked for a year as an employee of the Smiths to test out the parties’ arrangement. Because two farmhouses were already built on the property, each couple would be able to live on the property simultaneously; it was important to ensure that everyone could successfully reside in proximity to one another. Once it was

86. See NE. ORGANIC FARMING ASS’N OF VT., <http://nofavt.org> [<https://perma.cc/R9BD-646Q>] (last visited Mar. 30, 2017).

87. See COLLABORATIVE REGIONAL ALLIANCE FOR FARMER TRAINING, <http://www.craftfarmer.org> [<https://perma.cc/9UXT-NPFJ>] (last visited Mar. 30, 2017).

clear that everyone would get along, the two couples scheduled a meeting with First Pioneer Farm Credit (also known as Farm Credit East)⁸⁸ and their respective attorneys to start discussing the details of the transition.

The Smiths had been exploring different options for the succession of their farm with Equity Trust⁸⁹ and the Berkshire Community Land Trust (“BCLT”).⁹⁰ Equity Trust’s mission is “to promote equity in the world by changing the way people think about and hold property.”⁹¹ To that end, Equity Trust works to preserve farms for farmers, provides counseling on land tenure issues, strives to promote alternative forms of farm ownership, and aims to increase community access to local food. Community land trusts (“CLTs”) such as BCLT originated as a solution to the problem of access to affordable housing in urban communities.⁹² CLTs are often nonprofit, democratic organizations consisting of community members and owning land in an area to hold in trust to benefit the community.⁹³ The trust sells or leases homes built on the land at lower, more affordable rates than the real estate market would typically allow.⁹⁴ CLTs often place limiting terms and conditions on the sale and rental of homes on the land in order to deter developer speculation.⁹⁵ BCLT is similarly premised on a “democratic system for managing the Commons.”⁹⁶ BCLT promotes community ownership of land to ensure “permanent

88. See FARM CREDIT E., <https://www.farmcrediteast.com> [<https://perma.cc/29RV-2LUY>] (last visited Apr. 3, 2017).

89. See EQUITY TRUST, <http://equitytrust.org> [<https://perma.cc/7B4W-XGJX>] (last visited Apr. 3, 2017).

90. See BERKSHIRE CMTY. LAND TRUST, INC., <http://berkshirecommunitylandtrust.org> [<https://perma.cc/SAR9-63CG>] (last visited Apr. 3, 2017).

91. See *Our Mission and Core Values*, EQUITY TRUST, <http://equitytrust.org/mission> [<https://perma.cc/L35H-ZE8H>] (last visited Apr. 26, 2017).

92. See James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 70 (2009) (characterizing CLTs as “[i]nspired by the civil rights movement and community organizing efforts to defeat Urban Renewal” and “challeng[ing] conventional corporate and property notions of creating and distributing wealth”).

93. See *id.* (describing CLTs as “democratically controlled community-based nonprofits” that “have created and sustained resale-restricted homes, community-owned common spaces, or both, in cities, towns, and rural areas within and outside the United States”).

94. See David M. Abromowitz, *An Essay on Community Land Trusts*, FUTURE AFFORDABLE HOUSING N.Y.C. 2016 UPDATE (N.Y.C. Bar Ass’n), May 5, 2016.

95. See *Fideicomiso de la Tierra del Cano Martin Pena v. Fortunato*, 604 F.3d 7, 14 n.4 (1st Cir. 2010).

96. *About*, BERKSHIRE CMTY. LAND TRUST, INC., <http://berkshirecommunitylandtrust.org/about> [<https://perma.cc/9DMD-6YVB>] (last visited Mar. 27, 2017).

access, control, affordability and stewardship, now and for future generations.”⁹⁷ In particular, it supports community owned farmland and homes as a means to reduce farmer debt and allow for increased food security by supporting local production.⁹⁸

A key feature of the Caretaker Farm succession deal involved the use of a long-term ground lease. Both Equity Trust and BCLT offer model long-term leases that can be customized for individuals’ unique circumstances. The two couples here decided to use Equity Trust’s lease because it offered a means to build equity based on the value of the farm, whereas the resale formula for the BCLT lease was based on replacement value.⁹⁹ The couples also liked that Equity Trust provided commentary to accompany its lease, which explained the language in the various clauses and made the lease straightforward and easy to comprehend.¹⁰⁰ Equity Trust provided the couples with valuable consulting advice regarding fundraising, and Bridget recalls that Equity Trust’s technical and legal consultation on how to structure the deal was essential to the arrangement’s success.

3. The Farm Succession Arrangement

i. A Conservation Easement

Even before they advertised for a successor, the Smiths had decided to sell a conservation easement on the property as one way to generate funds for their retirement. On February 12, 2003, the Smiths sold a conservation easement to the Commonwealth of Massachusetts for \$252,500. As previously mentioned, in Massachusetts, such a conservation easement is called an Agricultural Preservation Restriction (“APR”) and the state becomes the owner of the easement.¹⁰¹ Not only does an APR prohibit development on the conserved land, but it also places an

97. BERKSHIRE CMTY. LAND TRUST, INC., *supra* note 90.

98. See *History*, BERKSHIRE CMTY. LAND TRUST, INC., <http://berkshirecommunitylandtrust.org/history> [<https://perma.cc/WNJ5-6696>] (last visited Mar. 27, 2017).

99. *Residential Lease Agreement*, BERKSHIRE CMTY. LAND TRUST, INC., §§ 5.6–5.7 <http://berkshirecommunitylandtrust.org/wp-content/uploads/2015/12/CLTSB-new-lease-v13-genericSept2015.pdf> [<https://perma.cc/B8SH-KZ3R>] (last visited Mar. 27, 2017).

100. See EQUITY TRUST, *supra* note 74.

101. See LAND CONSERVATION OPTIONS: A GUIDE FOR MASSACHUSETTS LANDOWNERS 31 (Wesley T. Ward ed., 5th ed. 2001).

affirmative burden on the landowners—the land must be kept in active agricultural use.¹⁰²

ii. A Community Fundraising Effort

After the Smiths sold the APR to the state, a local committee in Williamstown, Massachusetts commenced a fundraising campaign to support Equity Trust in making the initial purchase from the Smiths to begin implementing the farm succession plan. The community raised \$200,000 to contribute toward the closing of the deal thanks to money raised from CSA members, the Smiths' friends and family members, and funds contributed from the state's Community Preservation Act¹⁰³—a law that sets aside a certain amount of tax money each year to fund projects intended to preserve agricultural and recreational open spaces.

iii. The Closing: How a Land Trust Came to Execute Two Ground Leases

On March 17, 2006, the Smiths closed on the sale of their property, but the deal involved many intricate pieces, all of which happened on the same day. The Smiths sold their entire property (thirty-five acres of land, two farmhouses, buildings, and structures) to Equity Trust, subject to the APR, for \$427,000. Equity Trust then simultaneously:

- executed two separate ground leases—one agricultural and one residential—which separated ownership of the land from ownership of the buildings;
- sold the main farmhouse and other buildings to Don and Bridget for \$177,000, subject to the agricultural ground lease;
- sold the second residence back to the Smiths for \$1 (because the value of the second home was purposefully not factored into the original sale) subject to the residential ground lease, which does not have the many restrictions that are present in the agricultural lease;

102. If the Commonwealth of Massachusetts suspects that someone is not complying with the terms of the APR, it may seek to enforce the APR. 330 MASS. CODE REGS. § 22.11 (2017).

103. See MASS. GEN. LAWS ch. 44B, § 10 (2016).

- sold the underlying land to the Williamstown Rural Lands Foundation (“WRLF”); and
- transferred lessor status on both leases to WRLF.¹⁰⁴

Thus, at the end of the closing, with sixteen people around the table (five of whom were attorneys), the parties’ arrangement concluded as follows:

Sam & Elizabeth Smith	Senior retired farmers; owners of the second residence; lessees of the underlying land from WRLF per the residential ground lease
Don & Bridget	Junior farmers; owners of the main farm residence and buildings; lessees of the underlying land from WRLF; subject to the APR per the agricultural ground lease
WRLF	Owner of the underlying land; subject to the APR; lessors of both ground leases
State of Massachusetts	Owner of the APR
Equity Trust	Served as the pass through organization for the deal because it did not want to permanently retain ownership of the land

iv. The Nuts and Bolts of Don and Bridget’s Financing and Lease Arrangement

As to Don and Bridget’s financing, they contributed \$40,000 toward the purchase price of the main farmhouse and buildings and then obtained funds for the remaining amount through a leasehold mortgage¹⁰⁵ from a local bank. Don and Bridget also took out a separate loan with First Pioneer Farm Credit in New York to finance their purchase of all the farm equipment.

104. *See About Us*, WILLIAMSTOWN RURAL LANDS FOUND., <http://wrlf.org/about> [<https://perma.cc/3EK7-969P>] (last visited Mar. 29, 2017). WRLF is a land trust that has been dedicated to preserving open spaces for future generations since 1986 and promotes projects involving land conservation and affordable housing.

105. In real estate law, any kind of interest that can be sold or assigned to another can be mortgaged. Here, the interest that Bridget and Don acquired under their lease was mortgaged to the bank for the duration of the lease term in order to provide financing for the deal. *See* 28 MASS. PRAC., REAL ESTATE LAW § 9.12 (4th ed. West 2016).

Under Don and Bridget's ninety-nine-year agricultural ground lease, they pay rent to WRLF in an amount that is calculated as the monthly fair rental value of the leased premises and is paid on an annual basis, each November 15. This calculation recognizes that certain costs of ownership, including the costs of insurance and property taxes, are paid directly by the lessees (Don and Bridget); it also recognizes that use of the leased premises is restricted in ways that reduce the fair rental value (i.e., with limits to development and subdivision). Finally, the lease recognizes that the lessees will be providing certain benefits to the lessor, such as preservation and enhancement of soil quality and protection of the environment. The annual ground lease fee was initially set at \$680 in 2006, and is subject to adjustments every five years for inflation. In addition, Don and Bridget pay annual taxes on the property (both on the land and the buildings) to the town of Williamstown and pay for insurance coverage that also lists WRLF as an additional insured.¹⁰⁶

v. Additional Details Relevant to Future Generations

Should the Smiths want to move and sell their house, WRLF has a right of first refusal to purchase the home. Upon the Smiths' deaths, the house can pass to anyone who would then be willing to enter into and abide by the terms of the residential ground lease with WRLF.¹⁰⁷ Importantly, the land underlying the Smiths' residence (just under an acre) is not subject to the APR affirmative farming requirement. The only condition for buying or inheriting the Smiths' house is that the new owner must adhere to the lease with WRLF.

Similarly, should Don and Bridget want to move and sell their house, they are permitted to sell the buildings to anyone who is deemed a "qualified person," which is defined in the lease as a "person or group of persons who have demonstrated to lessor WRLF to their satisfaction that they understand and accept the terms of the lease, and are able to and understand they will use the

106. It is important to note that many people in the surrounding areas allow farmers to hay their fields for free or at very low costs just to keep the land in pasture, so the typical rate for farmland rentals in the area was not high.

107. In this way, the Smiths are similar to any other property owner seeking to sell a home—they must find the right buyer who fits all the conditions or continue holding onto the property.

lease in full compliance with all requirements and restrictions.”¹⁰⁸ In addition, Don and Bridget’s lease is inheritable to the extent that the person who inherits can and will farm the land. In the event that the house could not pass to Don and Bridget’s children because they are too young (their son and daughter are currently nine and twelve, respectively), then the property would be sold and transferred to a qualified person but the value of the sale would belong to the children.

In the event that Don and Bridget leave the farmhouse to someone who later decides not to adhere to the terms of the agricultural easement or the agricultural restrictions, which are part of the lease with WRLF, then WRLF has the option to find the person in default of the lease. If WRLF finds someone in default of the lease, WRLF as the lessor could terminate the lease—the lessor may enter any part of the leased premises and repossess the entire leased premises, and expel the lessee. The remedy of termination could also trigger a sale of the farmhouse/buildings (and then the lessee must surrender the possession of the improvements plus the leased premises).¹⁰⁹

The lease further provides that if Don and Bridget or eventual successor lessees are unable to find a buyer for the improvements within twelve months of the lease’s expiration, WRLF as the lessor must purchase the improvements for the “as Restricted Market Value” within thirty-six months of the lease termination date.¹¹⁰ The lessor may also bring an action at law or in equity for money damages or equitable relief.¹¹¹ Accordingly, it is the lessee’s obligation, and in the lessee’s interest (even if the person has been evicted), to find a new buyer. If no buyer is found, then WRLF has an obligation to purchase the buildings (for the as-restricted price), but would have up to thirty-six months to pay for it (in order to have enough time to run a fundraising campaign). If WRLF were forced to purchase the property, it would pay for its as-restricted agricultural value, but then, as both lessor and lessee, it would own

108. Ground Lease between Don Zasada, Bridget Spann, and Williamstown Rural Lands Found. (Mar. 17, 2006) (on file with author).

109. *Id.*

110. *Id.* “Restricted Market Value” refers to the value of the land without the development rights.

111. An action in equity is one where the plaintiffs seek equitable relief such as an injunction or specific performance of the lease terms, as opposed to seeking monetary damages for alleged harm suffered.

a more valuable property (with ownership of both the land and the buildings) and could then determine a next best use for the property if no farmer were to be found.

4. The Current Farm Business

Two years ago, Don and Bridget created an LLC and placed the farmhouse, the structures, and all the improvements into the LLC. The farm is thriving, currently supporting a 265-member CSA.

C. Temple Wilton Community Farm: A Collaborative Farming Case Study Featuring a Conservation Easement, an LLC, and a Rolling Ground Lease¹¹²

There is an interest here in doing things differently—people have an interest in forms that are not the usual forms.

— Anthony Graham, vegetable farmer, Temple-Wilton

1. Introduction

The Temple-Wilton Community Farm (“TWCF”) in Wilton, New Hampshire has been operating a year-round CSA since 1986, making it one of the country’s oldest CSAs.¹¹³ The 200-acre farm supports 110 CSA member families with over 40 different kinds of vegetables and herbs, milk, cheese, yogurt, eggs, beef, veal, pork, and chicken. The farm operates according to biodynamic principles¹¹⁴ and employs a multi-species grazing system, rotating sheep, cattle, and chickens across the pastures—a system that promotes the health of the animals, the land, and the people.

112. Except where otherwise noted, this Section relies on the following interviews: a telephone interview in March 2016 and an in-person interview in July 2016 with Anthony Graham, vegetable farmer at Temple Wilton Community Farm; a telephone interview in June 2016 with Carol Andrews, President of the Educational Community Farm and Vice President of the Yggdrasil Land Foundation; a telephone interview in September 2015 with Amy Manzelli, Esq., Counsel for Yggdrasil Land Foundation, and Ian McSweeney, Executive Director of the Russell Farm and Forest Conservation Foundation; and a telephone interview in May 2015 with Mr. McSweeney. All interviews are on file with the author.

113. See *supra* note 84.

114. The Biodynamic Association defines biodynamics as “a holistic, ecological and ethical approach to farming, gardening, food and nutrition.” Biodynamics seeks to incorporate the natural ecosystem of a farm area in order to promote soil health and fertility and minimize the use of external inputs such as fertilizers and pesticides. See *What Is Biodynamics*, BIODYNAMIC ASS’N, <https://www.biodynamics.com/what-is-biodynamics> [https://perma.cc/742Z-WSV9] (last visited Mar. 29, 2017).

2. Getting Started

In 1985, three farmers began discussing the idea that eventually, combined with the work of other farms and farmers, became what is now known as community supported agriculture. Trauger Groh, Lincoln Geiger, and Anthony Graham wanted to collaboratively provide wholesome food for their local community while maintaining good stewardship of the land. After several preliminary discussions, Trauger drafted an “aims and intentions” document detailing the farmers’ agreement “to make access to farmland available for as many people as possible through the use of covenants and easements that protect the land from development in perpetuity.”¹¹⁵

TWCF defines itself as “a free association of individuals, which aims to provide life-giving food for the local community and to respect the natural environment.” The farmers set forth “principles of cooperation” to govern their collaborative venture, which include how costs will be shared and how budgets will be approved. In addition, the farmers agreed that their overarching motivation would be guided by agreed upon “spiritual and nutritional aims, rather than by our financial needs.” The ensuing collaborative venture was informed by Trauger’s background and experience with social farming in Germany prior to moving to the United States.¹¹⁶

3. Unwritten and Otherwise Unstable Leasing Situations

There are several parcels of land that comprise Temple-Wilton Community Farm, and each was acquired and conserved separately and in different ways, at different times. Not all parts of the arrangement are discussed below, as the details of this thirty-year quest are voluminous and exceed the scope of this Article. Insofar as is relevant here, the collaboration initially began on several different parcels of land under various short-term lease

115. See *History of the Farm*, TEMPLE-WILTON CMTY. FARM, <http://www.twcfarm.com/description> [<https://perma.cc/A3ED-JPPU>] (last visited Mar. 29, 2017).

116. Social farming originated in Europe and is an innovative approach to farming that seeks to empower women, boost rural employment, and be inclusive of all populations—especially the elderly, those with disabilities, or those with a criminal record. See Hajnalka Petrics, *Global Forum on Food Security and Nutrition Forum*, FOOD & AGRIC. ORG. U.N., <http://www.fao.org/fsnforum/activities/discussions/care-farming> [<https://perma.cc/H5S2-D3R2>] (last visited Mar. 29, 2017).

arrangements or on neighbors' land with verbal permission. When the landowners began changing their minds about permitting farming on their property, the group started to seek a more stable tenure situation.

4. Creating a Nonprofit

In the late 1990s, TWCF could have simply been described as a group of people growing their food together. It was difficult to negotiate with landowners as a group and it was difficult to own anything collectively, so the farmers, together with a few farm members, formed a New Hampshire nonprofit called the Educational Community Farm ("ECF"). The board members of this newly formed nonprofit included farmers and CSA members. The creation of this entity later proved important in helping to purchase and lease land and to finance and hold equipment for the use of TWCF.

5. Securing Land

By the early 2000s, TWCF's dairy was operating at Four Corners Farm on Abbot Hill in Wilton under a tenuous short-term sublease agreement, and eventually Four Corners Farm came onto the market with a hefty price tag. The ECF wanted to purchase the farm, but lacked sufficient funds.

It was becoming clear that TWCF needed to secure its land base or the farm might not survive. In the spring of 2001, four TWCF families purchased an old orchard of approximately forty acres. This group of CSA members formed an LLC to hold the property. Once enough money was raised to pay back the LLC (largely through a New Hampshire Land and Community Heritage Investment Program ("LCHIP")¹¹⁷ grant) the property was transferred to Yggdrasil Land Foundation in the spring of 2002. Yggdrasil is a land trust with a stated purpose of supporting biodynamic, sustainable, and organic practices to ensure that healthy land remains available for future generations to farm.¹¹⁸ The land trust achieves its mission by securing land in perpetuity

117. See LAND & CMTY. HERITAGE INV. PROGRAM, <http://lchip.org> [<https://perma.cc/8C5Q-YXGX>] (last visited Apr. 12, 2017).

118. See YGGDRASIL LAND FOUND., <http://www.yggdrasillandfoundation.org> [<https://perma.cc/RWH2-7TMH>] (last visited Mar. 29, 2017).

for current and future generations of farmers, either by purchasing parcels or receiving gifts.¹¹⁹

At various times, several other pieces of land came up for sale on Abbot Hill. The ECF, the TWCF farmers, CSA members, and other partners used a variety of different mechanisms to secure a land base for TWCF. A generous CSA member financed one parcel. The farmers themselves purchased other parcels. Once they owned the properties, Anthony and his wife Glynn placed a conservation easement on the land. The Town of Wilton, the State of New Hampshire, and the U.S. Department of Agriculture (“USDA”) through the Natural Resources Conservation Service (“NRCS”) pooled funds to purchase the conservation easement. Proceeds from the conservation easement then helped pay off the mortgages on the properties, after which the land was donated to Yggdrasil. In return, Yggdrasil provided a ninety-nine-year lease to the ECF so that TWCF could continue to work the land and have stable tenure on the property.

6. The Rolling, Ninety-Nine-Year Ground Lease

As described above, after Anthony and a few other farmers gifted their land to the Yggdrasil Land Foundation, the land trust—as the lessor—then drafted a single rolling, ninety-nine-year ground lease agreement for the use of TWCF with the ECF as the lessee. The lease is a ground lease, meaning that the buildings and structures are not leased¹²⁰—only the underlying land is leased. The lease term runs for a period of ninety-nine years, commencing on January 1, 2004.¹²¹ In addition, the lease term is rolling, meaning it automatically renews itself at its expiration. Thus, the lease runs for ninety-nine years, “with automatic extensions of additional ninety-nine year terms.”¹²² Given the long duration of the lease term, the parties agreed that they will review the lease together at regular five-year intervals to reassess whether the lease continues to meet the needs of both parties. The lease is also assignable, meaning the ECF can give its rights under the lease to another

119. See *Core Practices*, YGGDRASIL LAND FOUND., <http://www.yggdrasilandfoundation.org/core-practices> [<https://perma.cc/U7QM-D3FH>] (last visited Mar. 29, 2017).

120. The ECF owns the buildings and structures.

121. Ground Lease between Yggdrasil Land Found. and Educ. Cmty. Farm, E-2 (last amended Jan. 1, 2014) (on file with author).

122. *Id.* at E-3.

entity, provided that the ECF obtains prior approval to do so from Yggdrasil. Finally, the lease requires the use of sustainable farming methods and prohibits the ECF from using any hazardous materials on the land, which are defined to include synthetic pesticides.¹²³

7. Epilogue

Temple Wilton Community Farm has always operated as a collaborative association of individuals. In the spring of 2016, the farmers and members of the CSA formed a member-owned cooperative called the Four Corners Cooperative, Inc., doing business as Temple-Wilton Community Farm. The stated purpose of the cooperative is as follows:

The Farm is dedicated to providing biodynamically grown food for the local community while building and maintaining the fertility and life diversity necessary for a self-sustaining farm organism on the lands entrusted to it. The Farm shall retain all net surplus for re-investment in the stewardship and further development of the farm organism. Individual profit from farming is not an economic aim of the Farm. Our guiding principles in this effort derive from the Aims and Intentions originally set forth by our founding farmers.¹²⁴

In terms of achieving stable land tenure, Anthony does not believe that the solution involves gaining ownership of land in the traditional sense. He believes it is better for the earth and the community if the land can be protected and held by a land trust so that there is no chance of the land eventually being sold for development. The farmers and food producers of the future need stable access to land, and in his view, that can best be achieved with a community farming model and the use of conservation easements and land trust organizations.

123. *Id.* at E-5–E-6.

124. *See* Four Corners Coop., Inc., Bylaws § 1.3 (on file with author).

D. Wingate Farm: A Multigenerational Farm Transfer Made Possible with a Conservation Easement and the First OPAV Ever to Exist in New Hampshire¹²⁵

Younger farmers should learn about the history and story of the land they're planning on farming.

— Olivia Pettengill, farmer at Wingate

1. Introduction

Over a century ago, James and Sallie Gillespie owned and farmed on a ranch in Missouri. When the couple decided to move east in the early 1900s, they purchased Wingate Farm in southern New Hampshire, in the Connecticut River Valley. At Wingate Farm, James and Sally gardened organically and raised a small herd of Brown Swiss dairy cattle on the fifty-four acres of land. James also pursued photography, building a portrait studio in one of the calving barns on the property. When James and Sally could no longer farm the land themselves, they leased the land to neighbors for growing corn and hay.

James and Sally had two daughters—Alma and Carroll—both of whom eventually inherited the farm in the 1970s. Carroll later married John Pettengill and the couple lived on Wingate Farm and had a family. Carroll and John's son, Peter Pettengill, returned to the farm in 1983 with his wife Deb and their two children—James (Jr.) and Olivia Pettengill. Peter converted the photography studio in the calving barn into a printmaking studio. Eventually, Peter passed the printmaking studio to James (Jr.) while Olivia began managing the farm in 2015. The succession of this family farm involved many players, multiple moving parts, and five years' worth of planning and meetings to orchestrate the transition.

Olivia Pettengill grew up in a barn house her parents built across the street from Wingate Farm. After college, Olivia started working on other farms, assisting mostly with vegetable CSA shares, but then expanded her experience and knowledge base to include dairy cows, goats, and chickens. Olivia's neighbors—the farmers at

125. Except where otherwise noted, this Section relies on the following interviews: a telephone interview in March 2016 and an in-person interview in July 2016 with Olivia Pettengill of Wingate Farm; a telephone interview in April 2016 with Jamie Pottern of Mount Grace Land Conservation Trust; and a telephone interview in March 2016 with Amy Manzelli, Esq. of BCM Environmental and Land Law, PLLC. All interviews are on file with the author.

Picadilly Farm¹²⁶—served as her mentors and helped her learn more about egg production. Olivia now sells her eggs there. She says, “You gotta have land or money and on top of that, really great mentor resources—people who can advise you and guide you.”

2. Transitioning the Farm

Olivia returned to Wingate Farm in 2012 because she wanted to farm the family’s land and restore it to a working, commercial farm. However, keeping the farm in the family and becoming the manager was not straightforward or simple. The family had placed the farm on the market and believed they would need to sell it due to financial pressures. Hoping for an alternative to selling the farm, the family approached Mount Grace Conservation Land Trust in Massachusetts.¹²⁷ Mount Grace, in turn, referred the Pettengills to Land For Good (“LFG”)—a nonprofit organization in Keene, New Hampshire that aims to ensure the future of farming in New England by helping farmers gain more secure access to land.¹²⁸ LFG recommended that the Pettengills pursue conservation efforts as a way to make an intrafamily generational farm transfer more financially feasible. Upon LFG’s advice, the Pettengills began working with Mount Grace to create a farm transfer that was the first of its kind in New Hampshire.

In 2013, the Pettengills began assembling the team that would help them with the successful intrafamilial transfer of Wingate Farm. Mount Grace quickly became a key member of that team. Jamie Pottern, a land conservation specialist with Mount Grace, started a series of conversations with the Pettengill family to determine what the family hoped to achieve with the succession of Wingate Farm. In 2013, sisters Alma and Carroll jointly owned Wingate Farm. Each owned an undivided half interest in the farm—meaning that Alma and Carroll owned the entire property together and each had an equal right to enjoy and use the entire farm. Carroll and her husband John still lived on Wingate Farm in one of the farmhouses, but Alma lived in Florida.

126. See PICADILLY FARM, <http://www.picadillyfarm.com> [<https://perma.cc/C5K2-AKN5>] (last visited Apr. 11, 2017).

127. See MOUNT GRACE LAND CONSERVATION TRUST, <http://www.mountgrace.org> [<https://perma.cc/N37K-7AUF>] (last visited Apr. 11, 2017).

128. See LAND FOR GOOD, <http://landforgood.org/about> [<https://perma.cc/U59A-NFEQ>] (last visited Mar. 31, 2017).

After many conversations, the family agreed upon four goals. First, everyone wanted to make sure that Alma could be paid properly for her half of the property. Second, the family wanted to allow Carroll and John to remain in the farmhouse for as long as they wished. Third, the family wanted to protect the property from development. Fourth, the family wanted to provide for the transfer of the two businesses on the property to the next generation. Specifically, the family wanted to ensure that (1) James could take over Peter's print business and (2) Olivia could manage the farm business and restore the land to commercial agricultural production.

To achieve these four farm transfer goals, the family needed help from a team of professionals. Mount Grace assembled a legal and financial team to help the family explore different options, and it also spent many hours strategizing and fundraising.

3. The Money

Jamie Pottern at Mount Grace became the primary grant writer for the federal and state programs and private foundation grants the family would need to make the entire transfer budget work, including paying for the conservation easement that would fund most of the transfer. She also helped the family avail itself of the resources available through the USDA's Agricultural Conservation Easement Program ("ACEP").¹²⁹

In the case of the Pettengills, the USDA agreed to pay, through its ACEP program, fifty percent of the value of the conservation easement that would ensure Wingate Farm remained in agricultural production. To receive the ACEP funds, the Pettengills were required to show that they had a match for the remaining fifty percent value of the easement. To make up this fifty percent match, Jamie Pottern at Mount Grace worked to secure commitment letters from other foundations pledging financial support. LCHIP pledged \$30,000 to help conserve Wingate Farm. Other organizations that helped to meet the match included the Russell Farm and Forest Conservation Foundation, the Tortuga Foundation, and the Bromley Charitable Trust. The 1772 Foundation also contributed \$50,000 toward the acquisition costs of the easement. Finally, the conservation commissions in

129. ACEP was formerly known as the Farm and Ranch Land Protection Program.

Hinsdale and Winchester, New Hampshire helped pay for the initial appraisal costs of the farm. Mount Grace ultimately raised \$200,000 to make the farm transfer possible. The money helped with funding the recording fees, the cost of the title search, etc. Mount Grace spent another four years raising private monies to help cover additional costs, such as the staff time involved in writing the grants. In this way, Mount Grace could prepay the various professionals it needed to consult, and was subsequently reimbursed through the funding it secured. While Mount Grace worked to secure funding for the transfer, Olivia was also separately writing other grants to allow her to invest in the farm's business and infrastructure. The grants allowed Olivia to secure money for building hoop houses and other improvements on the farm.

Reflecting on the fundraising process, Jamie Pottern of Mount Grace notes, "These deals—they require all hands on deck." The project required relationship building with the family and with the foundations that eventually provided financial support. Jamie notes that the land trust's job is often to work behind the scenes, navigating these relationships. Mount Grace also explored funding sources at several levels—including federal, state, town, and private. She says the transaction involved "lots of puzzle pieces coming together."

4. The Legal Mechanics: The Conveyance and Conservation Details

In addition to securing the above financial support, Mount Grace enlisted Farm Credit East to assist with understanding the tax implications of the different transfer options the family was considering. Jamie also enlisted the services of Amy Manzelli, Esq. at BCM Environmental and Land Law¹³⁰ to help the family work through the legal implications of their decisions. Jamie Pottern acknowledged that land trusts typically do not have tax or legal expertise and that it was necessary to consult the appropriate professionals.

Conveying the Wingate Farm property (which included more than fifty acres of land, the farmhouse, and three large barns—one of which housed the print studio) and selling the conservation

130. See BCM ENVTL. & LAND LAW, PLLC, <http://nhlandlaw.com> [<https://perma.cc/7CW6-HUNU>] (last visited Apr. 26, 2017).

easement was a multi-step process. With Amy's legal assistance, the family ultimately decided that Alma and Carroll should first convey their undivided half interests in the property by deed to Olivia and James. A conveyance to Olivia and James, as the youngest generation currently making the least amount of money, would result in the least amount of capital gains tax.

Thus, in February 2015, Alma and Carroll both conveyed their undivided half interests to Olivia and James, who each received an undivided half interest in the property and became tenants in common, as Alma and Carroll had been. As tenants in common, both James and Olivia simultaneously own all of the property. According to Amy, "Olivia and James essentially became the new Alma and Carroll" of the property. At this point in time, Olivia and James did not pay Alma or Carroll for their interests. Rather, all four parties signed a separate Purchase and Sale Agreement ("PSA"), which provided that Alma and Carroll were to be paid at least \$175,000 for their interests no later than December 31, 2015. The PSA also provided that a conservation easement would be sold, for not less than \$175,000. The PSA further provided James and Olivia's father, Peter Pettengill, with a right of first refusal.

In August 2015, Olivia and James (as grantors and joint owners of Wingate Farm) sold a conservation easement to Mount Grace Conservation Land Trust for \$200,000. Mount Grace used the money it raised from ACEP, the State of New Hampshire, and various foundations to pay for the \$200,000 conservation easement. After selling the conservation easement to Mount Grace, Olivia and James retained their ownership of the undivided half interests in the property. Essentially, Olivia and James sold the development rights to Wingate Farm, ensuring that the land would be kept in agricultural production subject to certain agreed-upon conservation measures.

After receiving the \$200,000 in proceeds from selling the easement, Olivia and James compensated Alma and Carroll for their undivided half interests in the property. Through the terms of the conservation easement, Olivia and James also granted the State of New Hampshire an executory interest in the easement.¹³¹ The State of New Hampshire provided \$30,000 toward the price of

131. See N.H. REV. STAT. ANN. ch. 227-M (2016).

the easement in exchange for the executory interest, among other items.¹³²

Regarding the terms of the conservation easement, Olivia recalls that the family negotiated the terms quite a bit over time. Arriving at the eventual terms of the easement “was a long, arduous process,” but in the end, the family had an agreement that served everyone’s needs. For example, the farmhouses and barns are in exclusionary areas—also called building envelopes—that are carved out and not covered by the terms of the easement. Practically speaking, excluding the farmhouses and barns from the terms of the easement allows for Olivia to expand those structures in the future to accommodate the needs of a growing business. The easement prohibits the building of new structures outside the building envelopes, but new buildings are allowed if they are intended to provide housing for farm workers. Thus, Olivia says that the conservation easement does not stifle her ability to expand her operation or grow with the needs of her business.

Wingate Farm’s conservation easement is inherently unique in that it contains the first Option to Purchase at Agricultural Value (“OPAV”) used in New Hampshire. Should James and Olivia ever sell Wingate Farm, the conservation easement provides Mount Grace with the option to purchase the land and buildings at their fair market agricultural value, as defined in the conservation easement. Granting an OPAV to Mount Grace ensures that the land will be kept in active commercial agricultural production and prohibits James and Olivia from later selling the property to a real estate developer or to someone who does not intend to use the land for agricultural purposes (for example, if someone wanted to use the property as a retirement home, rather than as a working farm). As expressed in the conservation easement, the parties included an OPAV in the easement because they intend that the land will always pass to a qualified farmer at or below fair market agricultural value, as those terms are defined within the easement. Unlike other states, such as Vermont, where OPAVs have been sold separately from the conservation easement, here, the OPAV was

132. Olivia and James granted a third-party enforcement right to the United States of America, through NRCS (part of the USDA). As a condition of receiving funding under the ACEP program, NRCS is permitted to ensure that no one is violating the terms of the conservation easement.

embedded within the conservation easement itself.¹³³ Thus, the OPAV and conservation easement are not two separate conveyances. As Amy explains it, “they are like identical twins—part of the same event.”

5. The End Result

Through these measures the following has been achieved. Alma lives in Florida and has been fully compensated for her share of the property. Carroll and John are able to continue living in their home on the property. James and Olivia have title to the farm, with each owning an undivided half interest in the land and all the buildings. Olivia and her partner Susie Parke-Sutherland now operate Wingate Farm as an LLC. James has commenced taking over the print business, but does not live on the property. He currently operates Wingate Studio as an unincorporated sole proprietorship. Mount Grace owns the conservation easement and the option to purchase the land at agricultural value should Olivia and James ever sell the property. In the event that Mount Grace is unable to continue owning the conservation easement and OPAV, the State of New Hampshire will acquire both through its executory interest. The USDA—specifically NRCS—has enforcement rights should anyone violate the terms of the conservation easement.

E. Pine Island Community Farm: A Collaborative Leasing Endeavor with Future Conservation Potential¹³⁴

Raising local meat, nurturing the fragile floodplain, and connecting people to the land.

— Pine Island Community Farm¹³⁵

1. Introduction

Located just outside of Burlington, Vermont, the 230 acres that now comprise the Pine Island Community Farm originally

133. See *Conservation Options: Different Ways to Conserve Your Land*, VT. LAND TRUST, <http://www.vlt.org/land-protection/conservation-options> [https://perma.cc/CM5R-YS4F] (last visited Mar. 30, 2017).

134. Except where otherwise noted, this Section relies on a telephone interview in November 2015 with Karen Freudenberger, Project Manager with Pine Island Community Farm, on file with the author.

135. See PINE ISLAND CMTY. FARM, <http://www.pineislandfarmvt.com> [https://perma.cc/FUA7-H9Z2] (last visited Mar. 30, 2017).

belonged to a farmer named Peter Fitzgerald. When the younger members of the Fitzgerald family were not interested in farming the land, it went to auction, where Vermont Land Trust (“VLT”) purchased it. The property was located just miles away from the Burlington and Winooski refugee resettlement communities. Burlington and Winooski have become home to “New Americans”—people who fled violence, torture, and ethnic cleansing in their own countries and arrived in the United States as refugees. New Americans in the Burlington area come primarily from Vietnam, Bosnia, Bhutan, and Somalia, but others come from Burma, Iraq, Sudan, the Congo, Rwanda, and Burundi. Many of these New Americans were farmers or herders in their own countries, but lost their land due to political upheaval.

Many of the Burlington and Winooski refugees had difficulty obtaining fresh, locally raised meat—especially goat meat. The challenges of procuring and slaughtering their own goats was monumental and included driving several hours to Boston and struggling with directions and language barriers. In addition to buying fresh meat, the refugee community was also purchasing anywhere from 300,000–1,500,000 pounds of frozen goat meat per year, the majority coming from New Zealand and Australia.

To avoid purchasing imported meat shipped halfway across the world, refugee families began discussing the possibility of raising their own goat meat to feed their families and to satisfy the demand for fresh, local goat meat in other refugee communities. Refugee families and the service providers assisting them began envisioning a way to “meet the demand for locally produced and culturally significant foods, as well as provide a locale where people [could] deepen their relationships with the land, nurture cultural values and traditions, and broaden their community connections.”¹³⁶

2. The Arrangement

i. The Manager and the Organizations

Karen Freudenberger is the farm manager at Pine Island Community Farm. She has worked in international community development throughout her entire career and moved to Vermont in 2009 after living in Madagascar. When Karen learned of VLT’s

136. See *Mission and History*, PINE ISLAND CMTY. FARM, <http://www.pineislandfarmvt.com/mission-and-history.html> [<https://perma.cc/SJY4-LEAV>] (last visited Mar. 30, 2017).

purchase of the Fitzgerald plot, she immediately prepared a proposal to VLT for the land, setting forth her vision for how the land could be used to contribute to a robust local food system without degrading the environment's fragile floodplain.

VLT agreed with Karen's vision and commenced a partnership with the Association of Africans Living in Vermont ("AALV")—a social services agency dedicated to assisting refugees in the Burlington area—and offered the 230 acres of land to AALV under a no-cost, five-year lease to create a goat collaborative. Pursuant to the arrangement with VLT, eighty acres of the land in the Winooski River floodplain is used for grazing, eight acres is used for vegetable production, and the remaining acres consisting of wetlands and vegetated buffers are preserved and protected from agricultural production. The property also contains two houses. Pine Island Community Farm was established as the overarching organization and has Vermont nonprofit status. Karen secured grants available to organizations working with low income populations in addition to a USDA community food grant to assist with funding the project, purchasing new farm equipment, and repairing the existing farm infrastructure.

ii. The Farmers

Chuda Dhaurali and his wife Gita are refugees from Bhutan, where Chuda's father had been a farmer. The couple lived at a refugee camp in Nepal for twenty years before resettling in Vermont in 2009. They began raising goats for Pine Island Community Farm in 2013, with 80 goats in the first season and 120 goats in their second season. The couple has a thriving goat herd and now lives in one of the two houses on the 230-acre plot with their two children, raising food for their family and community.

Chuda's friends, refugees from Rwanda—Theogène Mahoro and Theoneste Rwayitare—also came to the United States and began raising their own goat herd. Theogène and Theoneste fled genocide in Rwanda in 2004 and arrived in Colchester as part of the Vermont Refugee Resettlement Program. They and their four children moved into the second farmhouse on the Pine Island property in 2014 and began raising goats, chickens, and vegetables as a separate business but as members of the Pine Island Goat Collaborative.

Both families own and manage their own herds, thereby operating their businesses as individual farming enterprises. As such, the families pay income taxes on their own individual businesses. However, the families are members of the Collaborative, which allows them to share farm equipment, farm space, and barn space. In 2014, the two families together raised over 250 goats. The families obtain their goats—by sale or donation—from several different Vermont goat dairy operations that have no use for the baby male goats or “bucklings.”

In addition to the two goat-raising families, Pine Island Community Farm also has forty-five families raising vegetables on eighth-acre community garden plots and three families raising vegetables on quarter-acre plots. Many of the families grow for their own personal consumption but some have also started growing commercially, selling their produce to ethnic markets and restaurants in the Burlington and Boston areas.

Each family signs the Pine Island Collaborative Member Agreement, wherein the family agrees to follow the rules of the organization and pay a fee back to the Collaborative consisting of roughly ten percent of its profits for the year. The Member Agreement provides that the farmers are responsible for managing their individual enterprises and are expected to continue farming the land while VLT holds title to it. As long as Pine Island Community Farm leases the land from VLT, Pine Island will grant farmers license to use the land. Families using the community garden plots pay an annual flat fee of \$85 and also agree to abide by the terms of the Member Agreement. In addition, the Pine Island Goat Collaborative allows people who purchase a goat to make use of the slaughter room by paying an annual user fee.

3. Epilogue

Pine Island Community Farm is currently assessing whether the barns and pasture can accommodate a third goat herd without jeopardizing the delicate ecosystem in the area. However, even if a third goat herd is ecologically feasible and sustainable, local zoning prohibits building a third house on the property. Thus, additional research is needed to see whether a third goat herd is possible, and if so, how housing could be arranged to accommodate a third farming family.

In addition to finding a way to expand the goat operation, Pine Island Community Farm seeks to add seven new acres of garden plots and create additional opportunities for other New American families to raise chickens. Eventually, Pine Island hopes that the goat farmers will scale up their operations and raise enough capital to be able to purchase the land from VLT at agricultural value. There is also discussion of placing an easement and an OPAV on the land, as the property is not currently conserved. Employing such conservation measures would ensure the permanent use of climate change mitigation measures in the fragile floodplain and would decrease the purchase price of the land, creating an opportunity for affordable land access that provides stable tenure.

Pine Island Community Farm is finalizing its legal arrangements, but intends to become a member managed LLC with nonprofit 501(c)(3) status, consisting of producer-members (those raising vegetables, chickens, and goats) as well as consumer/user-members (those purchasing animals/vegetables, using the slaughter room, etc.). Once Pine Island can demonstrate that it can cover its taxes, insurance, and maintenance on the property, then VLT plans to transfer the property free of charge to the nonprofit, which would then hold title to the land until such a time as when the farmers could purchase it.

IV. CONCLUSION

The above case studies exemplify models of success for moving away from an industrialized farm system toward a civic agriculture. They demonstrate that agriculture can be part of the solution to climate change so long as there is access to sustainable alternatives. For farmers and their advocates who value local food systems and organic and sustainable stewardship practices, we must find ways to move away from the current system characterized by industrialized monocultures laden with chemical fertilizers, pesticides, and high GHG emissions and toward a more civic agriculture. Land access is a vital and necessary precursor to a civic agriculture, which holds much potential for mitigating the effects of climate change. Lawyers can facilitate such an adaptation by innovatively combining different mechanisms to allow access to land where it would otherwise be unaffordable. Clever lease contracts, strategically placed conservation easements, and LLC arrangements as part of a farm succession plan are just a few of the innovative legal

instruments that can help promote land access and preserve farmland to support vibrant local food systems without further degrading the environment.

We must grow in awareness regarding available alternatives. Then we must accept the challenge of making those alternatives possible. Finally, we must act to convert possibilities into realities throughout our communities. Medical students take the well-known Hippocratic Oath before they are permitted to practice, promising to first do no harm. Similarly, before we plant, we should also profess to first do no harm. Creating a civic agriculture in lieu of an industrialized agriculture would allow us to shift toward production methods that enable us to cope with—rather than exacerbate—climate change. There is much action to be taken and the case studies described in this Article demonstrate that innovative alternative models of land access are available for replication throughout the country and across the globe. There is a path forward that provides for food security and the preservation of the environment; now is the time to provide, to the best of our ability and judgment, access to that path.