

Buy-Protect-Sell 101

Webinar | December 11., 2020

Questions from the audience with answers from the panelists

Panelists include -

John Piotti, CEO and President, American Farmland Trust

Maggie Donin, Farmland Access Program Manager, Vermont Land Trust

Susan Payne, Executive Director, New Jersey State Agriculture Development Committee

Robin Fay, Senior Conservation Manager, Washington Farmland Trust

Stacy Funderburke, Regional Counsel and Conservation Acquisition Associate, The Conservation Fund

Adam Bishop, Farmland Protection Program Director, Maine Farmland Trust

Facilitator: **Cris Coffin**, NALN Director and Senior Policy Advisor, American Farmland Trust

COSTS AND RISKS ASSOCIATED WITH INTERIM OWNERSHIP

Q: As I understand it, Land Trusts are sometimes wary of owning land, especially land with buildings, due to increased liability (such as Susan touched on with possible environmental concerns). This is probably especially true if the plan is to be a long-term landowner. However, even for short term ownership there are increased risks in taking ownership. How do you manage that risk? Do you always have a buyer lined up? How long do you typically own the land before selling it? Any other considerations or advice to a Land Trust considering BPS?

SUSAN PAYNE: On-site security is an issue. If you're renting the farm out while you own it, one strategy could be to incorporate monitoring and checking on condition of improvements into the lease with the farmer. This may or may not prove effective depending on what kind of agricultural operation the tenant is running – and whether the operation requires them to be on the property daily (like for a vegetable operation), or only intermittently in order to plant/harvest row crops, etc.

If that's not practical, then the property needs to be completely secured/locked up/boarded etc. with postings to discourage trespassing. One experience we had was that someone broke in and removed all the copper wiring from the property, so this can be really problematic and slow down, and make more expensive, preparing the property for sale. Also, of course kids will want to party in vacant barns/houses if they find out they're vacant and if they are easily accessible.

Notifying the local police dept. and neighbors and providing them contact info in case of any issues arise is helpful. Neighbors are particularly helpful in having "eyes" on the property.

Make sure your insurance policy covers ag and/or residential structures to the extent same is needed.

Q: What is average cost of Phase 1, and Phase 2 (about the environmental assessment done in NJ)?

SUSAN PAYNE: In NJ, a phase I environmental review for an average ~75-acre farm that doesn't have more than a couple of buildings on it would cost around \$2500-\$5,000. Phase II would vary significantly depending on the results of the Phase I review. If there is a history of underground fuel tanks that need to be evaluated, the cost goes up considerably.

HOUSING AND FARMLAND AFFORDABILITY

Q: Susan brought up a really interesting point about expensive housing and the potential benefit of separating it to facilitate affordability. On the other hand, a lack of access to on-farm housing is a significant barrier to farmers. Any suggestions from the panel as to how you've approached housing solutions when selling land back to farmers?

SUSAN PAYNE: This goes to what your goals are for the property. If you're trying to make sure the property stays affordable to next gen farmers, then one approach could be to carve off existing large/expensive homes and then limit the size of any future dwellings that can be erected on the property to avoid a very large, expensive home from changing the nature of the farm in the future. This is not without controversy, however, as some legitimate and very successful farmers have bristled at the idea of not being able to build a house based on what they can afford and want. So, for example, you could place a 2,500 or 3,500 square-foot limit to the heated living space associated with the future housing opportunity on the farm. Another approach could be to limit the construction of a new house, driveway, garage, septic, well, and appurtenant outbuildings to ~ 1 acre. This has the effect of reducing house sizes in our experience.

Q: What are "retro options to purchase at ag value purchases" from the VLT?

CRIS COFFIN: Vermont's Purchase of Agricultural Conservation Easement (PACE) program includes an affordability tool known as an Option to Purchase at Agricultural Value, or OPAV. The OPAV gives the easement holder/s the right to purchase the protected farmland at its agricultural value if offered for sale to a non-farmer, helping to keep the land in the ownership of a farmer. The OPAV is now included in all VHCB farm projects, but there are properties protected through the program which predate the inclusion of OPAVs. VHCB has now authorized the purchase of OPAVs retroactively on certain of these earlier eased properties. More information can be found [here](#).

Q: Do you also add an OPAV agreement with buy-protect-sell projects?

SUSAN PAYNE: In NJ – no, not yet.

CRIS COFFIN: Vermont Land Trust routinely includes an OPAV in the sale of protected properties to farmers.

PROJECT FINANCING

Q: Hi Robin! My question is, have NRCS ACEP-ALE funds been used to pay off a loan that the land trust took on to conserve a property? We likely need to take out a loan because NRCS funds won't be approved or come through for closing in the timeline needed for our grant funding. We have state funding and are hoping that the NRCS funds will be the match and the easement will be pretty expensive.

ROBIN FAY: We have taken out a bridge loan to secure an easement and then recouped the cost with public grant funding, but not NRCS funding specifically. The State grant program allows for funds to be

paid retroactively with a waiver, but I do not believe there is any option to do this with NRCS dollars. Happy to discuss more by phone.

Q: Robin, did you bring the investors together, or did you work with an existing group of investors?

ROBIN FAY: We brought the investors together. When we began to consider creating an impact investment vehicle, we convened a task force of people with experience in the impact investment world to help us determine feasibility—some were existing board members and donors, some did not have prior connections to the organization. We met with that group over a number of months to help us right size the offering and define the terms. Then, once we went live with the note the task force members also helped us hone the pitch. Some task force members also ended up being investors.

Q: With impact investors, if the deal turns south financially, is there risk of these investors taking back the land and selling it for uses outside of conservation or farming purposes?

ROBIN FAY: In our case, the impact investment note is unsecured, meaning the investors do not hold any interest in the property as collateral and cannot lay claim to it as a means of recouping their capital should the deal go south.

Q: On Impact Note, how do you pay investors back?

ROBIN FAY: We pay interest using lease revenue and unrestricted philanthropic dollars we raise. We pay back the principle with the proceeds from the eventual sale of the fee interest in the conserved property to a farmer.

Q: So when we say investors, are there any SEC issues that come up?

ROBIN FAY: We hired a securities lawyer to help us design the investment vehicle and ensure it complied with all applicable laws and regulations. The impact investment note was offered to institutions and accredited investors only.

Q: If you are going to sell property for much less than you bought it for, you can't pay investors from sale proceeds, can you?

SUSAN PAYNE: In NJ land trusts should be able to buy the land at fair market value, qualify for grants to purchase the value of the farmland easement (typically 50% from the state and the balance from municipal, county or federal funds) and then sell the underlying fee for a price for which the land trust either breaks even, or makes money on the deal. One thing the land trusts need to be careful about is out-of-pocket costs (carrying costs, real estate fees, auction fees, payments in lieu of taxes, etc.) – none of which are reflected in the traditional appraisal process.

Q: Where does the funding come from for fee acquisition at the NJ Farmland Preservation Program? Is it a different pool of funding than the easement acquisition funding?

SUSAN PAYNE: No, it's the same pool of funding from which we pay for easement purchase transactions – dedication of Corporate Business Tax (CBT) proceeds to the Farmland Preservation Program.

Q: Is anyone paying above appraised value for the fee interest?

SUSAN PAYNE: In NJ we are statutorily prohibited from paying higher than appraised value when we buy land or easements and when we provide any grant funds to local governments or land trusts purchasing land/easements.

BPS IN ACEP-ALE

Q: Do you have any sense of when we might know how BPS will be handled by NRCS?

CRIS COFFIN: The ACEP Interim Rule provided some guidance on how NRCS will implement the statutory language around BPS in the 2018 Farm Bill. AFT and others submitted a number of comments regarding implementation of BPS in ACEP-ALE, and we anticipate that the Final Rule will provide additional details in that regard. We will work with NRCS to provide additional information to eligible entities in this regard as soon as it is available.

Q: Is there a public comment period for the rule making process for BPS?

SUSAN PAYNE: For state agencies such as NJ's SADC, all of its rules are subject to public comment periods.

CRIS COFFIN: There was a public comment period in 2020 on the ACEP-ALE Interim Rule, which included language related to implementation of the new BPS statutory authority. We expect NRCS to release the ACEP-ALE Final Rule sometime early this year, which is likely to address the comments received on BPS as well as other ACEP-ALE program elements.

Q: Has anyone on the panel successfully received NRCS BPS funding?

SUSAN PAYNE: In NJ – not specifically BPS funding from NRCS, but we have utilized NRCS grants in BPS transactions in the past.

IDENTIFYING POTENTIAL BUYERS

Q: Michigan does not have an active FarmLink or Landlink program, so we are trying to figure out ways to connect farmers with farmland. Any suggestions how to jumpstart a landlink program, or else link into other existing networks?

SUSAN PAYNE: Some of the best advice for a land trust and/or government agency to keep in mind when setting up a Farm Link program is to first discuss and decide on the basics – what's the program's purpose, what typical 'farm link' services do they want to provide, who will do the work, how do they measure success, how much will it cost? In one-word categories, these would include mission, scope, staffing, metrics, and funding. Tied in with scope and metrics also is expectations.

One of the biggest questions has to do with scope. Setting up a linking website system shouldn't be too difficult, as there are lots of existing linking sites to look at and use as examples. Some website-related things can be automated too. Beyond having a linking tool, the more services that a farm link program provides – like responding to inquiries, doing resource-referral, developing resources, organizing educational events (access to land, leasing, farm succession, etc.), and helping parties directly with their needs (facilitating matches, developing leases, aiding farm transfers, and other 1-on-1 technical assistance) – the more time and effort and skill (from staff and others) that will be needed.

In terms of staffing, a single person could probably get everything set up and maintain it, though a web developer might be needed to create the website. Getting feedback and direction from a board/committee/etc. would also help when laying out the scope at start. If the services are more basic, like more resource-referral than technical assistance and handholding, a person could probably do it as a part (1/3?) of their full-time job. If anyone's thinking of starting a farm link program, we'd recommend they check out these resources from Land For Good. The second one is like a guidebook for creating (or further developing) a farm link program:

- Resources for Farm Link Programs (from Land For Good)
 - o <https://landforgood.org/resources/farm-link-programs/>
- Developing and Strengthening Farm Link Programs
 - o https://landforgood.org/wp-content/uploads/LFG-Farm-Link-Guide-Developing-and-Strengthening-Farm-Link-Programs_print-version.pdf

Q: How do programs market property or otherwise identify prospective purchasers? (Maine FarmLink is one way)

SUSAN PAYNE: In addition to posting on our Farm-link website, we publish ads in wide circulation in agricultural news outlets, through the NJ Farm Bureau newsletter, blast emailing a wide array of agricultural interests throughout the state, notifying the county and state boards of agriculture, Rutgers cooperative extension, etc.

PROJECT STRUCTURE

Q: Do you usually have a buyer identified for the "sell" portion when you complete the "buy" portion of BPS?

SUSAN PAYNE: In NJ we have not identified buyers for the underlying fee land when we complete the purchase of the property.

ROBIN FAY: In the two transactions we have done so far we have had a likely potential buyer identified, but nothing in writing.

Q: How long do you typically hold the property as owner before conveying to a buyer?

SUSAN PAYNE: In NJ, generally the answer is as short of a period of time as is possible. However, we have had situations where we purchased a farm at the height of the market and by the time we closed

the market had changed substantially (like the onset of the great recession), so we may want to hold off until values recover before marketing the farm. If we buy a farm that is subject to an existing rental agreement, then when we buy it, we allow the renter to harvest the crops that year and seek to sell the property at the end of that calendar year so that the buyer takes possession of the property in time to get a crop in the following spring.

ROBIN FAY: Our goal would be 3-5 years, but in reality it will likely be more like 5-7 years.

Q: Is BPS really faster than a traditional easement transaction, given the need for a Phase I, due diligence, and fundraising?

SUSAN PAYNE: No, not in NJ's experience. Additional due diligence required when purchasing a property in fee takes more time than a typical easement purchase transaction.

Q: What are after easement values in the areas represented here?

SUSAN PAYNE: Value of preserved farmland in NJ ranges widely depending on 1) location, 2) quality of the farm and 3) housing opportunities associated with the preserved farm. Generally, we see values in the \$4,000 – \$10,000/acre range.

ROBIN FAY: Same factors as above apply, plus impacts from flooding and flood restrictions on development. We typically see values between \$2,000-\$6,000 per acre.

Q: What John describes cuts both ways. What happens if Maine needs to rebuild its dairy industry and there are no more 500-acre farms? Once split up, it becomes hard or impossible to stitch back together, similar to the way development only moves in one direction. Have any land trusts developed language that allows more long-term flexibility to grow or shrink farms as needed? The only way I can imagine this much long-term flexibility is if LT's hold fee and lease land.

SUSAN PAYNE: NJ allows division of preserved farms into smaller pieces with approval of the agency if the division is found to be for an agricultural purpose and all resulting parcels are deemed "agriculturally viable".

Q: Does BPS also work with other types of zoned properties, such as Rural (RR-5)?

CRIS COFFIN: A property's zoning status may impact what improvements (housing; other infrastructure) may be made to the property by the new owner and/or whether and to what extent a property may be subdivided prior to resale. Before pursuing a BPS, a land buyer should be sure to understand zoning status and requirements of a property.