

Legal Issues

Legal issues for CSA farms are similar to other farms'. They are also complex and different for every case. Legal information specific to CSA is scarce — much information in this chapter is adapted from non-CSA sources.

People starting farms and farms starting CSA projects may want to contact professionals for answers to business and legal questions. They can also do much research on their own. Public libraries have many books and workbooks on taxes and business, as do bookstores.

The three main areas of concern discussed here are:

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Land Tenure

This section discusses some options for securing land for a CSA project.

CSAs just starting which do not yet have land and ones expanding their acreage should remember that owning and leasing are not the only two options. Some institutions, such as schools, would enjoy sponsoring a CSA that grew crops on their property. Other land may be available from people who have rural property but no time to maintain it. They may agree to let you farm it in exchange for keeping an eye on the place, clearing flammable vegetation, or doing some other maintenance.

Whatever the arrangement, try to secure the land for several years at least. This allows you to become familiar with the soil and microclimate, to build up the soil structure and fertility, and to accumulate members and a reputation. In addition, you may have to work the land for a few years to get organic or bio-dynamic certification.

Land tenure, the stability of a farmer's right to use a property, is an important issue for CSAs. It ranks with low share prices as a main reason for CSA project failure. Embryonic efforts are underway to link the issue of land tenure (*or access to land*) with CSA. Some of these efforts are looking at community land trusts as a possible solution.

LAND TRUSTS

Land trusts fit well with CSA. CSA stresses the farmer-consumer relationship, suggesting that cooperation is necessary for small farms and ecologic practices to survive in an economy based on marketplace competitiveness. Land trusts (*or conservancies*) also skirt the marketplace by removing land from the market altogether.

Land can increase in value for reasons unrelated to farming activities. Urban and suburban sprawl, new highways and water projects can all increase land value to the point where the current owner-farmer cannot afford the taxes on it, the owner removes a tenant farmer to sell the land for development, or another small farmer cannot afford the land when it is sold. Land trusts, which are non-profit organizations, set land aside for specific uses, holding it so that it won't be developed.

Unstable land tenure is a main reason for CSA failure.

CSA and land trusts share similar concepts of resource control.

Agricultural land trusts earmark land for farming only. They can arrange for a piece of property to remain a farm in perpetuity, or for a long but finite length of time. They can also make other provisions, such as that the farm be organic or bio-dynamic, or that the owner live on the property. Just as a state park can preserve a forest or lake from being developed by builders, so an agricultural land trust can preserve a farm.

An organization in Connecticut called Equity Trust is attempting to foster this link between CSA and land trusts. It can provide assistance to farms looking to become land trusts and to property owners who want to preserve their rural land. Although a land trust itself, the organization prefers to link owners with local land trusts, so another effort is putting interested people and organizations in contact with one another. It has also started a fund which can be used to purchase land for CSA land trusts.

Equity Trust holds the **conservation easement** to Live Power Community Farm (LPCF) in Covelo, California, and was instrumental in Steve and Gloria Decater's efforts to preserve their farm. When LPCF came up for sale, the Decaters could not afford it. However, by putting 55% of the land's price in a conservation easement to be held by a land trust, and retaining 45% as the agricultural value of the land, the Decaters, their CSA members and Equity Trust were able to raise the money necessary to purchase the land. Equity Trust holds the development rights to the land, ensuring that it will remain in agriculture; the Decaters hold the farming rights. Furthermore, the agreement also provides that the land shall be farmed bio-dynamically or organically by a serious resident farmer.

Legal Form of the Farm or CSA

This section discusses the three business forms and issues to consider when choosing one.

CSAs generally come out of an existing farm, school or other entity. They tend to follow the organization of the sponsoring group. That is, farms who start CSA projects don't usually alter their organization, and schools generally retain the project as part of the school. Also, members don't tend to accrue any business interest in the farming operation.

CSA projects which create their own farm or garden, or alter an existing one, need to decide on a legal form for the business. The choice of form should reflect the goals and objectives of the individuals involved.

The three basic business forms are: sole proprietorships, partnerships and corporations. This section describes each of these forms and compares some of their advantages and disadvantages.

THE THREE BASIC BUSINESS FORMS

Of the three basic legal forms of business organizations — *sole proprietorships*, *partnerships* and *corporations* — only corporations (*which may be organized for profit or not for profit*) have a truly separate legal status apart from the individuals involved. The other forms are generally viewed as individuals carrying on a business for profit. This is an important distinction with many ramifications, particularly in the tax and liability areas. All business forms are governed by state law, but corporations are **creations** of law — they do not exist until certain legal steps are taken.

Most farms are **sole proprietorships** or **partnerships**, regardless of whether they are involved with CSA.

The cooperative nature of CSA can raise some interesting questions, especially if the project forms as a non-profit or for-profit corporation. A few of them are:

- ✦ **Who controls the land** — how it is used and what happens to it over the long run?
- ✦ **Is the farmer an owner or an employee of the firm?**
How about the members?
- ✦ **What are the farmers' and members' rights to real property and improvements made to the land or the farm?**

For growers interested mainly in establishing a loyal clientele for their farm, these issues do not need to arise.

SOLE PROPRIETORSHIP

A **sole proprietorship** is an individual who operates a business. It is the simplest and most common business form.

A sole proprietor has complete and sole control over the finances and management of the business and is subject to very few legal requirements. Paperwork is minimal. A sole proprietor must file a fictitious name statement if the farm uses a name other than that of the owner to let the public (*and creditors*) know of the existence of the business. The statement also offers some protection against others using the same name. In many communities, a sole proprietor must also obtain a business license.

The sole proprietor pays income taxes on the income received from the business and must file the appropriate federal and state income tax forms to report the income and expenses.

A sole proprietor is subject to unlimited personal liability for all obligations of the business.

PARTNERSHIPS

A partnership occurs when two or more people join together to carry on a business for profit. Partnerships may be either **general partnerships** or **limited partnerships**.

GENERAL PARTNERSHIPS

General partnerships are governed by the Uniform Partnership Act (Corp. Code, § 15001, et seq.). General partners may contribute money, property or services to the

Sole proprietorship is the most common business form for farms.

partnership. All general partners have an equal right to share in decision-making and management of the farm or CSA project (Corp. Code, § 15018 (e)). However, some general partners may wish to be less involved. This is permissible. However, whatever the level of involvement, each general partner is **personally liable** for all partnership obligations. If a creditor is unable to collect from the other partners, the remaining partner(s) is legally bound to pay the whole amount (Corp. Code, § 15015). This is one of the major drawbacks of the general partnership form.

General partnerships may occur informally, without a written agreement. Although this is legal, it is not a good idea. It is extremely easy for disagreements to arise in a partnership. Disputes over workload, philosophy, pay and other matters are common. To forestall these problems, a written partnership agreement should be developed to cover topics including:

- ✓ Partnership name;
- ✓ When the partnership started and how long it will continue;
- ✓ The purpose(s) for which the partnership is founded;
- ✓ What is being contributed to the partnership (*cash, property, effort*);
- ✓ How future financing will be arranged;
- ✓ Management responsibilities and the decision-making process;
- ✓ How the profits and losses will be distributed among the partners;
- ✓ Accounting procedures, including whether the books are on a cash or accrual basis or on a calendar or fiscal year;
- ✓ How disputes, including expelling a partner, will be handled/resolved (criteria, voting rights, mediation, arbitration provisions);
- ✓ What happens if one partner wants to sell an interest;
- ✓ Whether the business will continue upon retirement or withdrawal of a partner and on what terms;
- ✓ How to determine the value of the partnership interest of the partner who is leaving; and
- ✓ Procedures to end the partnership.¹

LIMITED PARTNERSHIPS

The limited partnership is more complex form of operation. For example, the California Revised Limited Partnership Act, effective July 1, 1984, (Corp. Code, § 15611, et seq.) requires a limited partnership to prepare a written agreement (Corp. Code, § 15621).

A limited partnership is made up of one or more general partners and one or more limited partners (Corp. Code, § 15611 (j)). A certificate of limited partnership must be filed with the Secretary of State (Corp. Code, § 15621). Limited partners are often passive investors in a business. As such, their exposure to liability is generally limited to the amount of their investment. Filing the partnership certificate is an important step in identifying the limited partners and assuring that their limited role and liability is recognized should a creditor attempt to collect from a limited partner.

The 1984 limited partnership act also imposes a number of record-keeping and filing requirements upon limited partnerships which should be reviewed thoroughly (Corp. Code, § 15615).

CORPORATIONS

Unlike sole proprietorships and partnerships, a corporation is a separate legal entity. A corporation has an existence independent of the individuals who serve on its board or as its employees. One of its most salient features is the continuity of existence which flows from its status as a separate entity.

There are many kinds of corporations. As creatures of law, they are all extensively governed by the Corporations Code. The major distinction is between corporations operated for **profit** and those operated **not-for-profit**; *In California, not-for-profits are known as nonprofits.*

This distinction needs clarification. Many people believe that **not-for-profit** means a business cannot bring in more money than it expends. This is not true. The key feature of a not-for-profit corporation is that whatever money in excess of expenses which it receives may not be given away (*distributed*) to shareholders or other individuals. Instead, the excess must be turned back into the business to enhance the nonprofit purpose.

Because of their educational and environmental benefits, CSAs can operate as non-profit corporations.

For Profit Corporations:

In California there are several types of for-profit corporations. Each type is subject to special rules concerning formation, organization, operation, taxation and dissolution. A detailed discussion of these different forms is beyond the scope of this chapter. However, people interested in operating as a for-profit corporation are urged to explore carefully the various forms since there are significant legal and tax advantages and disadvantages of each.

Non-Profit Corporations

Since January 1, 1980, California nonprofit corporations have been governed by a new nonprofit corporation law. This new law divides nonprofit corporations into three categories, each governed by a special section of the Corporations Code. These three categories are:

- 1 **Nonprofit Public Benefit Corporations** (Corp. Code, § 5110, et seq.);
- 2 **Nonprofit Mutual Benefit Corporations** (Corp. Code, § 7110, et seq.); and
- 3 **Nonprofit Religious Corporations** (Corp. Code, § 9110, et seq.).

ISSUES IN SELECTING THE BUSINESS FORM

This list indicates issues to consider when deciding on the form to use for a farm or CSA:

- ✦ Costs of forming the business
- ✦ Raising funds (capital)
- ✦ Liability
- ✦ Control and management
- ✦ Continuity of existence
- ✦ Taxation considerations
- ✦ Selling the business/going out of business

*CSAs forming
from scratch
may want to
explore forms
other than sole
proprietorship.*

- ✦ Paperwork burdens
- ✦ Limitations on personal gain
- ✦ Scrutiny by public agencies
- ✦ Community control

For many if not most CSA projects, the appropriate legal form is obvious. However, new farms or projects should consider their options. Furthermore, some CSAs may want to strengthen community control and involvement started by the marketing arrangement and explore cooperative or non-profit arrangements

¹ This list of topics to be covered was developed by Clifford, D. & Warner, R. *The Partnership Book*, California Edition, Nolo Press, Berkeley, CA, 1981, pp. 75-76

Liability & Insurance

This section explains liability and describes different types of insurance.

Liability is a legal concept which businesses dealing with the public or having employees should understand. Insurance is a big issue for all businesses, including farms. Both affect CSAs.

These two are included together because CSAs which bring members to the farm or which host events should consider insuring themselves for accidents on the farm for which they may be liable. This is not necessary — some CSA farms are insured and some aren't. However, you should be aware of these concepts and risks and make an informed decision.

As always with legal issues, it is a good idea to consult with a professional if you have questions.

LIABILITY

The best advice regarding liability can be summed up in two suggestions:

- ✦ Prevent injuries by complying with laws and regulations, and maintaining a safe environment for workers and members; and
- ✦ Buy appropriate insurance

This section elaborates on these suggestions. It also sets a framework for thinking about liability, describes the techniques to help prevent liability, and sets out insurance possibilities.

Liability is a broad concept. It includes both criminal and civil liability. Criminal liabilities (*jail sentences and fines*) occur when a person violates a law which contains criminal penalties. Civil liability (*often money damages*) can arise from laws which give others the right to sue to protect their interests (*civil rights laws*) or from failure to meet the obligations of private agreements (*contracts and leases*).

NEGLIGENCE

Negligence refers to the nonintentional infliction of harm by someone who is nonetheless at **fault** for the harm. The law recognizes that some things happen that cannot be prevented

through the exercise of due care. If the injury is no one's fault, it is an *accident*.

ELEMENTS OF A NEGLIGENCE CASE

Under the basic rules of negligence, the injured person must show four things to establish liability. If any one of these elements is missing, there is no liability for negligence.

To be negligence, your failure to use the proper care must have caused the injury.

① Duty to Exercise Due Care

Ordinarily, people are liable for injuries only if they are actively careless. They must use due care to prevent foreseeable injuries.

② Failure to Use Due Care (*Breach of Duty*)

Once a duty is established, courts evaluate the behavior against a basic standard of care, often referred to as the *reasonable person* standard. The question is posed, "*would a reasonable person charged with the same duties exercise the same degree of care under the circumstances?*"

③ Proximate (Legal) Cause

The cause in most negligence cases is rather straightforward and it is not difficult to see how the action caused the injury. The issue gets complicated where there is more than one act of negligence. The basic rule is that you are liable for your negligence even if someone else is also liable.

④ Injury

The person making a claim of negligence must show that they have been injured and are entitled to damages. This is generally a very straightforward matter, although the calculation of the amount can be complex.

FARM RESPONSIBILITIES TOWARD EMPLOYEES

In California, employers are required by law to carry workers' compensation insurance to take care of injuries to employees which occur during the course of their employment. Employee injuries, for the most part, are compensated through workers' compensation, a no-fault system. Employers are required to post notices concerning their workers' compensation responsibilities. Inexpensive workers' compensation insurance is available from the State Compensation Insurance Fund and from private insurance brokers. Volunteers in nonprofit organizations may be included in the workers' compensation policy if the board of directors approves the inclusion and they are counted in the insurance application.

FARM RESPONSIBILITIES TO OTHERS

A farm may be liable for negligence to others who are injured on the premises or as a result of negligence by a center employee.

WHO IS LIABLE?

The basic rule is that each individual is liable for his or her own negligence. However, in addition, an employer is liable for the negligence of employees when the negligence occurs in the course of employment.

The worst case arises when there is no insurance. The injured person is likely to sue everyone involved in the hope of finding a defendant who has the money to pay damages.

LEGAL DEVICES TO SHIFT OR AVOID LIABILITY

There are a number of legal devices which can play a part in a risk management program. Since public policy tends to discourage technical defenses which avoid liability, most devices determine who will bear responsibility if and when an injury occurs.

Used in conjunction with an appropriate insurance package, devices such as incorporation (*to protect board members from personal liability for acts of negligence by*

employees), and indemnification provisions in bylaws, leases, contracts and other legal documents can help the parties involved anticipate and make responsible preparation for injuries which might occur.

These devices will not apply to sole proprietorships and partnerships.

PREVENTION OF HARM AND OTHER PRECAUTIONS

SAFETY PROGRAM

The best safeguard against liability is to comply with applicable laws and regulations and have an ongoing safety program. Consider also what tools and equipment members will use. OSHA requires safety training for farm workers who use tractors and other potentially dangerous equipment. You may want to limit use of tractors, power tools, ladders and other equipment.

An ongoing safety program should include accident prevention training and regular review of accidents which have occurred on the farm. Farms should maintain a record of all injuries noting the name of the person, date, time of day, piece of equipment and people involved. These reports should be reviewed periodically to see if patterns emerge which suggest corrective measures.

Also, keep a list of emergency numbers, including 911 if used in your area, near every telephone.

The following suggestions should be included in any post-accident planning:

If you think the injury may be very serious and/or you do not feel able to safely transport the injured person — for example, in the case of broken bones, multiple injuries, or serious head and neck injuries — always call an ambulance (*dial 911 in most areas; no coin is needed for most pay phones*). If the situation is a life-threatening emergency requiring you immediately to render some form of first aid (*e.g., mouth-to-mouth resuscitation*), you should give only what aid you are capable of. According to California's "Good Samaritan" law (Health & Safety Code, § 1799.102), a person rendering emergency care at the scene of an emergency

Safety measures such as doing the proper training, having first aid supplies and keeping emergency numbers by telephones are good ideas for any farm or business.

cannot be held liable for damages resulting from any act or failure to act. However, the person rendering aid is only protected as long as (a) professional medical care was unavailable, and (b) he/she acted in good faith without expecting to be paid for his/her efforts.

If the injury is less serious but needs immediate attention and you feel able to safely transport the injured person yourself, decide whether to leave immediately or call 911.

If the injury is not very serious, it would be better to allow the injured person or his/her family or friends to assume responsibility for obtaining the appropriate medical care.

PROPERTY DAMAGE

Several things are recommended to diminish risks to your property and your CSA:

- ✦ Inspect for hazards.
- ✦ Store important documents and equipment safely.
- ✦ Make contingency plans in the event of a major loss. This plan should include some financial planning. For example:
 - *What are the farm's continuing costs (regardless of whether it is operating or not)?*
 - *Are there volunteers who can be called when needed to help with clean-up tasks after the damage?*

INSURANCE

Like other endeavors, the operation of a farm is subject to human error. Fortunately, there is insurance to provide a safety net when, even after best efforts are expended, someone or something is harmed.

It is essential that you read your insurance policies carefully to make sure that you really understand all of their provisions. It is also important to note any exclusions in your policies. If you find there are certain provisions you don't understand, ask your insurance agent or broker. If you still have questions, you might seek the help of a lawyer.

It is possible to insure against almost any possible risk. However, most farms can only afford very basic kinds of insurance. Therefore, it is important that to buy insurance only after a careful assessment of specific needs and budgetary constraints. In addition, it may be worthwhile to shop around among various insurance providers as insurance costs and coverage can vary dramatically from one agent to the next.

LIABILITY INSURANCE

Liability insurance is purchased to cover injuries that occur because of negligence. If you have general liability insurance, the insurance company will defend you if you are sued. If the court decides that you are **liable**, the company will pay the money judgment up to the limits of the policy.

Liability insurance can be purchased to give general liability coverage, specific coverage, or a combination of the two, purchased as a *package*. If you already have liability insurance for your farm, check that it covers CSA activities.

ADDITIONAL INSURED

EMPLOYEES

Your program's general liability insurance will cover the program if it is sued because of the negligent acts of its employees, but only when they were acting within the scope of their duties. However, if employees are also named in the suit, the policy usually won't pay for their

defense or any judgment against them. This can be remedied by adding your employees as **additional insureds** on the general liability policy.

VOLUNTEERS

Volunteers usually are not covered by the program's liability policy. Programs that use volunteers may have difficulty adding volunteers as additional insureds or buying separate liability coverage.

When a program seeks to cover its volunteers, it helps to be honest and reassuring with the underwriter about the volunteers' daily activities. The insurer will want to know everything the volunteer will be doing that might affect others, as well as anything that might conceivably happen to him/her.

Consider how often members come out to the farm. Are they coming several times a week, or just once a year? Think about what your members will be doing: are they just picking up shares, or are they doing fieldwork?

LANDLORDS AND FUNDING SOURCES

Frequently, funding sources as well as landlords, will require that they be named on your insurance policy as additional insured. This means that if they are named as co-defendants in a suit against you, the insurance would cover both the cost of their defense and any part of the settlement or judgment against them.

ACCIDENT INSURANCE

Liability insurance is not "*no fault*" coverage. Thus, if someone is injured while at your farm, but there is no one at fault, your liability insurance policy will not cover the accident. For this reason, an additional policy covering accidental injuries is worthwhile to consider. Accident insurance is generally available at very reasonable costs.

VEHICLE INSURANCE

A good auto insurance policy will cover most of the costs following an auto-related injury. A good policy will pay for your defense in the event of a lawsuit, and will pay any settlement or money judgment (*up to the policy limit*) that you would otherwise have to pay.

Often, insurance companies will include a **deductible** in the policy: an amount the insured must pay out of his/her own pocket before the coverage takes over. Usually, a policy with a higher deductible is the least expensive. Insurance should be considered a large "*rainy day fund*," to be dipped into only in the event of a large damage claim downpour.

The following is a list of some of the more common types of coverage for vehicles. These different types of insurance usually are written with a deductible of \$50 to \$250. Often an agent will offer a package of several different types of coverage at a rate less than the separate purchase price.

California requires vehicles to carry certain types of insurance in certain amounts. Be sure to check with your local office of the Department of Motor Vehicles or the Secretary of State.

Types of vehicle insurance are:

- ✦ Bodily Injury Liability
- ✦ Property Damage Liability
- ✦ Uninsured Motorist Protection
- ✦ Collision
- ✦ Medical Payments
- ✦ Under-insured motorist protection
- ✦ Comprehensive
- ✦ Fire, Theft, and Combined Additional Coverage for Physical Damage

PROPERTY INSURANCE

Property insurance can be purchased to protect you for three different kinds of damage:

- ✦ **Damage to your building** (*"real property"* or *"realty"* in legalese)
- ✦ **Damage to your equipment, supplies, or records** (*"personal property"*)
- ✦ **Consequential damage to you or your project** (e.g., the cost of your salary while the farm isn't operating)

Coverage for both realty and personal property can be purchased on either a **named-perils** basis or an **all-risks** basis. Insurance written on a **named-perils** basis will cover your property only for damages caused by peril specifically named in the policy (e.g., *only damage from fire, lightning, vandalism or other peril listed on the coverage page*). **All-risks** insurance will cover your property for damages from all perils that are not specifically excluded in the policy.

If you rent or lease space, your landlord will usually carry fire insurance on the building. However, some leases require that tenants purchase their own or additional fire insurance on the building.

An important exception to realty and personal property insurance is flood insurance, which can only be purchased from the federally-administered National Flood Insurance Program. If you live in an area where flooding is a risk, contact your local office of the Federal Emergency Management Agency (FEMA) for information on how to purchase flood insurance.

Insurance policies are written based on either the *"actual cash value"* or the *"replacement cost"* of the property. The actual cash value is the depreciated value of the property after use or wear. The replacement cost is the value of replacing the exact same piece of property, for example, the same square footage of the building or the same piece of equipment at current market rates.

RESOURCES

GENERAL BUSINESS INFORMATION

McKeever, M. *Start Up Money: How to Finance Your New Small Business*, Berkeley, CA, Nolo Press, 1st Edition.

Warner, Ihara & Sherman. *Homestead Your House*, Berkeley, CA, Nolo Press, 5th Edition

Small Business Administration: 660 J Street, Suite 215, Sacramento, CA 95814; (916) 498-6410.

LAND TRUSTS

American Farmland Trust: 1949 Fifth Street, Davis, CA 95616; (916) 753-1073.

Equity Trust: Chuck Matthei, (203) 376-6174.

Nevada County Land Trust: (916) 265-0430.

Placer Land Trust: Scott Dalton, (916) 791-0014;
Nature Center (916) 621-1224.

Trust for Public Lands: 116 New Montgomery Street, 4th Floor, San Francisco, CA 94105; 415/495-4014, fax 415/495-4103.

SOLE PROPRIETORSHIP

Kamaroff, B. *Small Time Operator*, Berkeley, CA, Nolo Press, 2nd Edition

PARTNERSHIPS

Advising California Partnerships. Berkeley, CA, California Continuing Education of the Bar, 1975 (Supplement 1983)

Clifford, D., and Warner, R. *The Partnership Book: California Edition*, Berkeley, CA, Nolo Press 1981

CORPORATIONS

Organizing Corporations in California. Berkeley, CA, California Continuing Education of the Bar, 2nd Edition, 1983

Advising California Nonprofit Corporations. Berkeley, CA, California Continuing Education of the Bar, 1984

CORPORATIONS (CONTINUED)

Mancuso, Anthony. *The California Nonprofit Corporation Handbook*,
Berkeley, CA, Nolo Press, 4th Edition

Non-Profit Resource Center: 828 "I" Street (*in the Central library*),
Sacramento, CA 95814, 916/268-2772