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April 24, 2020

VIA EMAIL

Ian McSweeney
Organizational Director
Agrarian Land Trust

Re: Minnesota's Corporate Farm Law

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Dear Mr. McSweeney:

Thank you for reaching out to me on behalf of the Agrarian Land Trust to seek legal advice regarding Minnesota's Corporate Farm Law for purposes of the Trust's initiative in Minnesota. My analysis is below.

Background

The Agrarian Land Trust (ALT) is a Nonprofit benefit corporation incorporated in California and organized:

1. To preserve and protect natural resources for the benefit of the public and to protect ecologically significant land by preserving and stewarding agricultural land in perpetuity;
2. To train and support a new generation of farmers by providing affordable farmland and affordable housing to low-income and other disadvantaged farmers;
3. To combat community deterioration in economically disadvantaged rural areas by preserving the affordability of agricultural land and housing, and by encouraging the development of new farming enterprises;
4. To lessen the burdens of government by preserving the long-term agricultural use of land otherwise under threat of commercial development;
5. To educate communities about and engage in scientific research about ecologically and economically sustainable farming practices;
6. To eliminate prejudice and discrimination by supporting historically marginalized farmworkers in developing and owning their own farm enterprises; and

7. To engage in any lawful activity in furtherance of the above purposes, but in no event will the corporation engage in any activity prohibited to corporations exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.¹

The ALT is embarking on an initiative in certain states, including the State of Minnesota, to help facilitate the transfer of farmland pursuant to its purpose stated above. The farmland so transferred is intended to be held by nonprofit entities called Agrarian Commons that will be organized under Section 501(c)(2) or 501(c)(25) of the Internal Revenue Code.

This letter analyzes whether and how a nonprofit entity organized under Section 501(c)(2) or (25) of the Internal Revenue Code can hold farmland in Minnesota.

Minnesota Corporate Farm Law

Minnesota has a Corporate Farm Law (CFL) that restricts the types of entities that can own farmland or engage in farming in Minnesota. The Minnesota Corporate Farm Law was passed by the Minnesota Legislature in 1973. Its purpose is to “encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.” Minn. Stat. §500.24, subd. 1. In general, the law prohibits pension or investment funds, corporations, limited partnerships, limited liability companies, and irrevocable trusts from owning or leasing farmland or engaging in farming in Minnesota, with certain exceptions.

Other Midwestern states have similar laws, and those laws have been challenged with some success in federal courts. For example, in a case in South Dakota, a corporate farming law enacted as a voter-approved amendment to the South Dakota constitution was found unconstitutional by a federal court because it violated the dormant Commerce Clause of the United States Constitution by discriminating against out of state entities. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003). The dormant Commerce Clause has therefore become a popular choice for challenging corporate farming laws. See, e.g., *Smithfield Foods, Inc. v. Miller*, 241 F.Supp.2d 978 (S.D. Iowa 2003) (holding that Iowa’s corporate farming law violated the dormant Commerce Clause and was discriminatory on its face, in its purpose, and in its effect); *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006) (holding that Initiative 300, which precluded non-family-owned limited partnerships from acquiring an interest in real estate used for ranching or farming in Nebraska, violated the dormant Commerce Clause, making it unconstitutional); *N.D. Farm Bureau, Inc. v. Stenehjem*, 333 F. Supp. 3d 900 (D.N.D. 2018) (holding that although one section of North Dakota’s corporate farming law violated the dormant Commerce Clause, this section was severable, and the rest of the law could be left in place).

¹ Articles of Incorporation of Agrarian Land Trust, Section II.

and sustainable agriculture, organizations and individuals working in this area have generally tried to preserve those laws and work within them. *See, e.g., The Eighth Circuit Grants Corporate Interests a New Weapon Against State Regulation in South Dakota Farm Bureau v. Hazeltine*, 49 S.D.L.Rev. 795 (2004), available at: www.nationalaglawcenter.org.

Possible Exemptions

Minnesota's CFL contains several exemptions, which have provided something of a "release valve." They allow several different types of entities to hold farmland or engage in farming while still meeting the goal of the CFL. The structure ALT is creating involves 501(c)(2) or 501(c)(25) nonprofit entities holding title to the land. Accordingly, the most relevant to ALT would be Minn. Stat. §500.24, subd. 2(z), which applies to nonprofit entities. In order to qualify for this exemption, the nonprofit must be organized under state nonprofit corporation law or be qualified for tax-exempt status under federal law and:

1. Use the land for a specific nonfarming purpose;
2. Lease the land to an entity that is specifically authorized under this section of the Minnesota CFL; or
3. Actively farm less than 40 acres and use all of the profits from the land for educational purposes.

Minn. Stat. §500.24, subd. 2(z). Because it is anticipated that generally the land will be used for farming, any Minnesota Agrarian Commons 501(c)(2) or 501(c)(25) nonprofit will need to qualify under either #2 or #3 above. The least restrictive option would be #2, as it contains no restrictions on the number of acres the entity can hold. To qualify for this exemption, the entities that the Minnesota Agrarian Commons could lease farmland to include:

- a family farm unit,
- a family farm corporation,
- an authorized farm corporation,
- an authorized livestock farm corporation,
- a family farm limited liability company,
- a family trust,
- an authorized farm limited liability company,
- a family farm partnership, or
- an authorized farm partnership

Minn. Stat. §500.24, subd. 2(z)(2). The statutory definitions of these terms are set out in Attachment A to this letter. This restricts the types of entities to whom Minnesota Agrarian Commons can lease farmland, but many of the lessees to whom the Minnesota Agrarian Commons would want to lease farmland could fit within these various structures. And leasing to individuals who fit in these allowed structure helps support the goals of the CFL as well.

If the Minnesota Agrarian Commons is unable to lease the farmland to one of the allowed types of entities, it does have other options. It could qualify for an exemption by of owning and

leasing less than 40 acres, but all of the profits from the land would have to go to educational purposes. Minn. Stat. §500.24 subd. 2(z)(3).

One option that has not frequently been used in this context but for which I see some potential is the “research or experimental farm” exemption. This exemption can be used by corporations, limited partnerships, pensions, investment funds, or limited liability companies that own or operate farmland for “research or experimental purposes, provided that any commercial sales from the operation are incidental to the research or experimental objectives of the corporation.” Minn. Stat. §500.24, subd. 2(p). This exemption has traditionally been used by companies like Monsanto and DuPont to test their new products on crops. But I believe a case can be made that some of the regenerative farms are actually doing research or experimenting. The entities that would want to rely on this exemption would have to show that the profits from the sales of the crops are “incidental” to the objectives of the corporation, which might be difficult in some cases. But in other cases, the farms truly are experimental as new methods of regenerative agriculture are being tried for purposes of education. An entity wanting to use this exemption would also need to submit a prospectus or proposal to the Minnesota Commissioner of Agriculture of the intended method of operation that contains information required by the Commissioner, including a “copy of any operational contract with individual participants.” *Id.*

Another option would be to qualify under the “De minimis” exemption if the entity owns 40 acres or less of farmland and receives less than \$150 per acre in gross revenue from rental or agricultural production. Minn. Stat. §500.24, subd. 2(bb).

As a fallback, the Minnesota Agrarian Commons entity could apply for what is called a “Commissioner’s exemption.” This is essentially a “catchall” provision for entities that do not qualify for any of the other enumerated exemptions. In order to qualify, the entity must submit a petition to the Commissioner and demonstrate that: 1) the exemption would not contradict the purpose of the CFL, and 2) would not have a significant impact “upon the agriculture industry and the economy.” Minn. Stat. §500.24, subd. 3(b). There is little guidance on how to interpret those factors and the Commissioner has discretion to issue or deny the exemption, but historically, most have been granted. There were 187 Commissioner’s exemptions granted in 2019. <https://www.mda.state.mn.us/business-dev-loans-grants/minnesotas-corporate-farm-report>.

Although these exemption requests historically have been granted, some purchasers of farmland are uneasy having to rely on the discretion of the Commissioner. Minnesota has a tradition of long-serving, amenable Commissioners, but Commissioners do serve at the pleasure of the Governor, and each Commissioner’s exemption must be reviewed and renewed annually. Some farmland purchasers have been anxious about making a purchase of farmland, which can involve a significant investment, reliant upon the discretion and goodwill of a particular Commissioner, knowing that change can occur with each new administration.

Other obligations of the Corporate Farm Law

Once an entity qualifies for an exemption under the CFL, the CFL imposes additional obligations. The entity must also:

1. Prepare a conservation plan;
2. Submit an annual report;
3. With the first report, submit a copy of the title of the property;
4. With the first or second report, submit a copy of the conservation plan proposed by the local SWCD; and with subsequent reports, submit a statement of whether the conservation plan was implemented;
5. Depending on type of entity, disclose the number of shares, partnership interests, or governance and financial rights owned by persons or beneficiaries of family farm trusts; and
6. Incorporate specific provisions in any leases.

Most of these obligations are consistent with the mission of ALT and the Commons, so I would not anticipate these being insurmountable obligations.

Structuring Agrarian Land Trust Agreements with Agrarian Commons in Minnesota

The discussion above analyzes the possible exemptions that a Minnesota Agrarian Commons 501(c)(2) or 501(c)(25) organization could rely upon. For purposes of launching this initiative, you will want to ensure that all applicable documents are at least consistent with Minnesota's CFL and do not contain any provisions that could inadvertently prevent the Minnesota Agrarian Commons from holding title to the farmland under the CFL. It would be a best practice to add provisions to relevant documents that the Minnesota Agrarian Commons must comply with Minnesota's Corporate Farm Law. The Good Faith Understanding agreement does currently state that the Agrarian Commons must comply with all "State specific legal, financial, and reporting requirements," but this is in the context of IRS regulations. You may want to consider adding a provision requiring the Agrarian Commons to comply with all state laws and regulations generally, or add something more specific about Minnesota's Corporate Farm Law. I would be happy to review and analyze all relevant documents – including the Minnesota Agrarian Commons Bylaws, the Good Faith Understanding, and the Land Lease Agreement – for the specific purpose of identifying any language that could potentially be problematic for compliance with Minnesota's Corporate Farm Law and could suggest specific language to add to each of those documents. The lease in particular is required to have specific language in it to comply with the CFL.

Other potential Corporate Farm Law issues

There is also an additional potential issue with the CFL as it pertains to the ALT itself. If the ALT retains any interest in which it "directly or indirectly, own[s], acquire[s], or otherwise obtain[s] any interest, in agricultural land," then it too must qualify for one of the exemptions listed

under the CFL. This could be somewhat more difficult. The question is what is considered an "interest" in farmland. The recent draft of the Good Faith Understanding that I reviewed contains this language: "The Trust may retain a perpetual conservation easement, an Option to Reacquire, and/or a right of first refusal on land and real estate transferred to the Commons..."

Although there is no written guidance on this issue, the attorney at the Minnesota Department of Agriculture has interpreted conservation easements to be an "interest" in farmland. Conservation easement holders in Minnesota that I am aware of are generally governmental entities such as counties or USDA NRCS. I know that nonprofit organizations such as The Nature Conservancy also hold easements on farmland, but they typically use the land for a "specific nonfarming purpose" and thus fall under the nonprofit exemption at Minn. Stat. 500.24, subd. 2(z)(1). This specific language in the Good Faith Understanding therefore may pose a problem for purposes of complying with the CFL. It is my understanding that the MDA has not considered a right of first refusal or an option to purchase an "interest" in farmland for purposes of the CFL.

Conclusion

You asked at the outset of the ALT's initiative whether Minnesota's Corporate Farm Law would prevent the launch of Agrarian Commons in Minnesota. As noted above, I believe it can be done in such a way that it complies with Minnesota's Corporate Farm Law and still meets the ALT's goals.

Sincerely,

Lind, Jensen, Sullivan & Peterson
A Professional Association



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SES/tmm
Enclosure

Minnesota Statute 500.24(z)(2) Qualifying Entity Definitions

(c) "Family farm corporation" means a corporation founded for the purpose of farming and the ownership of agricultural land in which the majority of the stock is held by and the majority of the stockholders are persons, the spouses of persons, or current beneficiaries of one or more family farm trusts in which the trustee holds stock in a family farm corporation,

related to each other within the third degree of kindred according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are corporations; provided that a family farm corporation shall not cease to qualify as such hereunder by reason of any:

(1) transfer of shares of stock to a person or the spouse of a person related within the third degree of kindred according to the rules of civil law to the person making the transfer, or to a family farm trust of which the shareholder, spouse, or related person is a current beneficiary; or

(2) distribution from a family farm trust of shares of stock to a beneficiary related within the third degree of kindred according to the rules of civil law to a majority of the current beneficiaries of the trust, or to a family farm trust of which the shareholder, spouse, or related person is a current beneficiary.

For the purposes of this section, a transfer may be made with or without consideration, either directly or indirectly, during life or at death, whether or not in trust, of the shares in the family farm corporation, and stock owned by a family farm trust are considered to be owned in equal shares by the current beneficiaries.

(d) "Family farm trust" means:

(1) a trust in which:

(i) a majority of the current beneficiaries are persons or spouses of persons who are related to each other within the third degree of kindred according to the rules of civil law;

(ii) all of the current beneficiaries are natural persons or nonprofit corporations or trusts described in the Internal Revenue Code, section 170(c), as amended, and the regulations under that section; and

(iii) one of the family member current beneficiaries is residing on or actively operating the farm; or the trust leases the agricultural land to a family farm unit, a family farm corporation, an authorized farm corporation, an authorized livestock farm corporation, a family farm limited liability company, a family farm trust, an authorized farm limited liability company, a family farm partnership, or an authorized farm partnership; or

(2) a charitable remainder trust as defined in the Internal Revenue Code, section 664, as amended, and the regulations under that section, and a charitable lead trust as set forth in the Internal Revenue Code, section 170(f), and the regulations under that section.

A1

(e) "Authorized farm corporation" means a corporation meeting the following standards:

(1) it has no more than five shareholders, provided that for the purposes of this section, a husband and wife are considered one shareholder;

(2) all its shareholders, other than any estate, are natural persons or a family farm trust;

- (3) it does not have more than one class of shares;
- (4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;
- (5) shareholders holding 51 percent or more of the interest in the corporation reside on the farm or are actively engaging in farming;
- (6) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and
- (7) none of its shareholders are shareholders in other authorized farm corporations that directly or indirectly in combination with the corporation own more than 1,500 acres of agricultural land.

(f) "Authorized livestock farm corporation" means a corporation formed for the production of livestock and meeting the following standards:

- (1) it is engaged in the production of livestock other than dairy cattle;
- (2) all its shareholders, other than any estate, are natural persons, family farm trusts, or family farm corporations;
- (3) it does not have more than one class of shares;
- (4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;
- (5) shareholders holding 75 percent or more of the control, financial, and capital investment in the corporation are farmers, and at least 51 percent of the required percentage of farmers are actively engaged in livestock production;
- (6) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and
- (7) none of its shareholders are shareholders in other authorized farm corporations that directly or indirectly in combination with the corporation own more than 1,500 acres of agricultural land.

(j) "Family farm partnership" means a limited partnership formed for the purpose of farming and the ownership of agricultural land in which the majority of the interests in the partnership is held by and the majority of the partners are natural persons or current beneficiaries of one or more family farm trusts in which the trustee holds an interest in a family farm partnership related to each other within the third degree of kindred according to the rules of the civil law, and at least one of the related persons is residing on the farm, actively operating the farm, or the agricultural land was owned by one or more of the related persons for a period of five years before its transfer to the limited partnership, and none of

A2

the partners is a corporation. A family farm partnership does not cease to qualify as a family farm partnership because of a:

- (1) transfer of a partnership interest to a person or spouse of a person related within the third degree of kindred according to the rules of civil law to the person making the transfer or to a family farm trust of which the partner, spouse, or related person is a current beneficiary; or

(2) distribution from a family farm trust of a partnership interest to a beneficiary related within the third degree of kindred according to the rules of civil law to a majority of the current beneficiaries of the trust, or to a family farm trust of which the partner, spouse, or related person is a current beneficiary.

For the purposes of this section, a transfer may be made with or without consideration, either directly or indirectly, during life or at death, whether or not in trust, of a partnership interest in the family farm partnership, and interest owned by a family farm trust is considered to be owned in equal shares by the current beneficiaries.

(k) "Authorized farm partnership" means a limited partnership meeting the following standards:

- (1) it has been issued a certificate from the secretary of state or is registered with the county recorder and farming and ownership of agricultural land is stated as a purpose or character of the business;
- (2) it has no more than five partners;
- (3) all its partners, other than any estate, are natural persons or family farm trusts;
- (4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;
- (5) its general partners hold at least 51 percent of the interest in the land assets of the partnership and reside on the farm or are actively engaging in farming not more than 1,500 acres as a general partner in an authorized limited partnership;
- (6) its limited partners do not participate in the business of the limited partnership including operating, managing, or directing management of farming operations;
- (7) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and
- (8) none of its limited partners are limited partners in other authorized farm partnerships that directly or indirectly in combination with the partnership own more than 1,500 acres of agricultural land.

(l) "Family farm limited liability company" means a limited liability company founded for the purpose of farming and the ownership of agricultural land in which the majority of the membership interests is held by and the majority of the members are natural persons, or current beneficiaries of one or more family farm trusts in which the trustee holds an interest in a family farm limited liability company related to each other within the third degree of kindred according to the rules of the civil law, and at least one of the related persons is residing on the farm, actively operating the farm, or the agricultural land was owned by one

A3

or more of the related persons for a period of five years before its transfer to the limited liability company, and none of the members is a corporation or a limited liability company. A family farm limited liability company does not cease to qualify as a family farm limited liability company because of:

- (1) a transfer of a membership interest to a person or spouse of a person related within the third degree of kindred according to the rules of civil law to the person making the

transfer or to a family farm trust of which the member, spouse, or related person is a current beneficiary; or

(2) distribution from a family farm trust of a membership interest to a beneficiary related within the third degree of kindred according to the rules of civil law to a majority of the current beneficiaries of the trust, or to a family farm trust of which the member, spouse, or related person is a current beneficiary.

For the purposes of this section, a transfer may be made with or without consideration, either directly or indirectly, during life or at death, whether or not in trust, of a membership interest in the family farm limited liability company, and interest owned by a family farm trust is considered to be owned in equal shares by the current beneficiaries. Except for a state or federally chartered financial institution acquiring an encumbrance for the purpose of security or an interest under paragraph (x), a member of a family farm limited liability company may not transfer a membership interest, including a financial interest, to a person who is not otherwise eligible to be a member under this paragraph.

(m) "Authorized farm limited liability company" means a limited liability company meeting the following standards:

- (1) it has no more than five members;
- (2) all its members, other than any estate, are natural persons or family farm trusts;
- (3) it does not have more than one class of membership interests;
- (4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;
- (5) members holding 51 percent or more of both the governance rights and financial rights in the limited liability company reside on the farm or are actively engaged in farming;
- (6) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and
- (7) none of its members are members in other authorized farm limited liability companies that directly or indirectly in combination with the authorized farm limited liability company own more than 1,500 acres of agricultural land.