


 A portrait of Jerry Cosgrove, a man with short grey hair and glasses, wearing a teal sweater over a white collared shirt. He is smiling slightly and looking towards the camera. The background is a blurred green leafy plant.

SUBJECTIVE SCENERY

Recently I was asked to review some language for a conservation easement on farmland relative to the easement's purpose clause, which included reference to scenic attributes as part of its conservation purposes justification for Section 170(h) of the Internal Revenue Code.

As a former farmer, I have to admit that the word "scenic" always raises a red flag in a conservation easement on working farm or ranch land. There are aspects of agriculture that are ugly, smelly and noisy. Because beauty has always been in the eye of the beholder, any "scenic" attribute is inevitably going to be subjective.

However, what caught my attention was a new phrase that I had not seen before. The term "scenic benefit to the public" was referenced as a "key component" of satisfying the conservation purposes test under 170(h)(4)(A)(iii). Just to be sure, I checked that statute and confirmed that the two-prong test of that provision does in fact still have two prongs: "scenic enjoyment of the general public" or "pursuant to a clearly delineated Federal, State or local governmental conservation policy, and will yield a significant public benefit." So who decides if such a governmental conservation policy will yield significant public benefit? And did Congress possibly

intend that significance be measured only by scenic attributes?

My answer to the first question relative to farmland is an easy one here in New York state—our state constitution, Environmental Conservation Law and Agriculture and Markets Law provide that the policy of the state shall be to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It further states that the legislature, in implementing this policy, shall include adequate provision for the protection of agricultural lands. The New York State Agricultural Districts Law protects the "right to farm," and the Agricultural and Farmland Protection Programs have provided assistance for farmland protection planning and the purchase of development rights using agricultural conservation easements. Many local governments have developed farmland protection plans and/

or established local PDR programs too. And our state's highest Court of Appeals has recognized and affirmed this approach.

The answer to the second question was recently articulated by attorney and law professor Bill Hutton in a characteristically concise manner: "Section 170(h)'s five categories of conservation purpose are disjunctive—*any one will do*. Of course, if the grantee believes that the farm is indeed pretty, it may want to invoke the 'scenic' qualifier, despite the mischief such a recitation is apt to cause. So our challenge, it seems to me, is to educate folks to resist the temptation to consider any open space target property as scenic, when to do so will almost certainly complicate the landowner's life and limit economic choices otherwise available."

As Bill observes, the allure of scenic preservation of working lands inevitably creates tension, if not conflict, with the economic necessities of the farming and ranching business.

So while it is true that 170(h) provides for scenic enjoyment as one category of conservation purpose, it is but one test only and probably not the best choice for working farm and ranch land. While I may not agree with the use of "scenic enjoyment" as the preferred conservation purpose (in fact, our program permits the use of scenic attributes as a secondary purpose to the conservation of viable agricultural land and agricultural soil resources), I strongly disagree with the view that a "scenic benefit to the public" or "the scenic enjoyment of the general public" are necessarily a critical component for satisfying the conservation purposes of 170(h). 🌱

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