PROTECTING THE VIEW

By: Elizabeth Wroblicka

INTRODUCTION:

While driving along the federally designated Kancamagus Scenic Byway, hiking the Appalachian Trail, or rafting through the Columbia River Gorge National Scenic Area, you will see breathtaking views of rivers, mountains, forests, and pristine natural landscapes. Equally appealing is the drive approaching a small New England town with pastoral views of cows grazing in a wild flower meadow, a barn and trees in the background, and mountains silhouetted in the distance.

The classification of a scenic view worthy of protection by a conservation easement varies widely across the country depending on what is customarily considered aesthetic within a region, the values of the organization acting as holder, and the natural resources and contextual setting of a parcel of land in relation to adjacent land uses. What rates as a high quality scenic resource is a mostly subjective determination by the individual viewer. The process of classifying scenic as a conservation easement purpose is much more subjective than classifying high quality wildlife habitat, agricultural soils, historic, or recreational land. Scenic is a conservation value that defies a consistent definition even within the same land trust.

Some land trusts are fortunate to operate in an area that has received governmental study and designation as a scenic area, but most do not have such policies to rely on. Rather, where Natural Heritage biological inventories, USDA soil types, or historic registries are frequently used to define the significant public benefit of ecological, agricultural, or historic conservation easements, scenic easements are commonly defined by a descriptive account of the view from the road.

Despite, or perhaps because of, their lack of a scientific or policy basis, scenic easements are possibly the most widely used of all the various types of conservation easements. In the fall of 2009, I interviewed fourteen experienced land conservation practitioners from around the country representing all sizes of land

conservation organizations to understand how scenic easements are being used today. In a random sampling, the word "scenic" appears in most conservation easements either as a conservation purpose, a conservation value, a descriptive term for a variety of natural resources, as part of the mission of the holder, or in the recitals as a generic beneficial public value articulated as government policy. Some land trusts focus on working lands such as agriculture or managed forests, some focus on a particular natural resource such as shoreline protection or biodiversity, some focus on recreation or rural character, but almost all protect the scenic value of land – not as a stand alone purpose, but in addition to their other conservation mission. Scenic is the O+ purpose for conservation easement donations because scenic values overlay with all of the other recognized conservation purposes.

Another reason why scenic easements are so ubiquitous may be because the scenic quality of land is easy for our constituents to comprehend and think of as important especially because most conservation easement land is not open to the public. Protecting a scenic view is purely about the public's enjoyment from the outside looking in. The general public can relate to a beautiful view without needing a scientific justification for biodiversity or an economic justification for working lands or an architectural designation of a historic building. Not everyone likes to ride a mountain bike, but everyone likes to pull over at a scenic overlook and gaze at an incredible vista because a great view can be downright awe-inspiring and much more emotionally engaging than a plant, for example. The scenic view is the picture you use in every newsletter and on every website, what you show a major donor to a capital campaign, and where you intentionally route your trail.[1]

Protecting scenic resources is a fundamental aspect of land conservation. Scenic easements are very popular, though what constitutes a scenic resource is open to interpretation. This article examines the basic components of scenic easements, their common usage by land trusts, and drafting techniques.

---

[1] While interviewees stated that their board members, organizational members, and community members support the protection of scenic values in their region, they also stated that private foundation support is more often geared toward the protection of wildlife habitat, farmland, recreational uses, and prevention of climate change.

I. THE LEGAL CONSTRUCT

The recognition of scenic as a natural resource worthy of legal protection began in earnest with the advent of the modern environmental movement. In 1963, New York's utility company, Consolidated Edison, planned to build a power plant on Storm King Mountain which provided an iconic view along the Hudson River. Con Edison needed to meet the ever-increasing demands for energy from residents of New York City and its new plant brought with it the promise of jobs and a boost to the local economy. A small group of dedicated volunteers thought there was a higher public purpose. The Scenic Hudson Preservation Conference (Scenic Hudson) considered the power plant a threat to the beauty of the Hudson Highlands which had been venerated by Nathaniel Hawthorne and Washington Irving, as well as the Hudson River school of landscape artists.

Con Edison needed a permit from the Federal Power Commission (FPC) to build its plant. Aesthetic considerations were not part of the permitting process. The FPC ruled in Con Edison's favor despite testimony by Scenic Hudson that the plant would mar one of the nation's most scenic treasures.

Scenic Hudson appealed to the federal court arguing that the FPC had failed to protect the pubic interest in accordance with the Federal Power Act by not adequately considering all of the factors that were of interest to the public, namely, the beauty of Storm King Mountain. On December 29, 1965, the circuit court ruled in favor of Scenic Hudson, setting aside Con Edison's permit. It was a landmark decision because for the first time a conservation group, even though it had no economic interest, was permitted to sue to protect the public interest and that interest was the scenic beauty of Storm King Mountain for all to enjoy. The court battle would go on for many years before Con Edison finally conceded, but the concept of a legally defensible public interest in natural resources was born and it was a scenic resource that carried the day.

Not surprisingly, the protection of scenic values has been part of the law of conservation easements from the beginning. In 1969 the first state conservation restriction enabling legislation was passed in Massachusetts. Scenic is listed as one of the recognized values worthy of protection. In 1981, the Uniform Conservation Easement Act recognized scenic as a conservation value, and in 1986, the Internal

Revenue Code granted an income tax deduction for the perpetual protection of scenic values.

Under the Internal Revenue Code, the preservation of scenic resources that qualify for an income tax deduction falls within the definition of "open space easements." A qualified conservation purpose includes the preservation of open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated federal, state, or local governmental conservation policy, and will yield a significant public benefit. 26 U.S.C. § 170(h)(4)(A)(iii). (emphasis added). For some reason, many land conservation practitioners interpret this section of the code to mean that every easement with an agricultural purpose must also contain a scenic purpose. As noted by those who have dissected the statute, an open space easement may be based on agricultural or scenic resources, among other things, but all open space easements must yield a significant public benefit. The fact that many agricultural easements do also contain a scenic purpose because the drafter desires multiple purposes is discussed below in Section III.

The Treasury Regulations state that preserving land may be for the scenic enjoyment of the general public if development of the property will impair the scenic character of the local rural or urban landscape or will interfere with the scenic panorama that can be enjoyed from an area or transportation way that is open to or used by the public. Regional variations require flexibility in applying this test. 26 CFR §1.170A-14(d)(4). Factors to be considered include, among other things, relief from urban closeness, openness of the land, degree of contrast and variety in visual scene, consistency with a government landscape inventory, and harmonious variety of shapes and textures.

In terms of whether a scenic easement provides a significant public benefit, a non-exclusive list includes, uniqueness of the property to the area, intensity of existing and foreseeable development in the vicinity, likelihood that development of the property will contribute to the degradation of the scenic character of the area, likelihood that donee will acquire equally desirable and valuable substitute property or property rights, cost to donee of enforcing terms of conservation restriction, or population density in the area of the property.

The IRS regulations are less than precise for what constitutes a deductible scenic easement. For the record, only one person of all the practitioners I spoke with thought that the regulations were helpful. That practitioner also noted that, "when you don't really understand what you are trying to say, you have to use more words." The Treasury Regulations devote more words to attempting to define open space easements than to any other conservation purpose.

Those that I interviewed all agreed that one rule is clear: a scenic conservation easement must afford visual access to the public though the degree of visual access required is debatable. Other than that, what qualifies as a scenic easement from a drafter's perspective seems to be a matter of subjective interpretation if there is no government landscape inventory to rely on. A scenic conservation easement really is a descriptive account of what you can see from the road.

II. QUANTIFYING A SCENIC VIEW

Although natural beauty is in the eye of the beholder, some land trusts have attempted to numerically define a scenic view. They start with the amount of frontage on a public way. If the public way is a government designated scenic byway, so much the better. There is no magic number for the amount of frontage because the contextual setting of the parcel is very important. The Treasury Regulations make frequent reference to adjacent land uses for good reason. Two hundred feet of road frontage in an urban area or on land that provides a view of the southern end of Lake Michigan is quite significant. Two hundred feet of road frontage in the deep Northern Forests of Vermont and New Hampshire does not usually amount to much.

The second most popular numeric analysis is a digital elevation model. If part of protected land is visible from a public way because of its height, then it may qualify as scenic. I know of one land trust that hired an outside GIS firm to digitize their entire service region with a color code whereby the darker colors constituted a scenic view because it was of higher elevation than the surrounding land. What exactly was on the ground visible to the public was not part of the analysis. The

conclusion that the property had scenic qualities was entirely based on the color-coded elevation map.

Perhaps the technique that makes the most sense for quantifying a scenic view comes from a contributor to the land trust listserv who stated that canoeists heading down the Lower Wisconsin River were provided with a disposable camera and asked to take pictures of what they considered to be scenic. The views that were the subject of the most photographs were valued as highly scenic. Tabulating photographs seems like a sure way of determining what is considered to be a scenic resource with significant public benefit as determined by the viewing public.

As noted earlier, some land trusts operate in a region where the federal, state, or local government has studied the area and created a database of scenic views. These land trusts rely heavily on these databases when determining whether a parcel is scenic. In the absence of a government inventory, most land trusts I spoke with eschew numerical methodologies and simply determine that a parcel is scenic if it offers an unobstructed view of undeveloped land reasonably visible to the public. The general precept is that open space is scenic by virtue of it being open because nature is pretty unless man interferes. Two exceptions to the open-space-is-scenic rule are areas of heavily harvested trees and concentrated animal feeding operations… clearcuts and feedlots are never pretty.

A. Project Selection Criteria for Scenic Easements

When asked how their project selection criteria for scenic resources compared to their selection criteria for agricultural or habitat resources, the most common response from the practitioners I interviewed was that even though protecting scenic resources is important to their organization, they did not have as good a list of criteria for scenic as compared to other purposes.

Maybe it was not a fair question. Most land trusts have access to reference materials prepared by another entity such as USDA soil maps or plant surveys by a biologist. This information folds into the project selection criteria for agricultural and habitat easements. We know what soils are best for growing crops and we know what species are endangered and therefore important to safeguard. But, again, a scenic easement is rarely more than a description of what the average

person can see from the road. Even government inventories of scenic areas and byways contain an element of subjectivity when determining whether the public view is "scenic."

Yet, despite the lack of hard scientific data, protecting a scenic viewshed is not only legitimate, it is also critical to land conservation. An expansive view of a mountain range at dusk can be so beautiful it makes you stop and look, lifts your spirits, and you remember why you do this work. Perhaps what the IRS lawyers were grappling with when they wrote the lengthy regulations on scenic easements, or what land trust practitioners were saying when I asked them about their lack of scenic resource selection criteria is….how do you quantify natural beauty?

III. DRAFTING TECNIQUES

Regardless of how a land trust arrives at the decision that a property possesses scenic qualities worthy of protection, when it comes to drafting a scenic conservation easement, there are several issues to be aware of.

A. Not Every Easement Should Have a Scenic Purpose

A scenic easement is an attempt to preserve a snapshot in time. All of the descriptive terms in the easement regarding the view and all of the baseline photographs reflect what one sees at the time of conveyance. The purpose of the easement is to preserve that view in perpetuity. A tall order if ever there was one given the tendency of nature to change over time and the tendency of landowners to want to do things to their land. Climate change and natural disasters affect what and how vegetation grows, new species are introduced as existing species become extinct, and as habitat changes so does the resident wildlife that lives off that habitat. A landscape is a constantly changing ecosystem. The best a conservation easement can do is control landowner uses, and even that is difficult.

The ephemeral nature of a scenic view may be one reason why all of the land trusts I spoke with tend to include as many conservation purposes as legitimately exist on the property when drafting conservation easements. Although you only need one IRS sanctioned conservation purpose for an income tax deduction, practitioners today are writing multi-purpose easements to guard against an IRS

challenge to deductibility, to give the land trust as much leverage as possible when dealing with a recalcitrant landowner, and to lessen the possibility of extinguishment for failure of purpose as conditions on the ground change.

All well and good, however, when you put a conservation purpose in an easement, you are obligating your land trust to protect all of the delineated conservation values that support that purpose. According to the IRS,[2] a land trust must have the resources and commitment to protect the conservation purposes of an easement in perpetuity and a land trust's nonprofit status requires that it not waste its assets and that it not confer impermissible private benefit. If there is not significant public benefit and your organization does not want to expend its resources protecting a particular conservation purpose on that property, do not put that purpose in the easement.

This is an important point when it comes to scenic resources as a conservation purpose. As noted above, scenic is the all-purpose conservation purpose. It makes its way into most easements, not as a stand alone, but as the second or third purpose of a multi-purpose conservation easement. All of the land conservation practitioners interviewed stated essentially the same thing – scenic rarely appears as the sole conservation purpose, but it frequently appears. In order for a conservation easement to be based solely on scenic resources, one interviewee stated that the quality of the view needs to be extremely high and unique, and the landowner needs to really want it and be willing to pay a hefty stewardship endowment because the easement will contain an affirmative mandate to keep the viewshed clear.

Nevertheless, even though most views are not of outstanding quality, scenic is included as a purpose in conservation easements written to protect the agricultural soils, wildlife habitat, recreational, or historic values of land. This common use of scenic as a purpose is because 1) undeveloped natural landscapes are inherently scenic and most land trusts do not have well defined criteria for

[2] Most land trusts today strive to ensure that all of their conservation easements satisfy IRS requirements regardless of whether a charitable donation is in play. The reasons for this are myriad; the best being that the IRS has the power to levy taxes and financial penalties against donors and land trusts for substandard transactions. Incorporating IRS requirements into your conservation easement template is therefore good practice.

scenic that might keep it out of the easement, 2) scenic resources coexist with all other conservation purposes, and 3) the trend in drafting is toward multi-purpose easements.

Fortunately, there is an equally strong trend to simplify the wording of conservation easements. 'Reference a particular conservation purpose in an easement only if it is clear on the ground what resources you are agreeing to protect, the resource is capable of being monitored, and you have the organizational will to enforce against violations," stated one practitioner.

The two trends are not mutually exclusive. You can have multi-purpose easements, but make sure every conservation purpose you choose to list is of significant quality and public benefit to warrant the expense of enforcement. Maybe every scenic easement you write does not have a view equal to that looking out over the Grand Canyon. It would be a red flag, however, if all of your agricultural and habitat easements contain scenic as an additional purpose as a matter of course.

B. Inconsistent Uses: Prioritizing Purposes and Segregating Uses

Given that conservation easements protecting scenic resources tend to have more than one purpose, a drafter needs to pay particular attention to the IRS prohibition against inconsistent uses. The Treasury Regulations state that a deduction will not be allowed if the contribution accomplishes one conservation purpose but allows the destruction of other significant conservation interests. The exception to the inconsistent use rule is that a use that is destructive of conservation interests will be allowed if such use is necessary to protect the conservation interests that are the subject of the contribution. 26 CFR §1.170A-14(e).

The desire to not violate the rule against inconsistent uses has manifested itself in two prominent drafting techniques. The first drafting technique is the prioritization of conservation purposes. For example, when the primary use of a parcel is agriculture, yet there are also scenic qualities, the conservation easement denotes agriculture as the primary conservation purpose with scenic as the secondary purposes. The argument given for prioritizing purposes is that if a farmer uses the property in such a way that is necessary for agriculture but harmful

to scenic values, then the land trust is justified in allowing the agricultural use because it supports the primary purpose.

There are several flaws with this reasoning. First, the regulations do not sanction or prohibit prioritization. Rather, they allow for a conservation interest, in this example scenic, to be harmed or impaired only if scenic *is not the subject of the contribution*. Thus, agriculture, as the subject of the charitable contribution, would be the only recognized conservation purpose in the easement. Agriculture is the only purpose that must be monitored and enforced. If agriculture ceases on the property, the easement is subject to extinguishment. If agriculture does not meet the conservation purposes test, the value of easement is not deductible.

If you only need one conservation purpose for a deductible conservation easement, why add scenic to an otherwise deductible easement? If the addition of scenic is not intended to help qualify the easement for deductibility if agriculture fails or to prevent the application of the cy pres doctrine if agriculture fails, then why include scenic especially if you are going to allow an inconsistent use that privately benefits the landowner and impairs the scenic conservation values? The land trust risks being accused of not being a qualified holder and of violating its tax-exempt status.

Second, when a conservation easement lists several purposes, presumably all of them are the "subject of the contribution." Appraisers do not take into consideration the prioritization of conservation purposes when valuing a conservation easement. I asked an appraiser experienced in appraising conservation easements if the fact that scenic was called a "secondary" purpose meant anything to his valuation and he said it did not. Appraisers look at the value of rights the landowner is giving up, not what resources are on the ground, much less how the donee characterizes them.

There is no precedent for the premise that prioritizing purposes gives the holder leeway to allow impairment of the secondary purpose. If you list scenic as a conservation purpose in an easement, you are obligating the land trust to protect the scenic values. If you believe that there will be frequent conflict between the agricultural use and the scenic values and the land is best suited to agricultural use, then it would be better not to list scenic as a conservation purpose rather than call it

a secondary purpose and believe that provides justification for allowing the agricultural use to impair the scenic values.

In reality, land trusts grapple with inconsistencies between permitted uses all the time, which leads to my third point. The third reason not to prioritize purposes is that you retain more leverage with the landowner as inconsistencies between uses arise. If agricultural resources are prioritized over scenic resources, some drafters believe that a land trust will have more clarity about what to enforce. What you gain in clarity, you lose in leverage. Even if the agricultural use could be moved out of the view so as not to harm the scenic resource, by prioritizing agriculture, the land trust has given up leverage to compel the landowner to act to protect the view.

From the landowner's perspective, prioritization may be desirable especially if the easement is on working lands and the landowner wants some assurance that the land trust will not be interfering with agricultural uses every time the scenic view is marginally blocked. Another way to address this type of concern would be through the notice and approval process for reserved rights by giving the landowner more discretion when the use is ancillary to working lands.

The second drafting technique which helps avoid inconsistent uses is to segregate protected resources and permitted uses on a property. If a conservation easement has multiple purposes, it will most likely have an area designated within the property where each resource exists. Each resource area or zone will list permitted uses. Additionally, there will be a development area where no conservation purposes exist but where the landowner has the greatest amount of permitted uses.

Segregating resource areas rather than prioritizing purposes is potentially a better way to address the lurking problem of inconsistent uses. If agriculture is allowed in the agricultural zone, and wildlife habitat is protected within the natural area zone, there is no need to prioritize agriculture over habitat in the conservation purposes as it is clear what resource to enforce when and where.

There usually is not a scenic zone because the scenic value is based on the view of the whole or a substantial portion of the property. Segregating uses is

helpful, however, to protect scenic resources from structures, which are the most common threat to scenic values. Creating a development zone and requiring that structures be within that zone ensures that the scenic view will not be blocked by a structure.

C. Drafting to Allow for Structures in a Scenic Easement

When asked whether it is possible to have a structure in a scenic conservation easement, some practitioners I spoke with said no, some said it depends on the location, some said it depends on the structure.

If a landowner reserves the right to construct a building on conserved property, whether for residential or agricultural use, most practitioners require that the building envelope be outside of the scenic viewshed. This can be accomplished by locating the building envelope off to the edge of the property, never on a ridgeline or high point, away from the road and out of the foreground of the parcel, or tucked behind a natural barrier such as topography or trees. Though it was pointed out that the trees will eventually come down and you have to allow for change which is one of the difficulties with trying to preserve a snapshot in time.

A few land trusts include an affirmative requirement that the landowner maintain the vegetative buffer between the building and the public's view, or that the landowner keep a field mowed to preserve a view, but most do not want the added stewardship responsibilities of forcing a reluctant landowner to act. Two practitioners I spoke with who frequently work on properties where landowners want the right to cut trees to preserve their view from their house out over the water, for example, will specifically address in the baseline report what trees the landowner may trim. They do this because cutting too many trees risks making a building visible to the public looking at the property. Conversely, another land trust I spoke with experienced the dilemma of having to tell a landowner that the evergreen trees he planted along the property boundary next to the road blocked the public's view and had to come down.

In addition to physically locating a building outside of the scenic viewshed, some land trusts will also place restrictions on the design of the building including limiting the size and color. A landowner might build a structure of such magnitude

that even though located away from the view it still harms the scenic values. Land trusts tend to worry about the color of a building if it is not possible to build it out of the scenic viewshed or if the scenic resources are of such high quality that it is important that the building blend within the landscape. Attempting to control the design of a building carries high stewardship costs for the land trust and should not be undertaken lightly nor without a significant monitoring endowment contribution for that conservation easement.

If there is a pre-existing building on the property and the property also has scenic values, most land trusts will still consider a conservation easement with a scenic purpose so long as the building does not interfere with the scenic values. If the pre-existing structure is for residential use, then most practitioners said the structure should be out of the viewshed in order for the property to qualify as scenic. If the pre-existing structure is a barn, there is a double standard applied that exemplifies the subjectivity of scenic easements. Some barns are considered historic, part of a cultural landscape, and a welcome part of a scenic view. Some barns and related agricultural structures are considered eyesores and must be located out of the viewshed or removed in order for the property to qualify as scenic. An unforeseen complication is when a new landowner wants to replace an existing structure that was considered compatible with the scenic qualities with an unacceptable eyesore of a building. Should the land trust weigh in on the design of the new barn?

Of course, the more reasonable alternative is to not use scenic as a conservation purpose where a viable farming operation results in not great views. By far the most likely conflict between conservation purposes arises between scenic values and working lands. The lesson is to include scenic values only if there is a significant public benefit and do your best to create a viewshed that is left alone and does not allow for reserved rights related to working lands or residential uses.

C. Renewable Energy Sources in the Scenic Viewshed

Perhaps the closest thing to a moral dilemma that land conservation practitioners are faced with today is how to balance the public benefit of preserving conservation values with the perceived greater good of fostering renewable energy.

Burning fossil fuels is one of the biggest contributors to climate change, which will surely harm the natural resources that we strive so diligently to protect. Yet, alternative or renewable energy sources such as wind, solar, and hydroelectric power all have harmful effects on wildlife habitat and scenic values.

We restrict oil and natural gas drilling on conservation easements, we fight the utility companies when they want to take protected land by eminent domain, and we rail against cell phone towers, so why is a wind turbine any better? Isn't it just another utility that serves an important public benefit like all energy and communication conduits and should be located somewhere other than on conservation easement property?

While most land trusts are in the midst of developing a policy on how to deal with requests from landowners to install wind turbines and solar panels, a current conservation easement drafting trend is to consider renewable energy structures the same as any structure and locate them in the development zone, out of the viewshed, and to control the size. Most practitioners I spoke with state that their easements require that the energy generated be used on the property. The reason being that restricting the use restricts the size of the generating structure.

That may work for easements drafted today. The question is what to do when a landowner of a property with an existing conservation easement that is silent on the subject requests the right to install renewable energy sources.

Land trust practices need to be flexible and adapt to changing public opinion about what is important to protect. A land trust could amend an existing conservation easement to allow a landowner to add a renewable energy source to the property so long as it is consistent with the conservation purposes, there is no net loss to conservation values, and any impermissible private benefit is adjusted. Any resulting private benefit could be handled by a monetary offset from the landowner to the land trust, or by placing additional conservation land under easement.

It is reasonable to believe that an agricultural easement would not suffer harm by the addition of a wind turbine. It could arguably be enhanced if the energy generated is used for the agricultural operation. On the other hand, it is difficult to

imagine how the addition of a wind turbine does not harm the scenic values of a protected property.

The potential conflict between scenic values and renewable energy sources is another area that highlights the subjective nature of scenic easements and why special attention should be paid to the abundant use of scenic as a conservation purpose. Some practitioners I spoke with do not see a conflict because they do not think wind turbines or solar panels harm the scenic values of a property. Others would not allow a wind turbine on the ridgeline of a protected property under any circumstance. It all gets back to what a land trust considers to be "scenic," which, as stated from the beginning of this article, defies one consistent definition because it is dependent on context and individual interpretation.

Many states have legislation in place or pending that addresses the use of renewable energy on private land and trumps conservation easements. Given the populist and public policy push toward renewable energy, it would be unwise if land trusts took a stance against renewable energy in favor of protecting established conservation values. Land conservation should be seen as an antidote to many of the causes of climate change. When drafting conservation easements today, the better approach is to allow for renewable energy on a protected property but restrict the size and location to minimize the harm to scenic values. If this is not possible to do because there is no way to locate the structure out of the scenic view, consider not incorporating scenic as a conservation purpose. Drafting conservation easements to protect conservation values while allowing for future human uses is always a balancing act between minimizing the harm to natural resources, encouraging economic viability and productivity, and being mindful of shifting beneficial public values.

CONCLUSION:

Consider carefully when to use scenic as a conservation purpose. Not because scenic values are not important, but because the likelihood that there will be a conflict between scenic values, which is essentially saying "do not touch," and other uses of land is high. Scenic values are a subjective interpretation of an aesthetic at a particular point in time and conservation easements must be flexible

to allow for unforeseen changing conditions – both on the ground and in the minds of the public.

Because what constitutes a scenic value is subjective, what constitutes harm to those scenic values is equally subjective. It is incumbent that conservation easements be clear as to what is and is not allowed to put all parties on notice. Locate structures within development zones and out of the scenic view. If you deal with working lands, not only is scenic not required by the Internal Revenue Code as a tandem conservation purpose, but it may be problematic because it will be difficult to frame a scenic view that can remain unaffected by the permitted uses. Create an agricultural zone and include scenic as a purpose only if there are enough scenic values on the property outside of the agricultural zone to warrant protection.

Prioritizing conservation purposes may not be prudent because it may constrain a land trust's leverage with a landowner when dealing with inconsistent uses and it may create a situation where a land trust is sanctioning potential destruction of a conservation value that it has promised to protect.

Land trusts must figure out how to allow for renewable energy sources on conservation easement properties. It is the rare landscape that is of such high scenic value that every attempt should be made to protect the scenic viewshed exactly as it is. Most properties can accommodate both renewable energy uses and scenic values by segregating structures away from the view. The experienced conservation easement drafter will balance the myriad competing public, private, and natural resource values when crafting a document that purports to control the use of land until the end of time.