

Spring 2015

Professor Gerald Korngold on Conservation Easements

James Hagy

New York Law School, james.hagy@nyls.edu

Katherine DiSalvo

New York Law School, Katherine.DiSalvo@law.nyls.edu

Naveed Fazal

New York Law School, Naveed.Fazal@law.nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/rooftops_project



Part of the [Business Organizations Law Commons](#), [Land Use Law Commons](#), [Legal Education Commons](#), [Organizations Law Commons](#), [Property Law and Real Estate Commons](#), [Social Welfare Law Commons](#), [State and Local Government Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Hagy, James; DiSalvo, Katherine; and Fazal, Naveed, "Professor Gerald Korngold on Conservation Easements" (2015). *Rooftops Project*. Book 13.

http://digitalcommons.nyls.edu/rooftops_project/13

This Book is brought to you for free and open access by the Academic Centers and Programs at DigitalCommons@NYLS. It has been accepted for inclusion in Rooftops Project by an authorized administrator of DigitalCommons@NYLS.

THE ROOFTOPS PROJECT



Perspectives

Perspectives on Conservation Easements with Professor Gerald Korngold

What are the practical and policy motivations behind conservation easements? **Katherine DiSalvo** and **Naveed Fazal** of The Rooftops Project talk with NYLS Professor and conservation easement scholar **Gerald Korngold**

Professor Gerald Korngold is a faculty member in the Center for Real Estate Studies at New York Law School. He came to NYLS from Case Western Reserve University School of Law, where he was the McCurdy Professor of Law, and also served as Dean from 1997 to 2006. He has lectured nationally and internationally on land and property law issues, including the law and policy of conservation easements.

RTP: Let's begin with the basics. What exactly are conservation easements?

Professor Korngold: Conservation easements are restrictions created on land, held by either not-for-profit organizations or the government. These restrictions prevent the owner of the property from altering the land's natural, ecological, and/or environmental attributes. Generally, conservation easements prevent things such as subdivision of land, harvesting of timber, erection of additional structures, changes in natural topography, and other similar activities so as to preserve the land in its current natural state. In the vast number of cases when they are granted to not-for-profits, conservation easements are created perpetually. This is a function of the desire to preserve the land. But the most important driver in the perpetual nature of such easements is the Internal Revenue Code (IRC). The IRC requires that the conservation easement be perpetual in order for the donor to deduct the value of the easement on the donor's income tax return.

RTP: So by granting a conservation easement, the owner gets a deduction from his or her taxes by maintaining the current state of the land?

Professor Korngold: A conservation easement donor essentially gets to deduct the value of the easement, which is arrived at by various methods of appraisal. If a donor grants a conservation easement to federal, state, or local government, it is tax deductible just as it might be when donated to a charity.

The deduction equation amounts to the difference between the value of the land without the easement and its value with the easement. The gap is what the donor is giving. For example, imagine that a piece of land without restriction is valued at \$100,000 because it can be developed for subdivision with five houses. But the conservation easement would prevent it from being subdivided and so the value would be \$20,000. The \$80,000 gap is deductible on the income tax return of the donor. This is the federal income tax deduction, but there may also be additional tax benefits.

Some states allow state income tax deductions, and there are property tax deductions as well, calculated based on the value of the property. A property that is subject to a restriction is valued less. So instead of valuing it at \$100,000 for a residential subdivision, the restriction values it as \$20,000 multiplied by a tax rate, and the annual property tax amount goes down. There are also estate tax benefits when a person dies owning real estate with a conservation easement. Tax benefits are a significant driver in the decision for people to make conservation easement gifts. However, it is very important to understand that people who make conservation easement donations are giving up valuable property rights that are not being fully offset by the deductions. They are making these gifts because of a commitment to conservation and a commitment to the not-for-profit they are giving it to.



RTP: Who is responsible for obtaining the appraisal or valuation to support the donor's tax deduction: the donor or the recipient charity?

Professor Korngold: The donor is responsible for obtaining the appraisal. If there is subsequently a challenge to the appraisal amount, then there may be litigation. There are certain appraisal standards that are set out, and there are a lot of judicial decisions about methodologies to be used in appraisal of the value of a conservation easement. For example, any time you restrict the land and the ability to develop it, it will drop in value. The "before and after test" is the basic concept in terms of how valuation is to be done. When you are looking for the cost to the owner of giving up development rights on the property, it's harder to calculate because it isn't an active market as there is if we were talking about a house or sale of land in fee.

RTP: How did you first get involved with conservation easements?

Professor Korngold: I started my first research on conservation easements in the early 1980s because I saw them as an extraordinarily useful tool to allow private action to help achieve environmental goals at a time when government was limited in terms of being able to achieve these goals. I thought providing private opportunities to affect the public good was a very positive idea. The government is still an important force in the environmental and conservation area, but it's a good opportunity to allow individuals and private groups to help in the effort to preserve the environment. It provided an effective, efficient, low-cost way to help preservation and ease the burden of government, which has a lot of other priorities to fulfill. It was also of interest to me because, within property law, there were a lot of historical doctrines that stood in the way of permitting conservation easements. I was drawn to thinking about how to address those doctrines and possibly modify them in modern ways to help the law evolve and embrace something which current public policy demanded. It was a concern about both the environment and how it intersected with traditional property law.

RTP: Are all conservation easements donations? Can an owner be forced to make a conservation easement on his or her property?

Professor Korngold: Except in rare cases, conservation easements are consensual arrangements, much different from zoning, where the government passes a regulation. A deed of easement is executed very similarly to how it would be done if somebody bought a right of way over a neighbor's property. There are rare cases where it is theoretically possible for a government to take by eminent domain, but that is not the norm.

RTP: Do conservation easements run with the land, similar to the way a chain of title does?

Professor Korngold: Yes, that is correct. They are perpetual, recorded against the burdened property, and bind any future purchasers. It is important to understand that there is no benefitted property; there is only burdened property on which there is the easement, held in gross. This means that a conservation organization that does not own land directly benefitted by the restriction can own this restriction from a distant location, like a national

office in the District of Columbia or a local conservancy, without owning the land next door. These are different from restrictions that have been permitted in the past.

RTP: How do conservation easements benefit not-for-profit organizations?

Professor Korngold: Conservation easements have become a major tool for land preservation by the not-for-profit community. While any not-for-profit, 501(C)(3) organization can hold a conservation easement, there are specialty ones that typically hold them. There are land conservancies with missions to preserve land that will sometimes hold land in fee, but a lot of organizations hold under conservation easements. There are national organizations, such as the Nature Conservancy, that will hold conservation easements. There has been tremendous growth in these easements that are reflected in the 2010 census on the Land Trust Alliance website. But keep in mind that this only displays those who choose to report. Organizations also benefit from using the conservation easement vehicle when they have used donated funds to purchase property interests to preserve land. The cost of purchasing a conservation easement is not as high as the cost of purchasing fee simple title, so the organization will spend less on a conservation easement and still achieve its goal. The conservation dollar can go much farther.

RTP: Can conservation easements be enumerated for a specific type of conservation, such as wildlife or conservation of land?

Professor Korngold: Conservation easements can be for a fairly broad set of purposes, such as environmental or ecological. To be tax deductible, it has to be a legitimate purpose, such as scenic or open-space preservation. Another purpose is habitat protection: the conservation easement will protect an area from development so that animals and birds can keep their natural habitat. Conservation easements can also be over vast areas, such as in Vermont during different seasons, so people can see the scenery from the roadway. As long as it falls into the broader conservation theme, it can be specific in terms of what the purpose is. Watershed protection is a particularly big one.

But keep in mind, the public does not need to have access to the easement, and in fact it is very rare that a conservation easement grants the public access. However, public policy does play a large role in the choice of how to spend money, whether it be on scenic vistas or playgrounds within large cities.

RTP: Can the purpose of a conservation easement ever change, or is it perpetual?

Professor Korngold: Modification and termination are extremely problematic and volatile issues. The IRC places very narrow limits on changes that can be made to conservation easements. It essentially allows for a change in a conservation easement only when its purpose can no longer be accomplished. After that, it requires a substitute purpose. Even if it is not a conservation easement for which there are deductions taken, there is considerable debate about whether it can be modified and who must participate in the modification proceeding, i.e., who has standing. Even if it is a simple agreement by the



conservation organization, if the public has a voice through the Attorney General, or through a formal judicial proceeding, it's a very controversial issue right now.

Under the IRC, in a situation where, due to unforeseen circumstances, the original purpose of the conservation easement can no longer be obtained, the conservation easement is extinguished and the holder of the easement has to take the money it gets from the sale of the property and reinvest in another similar conservation purpose. It is precisely to prevent someone from getting a deduction and having the gift disappear. In order for that gift to be protected, the organization has to reinvest in some sort of conservation purpose.

RTP: Bringing conservation easements back to a more local scope, such as New York City, how common are conservation easements in large cities? How common is it in Manhattan for a current generation to donate a conservation easement on land?

Professor Korngold: One of the difficulties with conservation easements is that we don't have good data on the number of locations or type of easement. We have some data points, but we don't have great comprehensive data. This makes it hard to develop policy decisions by just looking at a snapshot. Within cities, there are not as many as compared to suburban areas. Within cities, you might see the first cousins of conservation easements, which are historical easements. Historical properties can be preserved either by government regulation, zoning, or historical districts. A second way is through private easement, so a historical association might own easements on façades of certain buildings within cities. There are historical façade easements granted to certain not-for-profits. They have somewhat different requirements, as there is some government involvement in terms of signing off on the historic significance of the façade before the easement qualifies for a federal tax deduction. For example, it has to meet certain requirements and be certified. Either it is already on a list or you can get a certification from the Secretary of Interior. You tend to see more historical easements within cities and fewer conservation easements.

RTP: How would a conservation easement most benefit a not-for-profit organization?

Professor Korngold: The organization doesn't get any deductions. The deduction goes to the donor, and the organization is generally the donee. Many not-for-profits will hold conservation easements in relation to their activities. Universities or educational institutions might hold a conservation easement on surrounding areas in order to have a setting for them to be there. Nature preserves might own their land or want certain surroundings for habitat including a right of access. However, there is responsibility that comes with being an easement owner. Stewardship responsibility requires annual inspection, and there are best practices in stewarding a conservation easement. It is important to monitor them so there are no violations, but more important is maintaining a dialogue with the landowner to anticipate problems and know what is going on so that potential issues are solved before there is a problem. This can sometimes be an extra burden

to take on as a not-for-profit. It is important to ask, is this off mission? Is this something worth investing in? It might be possible that an organization holding a conservation easement can work with another organization to handle the stewardship responsibilities. For example, a university can enter into an arrangement with a local conservancy to do the stewardship for it, perhaps for a fee. The current best practice among institutional holders of conservation easements is that when taking the donation, the donee organization receiving it will ask for, or will suggest, the creation of a fund to pay for the stewardship costs. As a cautionary note to not-for-profits, it's important to know that owning a conservation easement will require stewardship obligations, which will cost money. It is possible, however, to outsource or include an endowment to handle those expenses as well.

Stewardship costs and obligations are all part of the culture surrounding conservation easements. The Land Trust Alliance, which is a national association of community land trusts, has been working to develop standards of practice to enumerate what must be done with stewarding the easements. Good stewarding is not just checking in with the landowner, but maintaining a healthy dialogue over time and addressing the issues and concerns together. It's not like the health department coming in for a restaurant inspection, but rather keeping the conversation open so that there never is a violation.

Ultimately, sometimes legal action does need to be taken. However, conservation easement violations are highly expensive to litigate. Usually the preferred remedy is an injunction and an order to restore and desist. However, there are some instances, such as cutting down timber, in which restoration is impossible and an injunction would be meaningless. In those cases, money damages may be possible. It is important to remember that this is not a situation where two random people collide and go to court. These are two parties, the fee owner and the easement holder, that are going to be interacting forever. This is why it is so important to keep the dialogue open from the beginning.

RTP: What concerns, if any, do you have about the use and future of conservation easements?

Professor Korngold: My one concern about conservation easements is how future generations will deal with these perpetual rights and the modification and termination questions. It behooves us to some extent to think now about those issues and develop appropriate legislation and case law solutions for how future generations can deal with these perpetual interests when changing social, economic, and environmental conditions require it. For example, climate change has made certain areas that were historically thought deserving of preservation no longer desirable to be preserved or viable to be preserved. Those areas are burdened with conservation easements. Do we continue those forever? Who makes the decisions to remove those? Who gets a voice? Do we let the vision of the past control future generations? But we also should be mindful of empowering future generations to be able to deal with the world that they inherit without tying their hands forever.





Katherine DiSalvo (Class of 2015) concentrates her study on real estate and international law. She currently works at a wills and trusts firm in Manhattan and was previously a judicial extern in the King's County Supreme Court, Civil Term. Katherine received her bachelor's degree in Political Science from the University of San Diego.



Naveed Fazal (Class of 2015) concentrates his study in both real estate and corporate law. He currently works at CB Richard Ellis as an intern for both the Legal and Brokerage Departments, in addition to chairing the Moot Court Association at New York Law School. Naveed received his bachelor's degree in Political Science from the University of San Diego.



James Hagy is Distinguished Adjunct Professor of Law at New York Law School. He also founded and directs The Rooftops Project at New York Law School's Center for Real Estate Studies. More information about The Rooftops Project and Professor Hagy may be found at www.nyls.edu/rooftops.

Copyright © 2014 Rooftops Group LLC. All rights reserved. These materials may not be quoted, copied, referenced, or reproduced in any way, in whole or in part, whether in printed or electronic format, without express written permission, which may be given or withheld in the sole discretion of Rooftops Group LLC.

The author and copyright holder may be contacted at james.hagy@nyls.edu.

Important Note:

This publication is not intended and should not be construed as legal, tax, investment, or professional advice. It does not purport to be a complete or exhaustive treatment of the topics addressed. The information and views expressed may not apply to individual readers or to their organizations or to any particular facts and circumstances. Sending or receipt of this publication does not create any attorney-client relationship. Engagement and consultation with appropriately qualified, experienced, and licensed professionals should always be sought with respect to planned transactions, investments, and projects.

Views expressed by persons or organizations interviewed or quoted by The Rooftops Project are not necessarily those of New York Law School, its faculty, staff, or students.

Neither New York Law School nor its faculty or staff evaluate, rate, review, or recommend products, services, or suppliers whatsoever. Any particular products, services, or suppliers mentioned are used as examples to illustrate concepts and are for general information only.

No representations or warranties are given whatsoever, express or implied, with respect to information contained in this publication or to its accuracy. Any representations or warranties that might otherwise exist, whether by statute, common law, or otherwise, are expressly excluded and disclaimed.

New York Law School, its faculty, and the authors, editors, and copyright holder of this publication expressly disclaim and do not accept any liability for any loss resulting from errors or omissions contained in, or for following or applying principles or views expressed in, this publication, including without limitation any liability for direct, indirect, consequential, exemplary, or punitive damages or for loss of profits or business opportunity, whether by tort, negligence, breach of contract, or otherwise.

