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I. Introduction

In 1975, Syracuse University made two conveyances of certain real property that it owned in the Town of Long Lake, Hamilton County, New York. The entirety of the conveyed property was known as Camp Sagamore, the Adirondack Great Camp that was designed by William West Durant.[1] One

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Tripartite negotiations concerning the transaction discussed herein commenced in December 1984. The Indenture was recorded in May 1986. The author was the Chief Negotiator representing the State of New York.

The views expressed herein are those of the author and do not represent the policy of the State of New York or the Department of Environmental Conservation.

1. William West Durant (1850-1934) is best known for his development of transportation systems in the Adirondack region of New York. He was president of the Adirondack Railway, and was at one time one of the largest landowners in the Adirondacks.

After the construction of several other wilderness camps, Durant began the construction of the great Camp Sagamore near Raquette Lake in 1897—designed to be his final, year-round residence. Reflecting his reputation as one of the great entertainers and hosts of the Adirondacks, Sagamore was planned to be the most luxurious and impressive of his prior wilderness homes. The original complex consisted of a main lodge and an impressive collection of service buildings to accomodate guests and staff members.

Due to financial difficulties, Durant sold the camp in 1901 to Alfred G. Vanderbilt, great grandson of railroad magnate Commodore Vanderbilt. Much of the present camp was constructed by the Vanderbilt family who continued to own the property until 1954.

Sagamore received considerable attention during the first decade of the 20th century because of the notoriety of the Vanderbilts, and reached its height of national fame during the late 1920's when it was the well-known gathering place of Mrs.

conveyance, which included certain improvements, was made to the People of the State of New York. By virtue of existing law, the tract conveyed became a part of the Forest Preserve.[2] This parcel included 10.9+ acres, upon which were located various out buildings. The other parcel was conveyed to the Preservation League of New York State,[3] subject to certain covenants, conditions, and restrictions. It was subsequently reconveyed to the National Humanistic Education Center, Inc., which is now known as Sagamore Institute, Inc.[4] This parcel was some 7.7+ acres in size but included the main lodge of Camp Sagamore. As a result of the two conveyances, the Great Camp was severed.

In 1983, the electors of this state approved an amendment to the New York State Constitution, authorizing and empowering the transfer of the 10.9+ acre parcel and the improvements situated thereon to Sagamore Institute, Inc., in consideration of the conveyance to the People of some 200+ acres of forest land for addition to the Adirondack Forest Preserve.[5] The amendment contained the following provision:

Emerson's (Vanderbilt's wife's) high society friends.

Of all the Adirondack Great Camps, Sagamore in particular exemplifies the goal of total self-sufficiency which is prompted by an isolated location. It conveys a sense of luxury and expresses the allure of untamed wilderness in its rustic architecture and remote surroundings. Gadski, *Sagamore: A Prototypical Adirondack Great Camp*, Preserv. League of N.Y. Newsletter, Jan.-Feb. 1983, at 3-6.

2. N.Y. Const. art. XIV, § 1 (1894, amended 1983); N.Y. Envtl. Conserv. Law § 9-0101(6) (McKinney 1984).

3. The Preservation League is the only organization dedicated to protecting the vast and incomparable architectural heritage of New York State. Founded in 1974 as a not-for-profit membership organization, the League has been the voice of concerned citizens from Niagara Falls to Battery Park to Montauk Point seeking to preserve the irreplaceable treasures of our past. The League provides technical assistance to local preservation groups, serves as a resource center, issues publications, sponsors conferences, maintains a legislative network, produces and distributes films, and works to arouse public awareness of the importance of preservation. In addition, the League administers preservation covenants on Camp Sagamore, an Adirondack wilderness estate. Interview with Fred Cawley, Executive Director of the Preservation League of N.Y. (Apr. 14, 1986).

4. Sagamore Institute is an education corporation organized and existing pursuant to the Education Law of the State of New York.

5. N.Y. Const. art. XIV, § 1 (1894, amended 1983).

> on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state.[6]

Chapter 773 of the laws of 1985 fulfills this constitutional requirement.[7] The agreement mandated by the constitution has been negotiated and the actual transfer of title is to occur in late 1986.[8] Thus, this Article will discuss the negotiations between the parties and the resolution of the pertinent legal issues—all of which led to fulfillment of the constitutional amendment that has become known as the "Sagamore Amendment."

II. Background

A. *Necessity for the Amendment*

The conveyance by Syracuse University to the People included 10.9+ acres which were improved by the outbuildings of Camp Sagamore. Since the land in question was located within the County of Hamilton (one of the counties enumerated in the Environmental Conservation Law (ECL)[9] and not otherwise excepted), it became a part of the Forest Preserve and subject to the provisions of Article XIV of the New York State Constitution.[10]

The Forest Preserve, whose centennial was in 1985, provides protection to the state lands within it, commonly expressed by the term "forever wild." The critical impact to the

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6. *Id.*

7. 1985 N.Y. Laws 773

8. The deed was recorded on ____ __, 1986 in Liber ____ of Deeds at __ in Hamilton County, New York. (When the deed is recorded the Pace Envtl. L. Rev. will publish the information in a supplemental announcement.)

9. N.Y. Envtl. Conserv. Law § 9-0101(6) (McKinney 1984).

10. N.Y. Const. art. XIV, § 1 (1894, amended 1983).

goal of reuniting Camp Sagamore arises from the adjective "forever," which means that the lands constituting the forest preserve are inalienable by the state absent constitutional amendment. Thus, none of the traditional methods of disposal of realty by the state would be available until the electors of the state first gave their assent to disposal. They did so at the general election held in November, 1983.[11]

B. *Parties to the Negotiation*

The People of the State of New York, being the fee owner of the 10.9+ acres and the improvements thereon to be conveyed, were a necessary party. The land in question is under the jurisdiction of the Department of Environmental Conservation (DEC) pursuant to statute,[12] and has been administratively delegated within that department to the Division of Lands and Forests. Personnel of that division, together with personnel from the Office of Counsel of DEC, represented the People.

Sagamore Institute, Inc. is both the named grantee of the 10.9+ acres to be conveyed by the People and the grantor of some 200 acres to the People. The Institute was represented by its president.

The Preservation League of New York, represented by its executive director and its counsel, was a necessary party since it held the rights to enforce the covenants and restrictions contained in the deed of the 7.7+ acre parcel from itself to Sagamore Institute's predecessor. While this land was not directly involved in the conveyance, the Sagamore Amendment identified the underlying rationale for the transfer in these words: "in order to facilitate the preservation of historic buildings listed on the national register of historic places by rejoining an historic grouping of buildings under . . . unitary ownership and stewardship . . . ."[13] Accordingly, the participation of the League was necessary in order to secure a uniform set of covenants and restrictions on the entire Great Camp

11. *Id.*
12. N.Y. Envtl. Conserv. Law § 9-0105 (McKinney 1985).
13. N.Y. Const. art. XIV, § 1 (1894, amended 1983).

(i.e. both the 7.7+ acre parcel and the 10.9+ acre parcel together with improvements).

C. *Structure of the Transaction*

One of the earliest questions to face the parties was the structuring of the transaction. What form should the various instruments take? What instruments were necessary?

While it was clear that two deeds were required, one from Sagamore Institute to the People and the other from the People to Sagamore Institute, it was not so settled as to what format should be employed for the various covenants and agreements among the necessary parties, in the words of the Sagamore Amendment, to secure "the natural and historic character of the lands and buildings conveyed by the state . . . ."[14] The state proposed that all such agreements and covenants be contained in a separate document, to be referenced in the deed and to be recorded simultaneously therewith. The League questioned the effectiveness of this approach, preferring the more traditional recitation of the covenants, conditions and restrictions in the deed. The Institute voiced no opinion.[15]

The state had previously used agreements, which it called "conservation easements,"[16] in circumstances that were somewhat similar. These easements were in the nature of agreements between landowners that recognized the environmental importance of the servient estate. They granted the adjoining dominant estate the right to view the servient estate in its natural condition (as the same existed on the date of recording of the easement), and further restricted the owner of the servient estate from taking certain specified actions.

The League nevertheless questioned the authority and enforceability of such easements if they were not to be gov-

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14. *Id.*

15. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

16. As used herein the term does not refer to Conservation Easements taken pursuant to N.Y. Envtl. Conserv. Law § 49-0303(1) (McKinney 1984), but rather to easements, similar to traditional easements of view, taken by one landowner over adjoining lands of another landowner.

erned by Article 49, Title 3 of the ECL, which governs a particular type of conservation easement.[17] The state, however, indicated that Article 49 of the ECL was not applicable because of the inherent conflict contained therein with Article XIV of the N.Y. Constitution[18] and because the implementing regulations for Article 49 were far from promulgation.[19]

Since there were no reported judicial decisions dealing with the type of conservation easements that the state proposed, the state concurred with the League's proposal to incorporate the text of the covenants, conditions and restrictions into the deed from the People to the Institute.[20]

This left for resolution the question of whether the conveyance from the state to the Institute would be subject to either a possibility of reverter[21] or a right of reacquistion.[22]

The prior deed from Syracuse University to the League did not contain either words of limitation[23] or words of condition.[24] Instead the deed was subject to certain covenants, con-

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17. *See* N.Y. Envtl. Conserv. Law § 49-0303(1) (McKinney 1984).

18. *Id.* Section 49-0303(1) contains a clause that makes void *ab initio* any conservation easement if any court of competent jurisdiction finds it to be part of the Forest Preserve. The state's fear was that this clause might be misinterpreted to apply to the type of conservation easement it proposed and therefore invalidate the restrictive covenants.

19. The regulations are in draft form but have not yet been released for public comment. Interview with Philip Hulbert, Assistant Director of the Bureau of Real Property, Division of Lands and Forests, Department of Environmental Conservation of N.Y. (March 1986).

20. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

21. A conveyance subject to a reversion (known as a fee on conditional limitation in classical real property terminology) carries an automatic reversion to the grantor on the happening of a specified event. N.Y. Est. Powers & Trusts § 6-4.5 (McKinney 1967).

22. A conveyance subject to a right of reacquisition (known as a fee on condition subsequent in classical real property terminology) requires prior court action to declare a termination of the fee in interest. *Id.* § 6-4.6.

23. Under traditional estate law,

> [a] fee on limitation is created by words of limitation which mark the period during which the estate is to continue. . . . Words of duration, such as 'while,' 'until,' 'so long as,' or 'during the time that,' and other words denoting a duration of time, are usually used to create an estate upon limitation, leaving a possibility of reverter in the grantor or his heirs.

20 N.Y. Jur. Estates § 16 (1976).

24. Words of condition either create or destroy the granting of an estate upon

ditions, and restrictions contained in an agreement between Syracuse University and the People. The agreement, which was recorded in the Hamilton County Clerk's Office, ran with the land and was enforceable by entry.[25] On the strength of that last phrase, the parties agreed that the prior deed was subject to a reversion, and also agreed that the present conveyance should be structured as subject to a right of reacquisition.[26] This decision was based on a number of factors, including: (1) the substantial restoration obligations being undertaken by the Institute; (2) a judicial disapproval of forfeitures; (3) the necessity for some consideration owed to the Institute given its agreement to apply certain new conditions to the 7.7+ acre parcel already owned by it.

The final major structural question was the nature of the continuing role to be played by the League. Pursuant to the conveyance by the League to the Institute,[27] the League retained a right of first refusal on the 7.7+ acre parcel, a valuable interest in real property which the League was not willing to release. In addition, the League had been administrator of the existing covenants and restrictions on the 7.7+ acre parcel and was intimately familiar with not only the 7.7+ acre parcel, but with the 10.9+ acre parcel as well. Given the necessity for unitary stewardship and the desire of the parties to provide for the most simple form of post-closing enforcement procedure possible, it was agreed as follows:

(1) The state would appoint the League as its enforcement agent, reserving to itself, however, any determination as

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the occurrence or non-occurrence of an event. *See id.* § 21. An example of a condition precedent is: owner will "convey the land upon condition that the grantee do or abstain from doing something, or that something happen or fail to happen, before the vesting of the estate . . . ." *Id.* Alternatively, an example of a condition subsequent would be: owner conveys the land to grantee, provided that an express condition of use or behavior is not breached. If so, title shall revert or the grantor shall have a right of reacquisition. *Id.* at 262.

25. Indenture between Sagamore Inst., Inc. & Preserv. League of N.Y., dated Nov. 1, 1975, recorded on Dec. 12, 1975 in Liber 167 of Deeds at 23, Hamilton County, New York.

26. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

27. *See supra* note 25.

to initiation of legal proceedings;[28]

(2) The League released all substantive convenants on the 7.7+ acre parcel replacing them with the substantive covenants contained in the deed to the 10.9+ acre parcel,[29] but retained its right of first refusal on the 7.7+ acre parcel and obtained the right of first refusal on the 10.9+ acre parcel;[30]

(3) The state obtained a right of second refusal on both parcels;[31]

(4) The Institute would deal with the League on a regular basis in terms of reports, inspections and approvals. The state agreed to be bound by the League's determinations on such matters, provided that it was given a reasonable period of time in which to review and comment;[32]

(5) With a few limited exceptions, the entire Great Camp is subject to a single, comprehensive set of covenants, conditions and restrictions.[33]

The authority of DEC to enter into agreements is set forth in the ECL.[34] DEC's conclusion that the League, as enforcement agent, should continue to administer the covenants of the conveyance was based on the following factors: DEC's relative lack of time and resources available for the ongoing post-closing administration of the covenants; DEC's recognition of the League's substantial knowledge and expertise with respect to the site and the field of historic preservation; and DEC's recognition of the League's existing rights and its substantial investment of time and effort in the preservation of the Great Camp.[35]

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28. Indenture between N.Y. & Sagamore Inst., Inc., dated _____. ___, 1986, recorded on ____ ___, 1986 in Liber ____ of Deeds at ___, Hamilton County, New York [hereinafter cited as "Indenture"], at para. (b), 1(e). (When information is obtained the Pace Envtl. L. Rev. will publish the information in a supplemental announcement.)

29. Indenture, *supra* note 28, at para. 21(a), (b).

30. *Id.* at para. 21(b), (c), (d).

31. *Id.* at para. 21(c), (d).

32. *Id.* at para. (b).

33. *Id.* at para. 1(f).

34. *See* N.Y. Envtl. Conserv. Law § 3-0301 (McKinney 1985).

35. The administration of the covenants would be the responsibility of the Division of Land and Forests, which has no familiarity with such covenants and whose

The agency agreement is limited, however, since the state reserves the right to initiate any legal actions or proceedings. The agency agreement may be terminated, for cause, at any time by the state upon ninety days written notice, and at any time for any reason by the League.[36] The League agreed to undertake the duties of the delegation (*i.e.* become the state's agent) without committing any fiscal resources thereto.[37] Although the agreement may appear illusory, the consideration to the People is the League's promise to undertake certain duties that would otherwise be the responsibility of a state agency, and the benefit to the League is the opportunity to review and have input on the implementation of the historic preservation covenants as it relates to the 10.9+ acre parcel in which the League otherwise has no legal interest.

The Institute conveyed to the state some 200+ acres of land by full covenant and warranty deed, after approval of title by the Attorney General.[38] Subsequently, after certification by the Commissioner of DEC that the Institute had conveyed the 200+ acre parcel, and that the People had recorded the conveyance with the description thereof and the restrictions governing the same, the Commissioner of General Services[39] issued Letters Patent to the Institute.[40] These procedures are outlined in Chapter 773 of the Laws of 1985. Note, however,

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staff is responsible for the administration of nearly four million acres of land statewide. Legal service for all land acquisition and land management questions is the responsibility of a single attorney in the Office of Counsel.

36. Indenture, *supra* note 28, at para. (b).

37. *Id.*

38. The Attorney General acts through the Real Property Bureau in the Department of Law. Approval of title is required by N.Y. Envtl. Conserv. Law § 3-0305 (McKinney 1978).

39. The Commissioner of General Services succeeded to the duties of the former Board of Commissioners of the Land Office and, with certain exceptions not here relevant, is the official of the state empowered to grant real property. *See* N.Y. Pub. Lands Law § 24 (McKinney 1979), § 33 (McKinney 1983). For examples of exceptions, *see* N.Y. High. Law § 30(18) (McKinney 1979) relating to property no longer needed or useful for highway purposes and conveyance thereof by the Commissioner of Transportation, N.Y. Envtl. Conserv. Law § 16-0107(17) (McKinney 1978) relating to sale of flood control property on terms beneficial to the state by the Commissioner of DEC.

40. 1985 N.Y. Laws 773.

that the entire transaction was made without benefit of any written agreement among the parties, and was based solely on the Sagamore Amendment and the interest of all parties in implementing the same. No contract of sale or agreement to convey has ever been executed, nor will any such agreement ever be executed, especially since the enactment of the chapter law.

D. *Impact of Other Laws*

Aside from the constitutional and real property aspects of the structuring of the transaction above described, consideration had to be given to the State Environmental Quality Review Act (SEQRA)[41] and its implementing regulations.[42] Since DEC is the role model for all other governmental agencies with respect to SEQRA compliance,[43] it is particularly necessary that any action, as defined by the statute[44] and the regulations,[45] comply with SEQRA. It is first necessary, however, to determine whether SEQRA applies.

Legislatively mandated actions are exempt from SEQRA.[46] Since the Commissioner of General Services is legislatively mandated to convey the state's parcel to the Institute (after certain preconditions are fulfilled), the act of conveying is, in SEQRA terminology, an exempt action.[47]

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41. N.Y. Envtl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1985).

42. N.Y. Admin. Code tit. 6, §§ 617, 618 (1978).

43. There is no specific authority for the proposition; however it is a logical inference from the Commissioner's authority under Article 8 and DEC's own administrative practice. *See* N.Y. Envtl. Conserv. Law § 8-0101 to -0117 (McKinney 1985) & *id.*

44. N.Y. Envtl. Conserv. Law § 8-0105(4), (5) (McKinney 1977).

45. N.Y. Admin. Code tit. 6, § 617(2) (1978).

46. An "exempt" action under SEQRA's regulations includes: "actions of the Legislature of the State of New York or of any court." N.Y. Admin. Code tit. 6, § 617(2)(o)(7) (1978).

SEQRA was enacted in 1975, imposing several basic mandates on local and state agencies in the interest of enforcing environmental protection. Of the three basic mandates, the applicable provision from which legislatively mandated actions are exempt requires that agencies or applicants for permits or approvals prepare an environmental impact statement (EIS) "on any action they propose or approve which may have a significant effect on the environment." N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1977).

47. N.Y. Admin. Code tit. 6, § 617(2)(o)(7) (1978).

Accordingly, no compliance with SEQRA was deemed necessary with respect to the conveyance or the terms and conditions upon which it is to be made.[48]

In addition to SEQRA, the State Historic Preservation Act (SHIPA)[49] would apply to certain subsequent activities of DEC undertaken in fulfillment of its post-closing administration and enforcement responsibilities. Although similar in approach to SEQRA in terms of its application to actions, permits or approvals, SHIPA differs in that it mandates a referral of the action, permit, or approval to the Commissioner of Parks, Recreation and Historic Preservation for his review and comment. While not vesting in that commissioner any veto power, SHIPA does require a consideration of the historic resource impacts that the proposed action, permit or approval may have.[50] DEC will comply with SHIPA whenever any post-closing activity of DEC falls within SHIPA's jurisdiction.

Since neither the property conveyed by the People, nor the property being acquired by the People is within the coastal area,[51] no compliance with the Waterfront Revitaliza-

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48. There is the possibility, however, that some future activities of DEC, in furtherance of its responsibilities for post-closing administration of the covenants, conditions and restrictions, may be actions requiring approval under SEQRA. Should such an eventuality arise, DEC would undertake all necessary environmental reviews mandated by the then existing statutory law and implementing regulations.

49. N.Y. Parks, Rec. & Hist. Preserv. Law § 14.01 - 14.09 (McKinney 1980).

50. *Id.* at § 14.09. Section 14.09 requires that:

> the agency's preservation officer shall give notice, with sufficient documentation, to and consult with the commissioner concerning the impact of the project if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property that is listed on the national register of historic places or property listed on the state register or is determined to be eligible for listing on the state register by the commissioner. . . . Every agency shall fully explore all feasible and prudent alternatives and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts on such property. In the event that the agency has filed or will file with the [D]epartment of [E]nvironmental [C]onservation, with respect to that contemplated project, a draft environmental impact statement pursuant to the provisons of article eight of the environmental conservation law, it shall provide a copy thereof to the commissioner and the chairman of the board and shall also supply such further information as the commissioner may request.

51. *See* N.Y. Exec. Law § 911(1) (McKinney 1981). Under Section 911(1), the

tion and Coastal Resources Act[52] or its implementing regulations[53] was required. Approval by the Adirondack Park Agency (APA) was not required for either the conveyance by the People or the acquisition by the People of the real property involved in this transaction.[54] However, once title to the property acquired by the People vested by the recording of the deed thereto, it became subject to classification by APA[55] and must be administered by DEC in accordance with the Adirondack Park State Land Master Plan.[56] Likewise, the parcel acquired, although subject to payment by the state of real property taxes,[57] did not require the approval in advance of the State Board of Equalization and Assessment (SBEA).[58]

The Sagamore Amendment required legislative approval of the tracts to be exchanged, and also required a finding that the land and buildings conveyed by the state were at least equal in value to the lands conveyed to the state. The Institute and DEC identified the bounds and acreages of the tracts involved and DEC prepared survey descriptions thereof.[59]

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coastal area is defined as:

> (a) the state's coastal waters and (b) the adjacent shorelands, including landlocked waters and subterranean waters, to the extent such coastal waters and adjacent lands are strongly influenced by each other including, but not limited to, islands, wetlands, beaches, dunes, barrier islands, cliffs, bluffs, intertidal estuaries and erosion prone areas. . . .

Id.

52. *Id.* at §§ 910-920 (McKinney 1984).

53. N.Y. Admin. Code tit. 6, § 617.5(d), tit. 19, § 600 (1978).

54. N.Y. Exec. Law § 814 (McKinney 1976). An action is subject to the jurisdiction of APA only when a state agency

> intends to undertake any new land use or development *within* the Adirondack park, other than land use or development by the [D]epartment of [E]nvironmental [C]onservation pursuant to the master plan for management of state lands, irrespective of whether the land use area wherein the project is proposed to be located is governed by an approved local land use program . . . .

Id. (emphasis added).

55. *Id.* at § 816 (McKinney 1973).

56. *Id.*

57. N.Y. Real Prop. Tax Law § 532 (McKinney 1985).

58. This is an administrative practice. There is no statute vesting prior approval authority in SBEA. Its sole responsibility is approval of assessments on state lands that are subject to taxation. *See id.* at § 202 (McKinney 1981).

59. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

These were included in the chapter law.[60] An independent real property appraiser was jointly retained by DEC and the Institute to appraise the two tracts so that a basis for the legislative determination of value would exist.[61] In addition to estimating the fair market value of the parcel to be acquired by the state, the value of the parcel to be conveyed by the state was estimated in both its unencumbered (i.e. without consideration of the restrictive covenants) and its encumbered (i.e. with consideration of the restrictive covenants) state.[62]

Since this transaction was a legislatively approved exchange, the approvals of the Comptroller and the Director of the Budget were not necessary.[63]

Finally, the Attorney General will require from the Institute such muniments of title as he deems necessary, including any approval of a Justice of the Supreme Court and any other state officials as may be required under the Not-for-Profit Corporation Law,[64] with respect to the property acquired by the People. Both the Institute and the League may additionally be required to provide certified copies of the resolutions of their respective boards authorizing the exchange and execution of all documents necessary to effect the same.[65]

III. The Covenants, Conditions, and Restrictions

For purposes of analysis, the covenants, conditions and restrictions can be divided into three categories: (A) those regulating the relationship of the parties; (B) those imposing an affirmative obligation on the Institute; and (C) those prohibiting the Institute from doing what it would otherwise have the right to do. They will be discussed here in that order.

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60. 1985 N.Y. Laws 773.

61. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

62. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

63. N.Y. State Fin. Law § 112 (McKinney 1980). Absent such legislation, their approvals would be necessary with respect to the property acquired by the People.

64. N.Y. Not-for-Profit Corp. Law § 510(a)(3) (McKinney 1972).

65. This is an administrative practice of the Department of Law. The Not-for-Profit Corp. Law vests management of the affairs of a corporation in its Board of Directors. *Id.* § 701 (McKinney 1973); *see id.* § 509 (McKinney 1970), § 510(a)(1) (McKinney 1972).

A. *Regulating the Relationship*

While the jural relationship of the parties is governed by the entire document, the type of covenant included under this subhead is what might broadly be called "procedural," i.e, defining the manner in which the parties relate to each other rather than the obligations imposed upon them, or benefits accruing to a party. Examples of this type of covenant included in the deed are (1) an agreement with respect to the conditions of the 10.9+ acre parcel on the date of vesting; (2) an agreement with respect to the manner in which the document is to be interpreted; (3) an agreement respecting the delivering of all post-closing communications required or permitted among the parties; (4) agreements respecting the severability of the clauses of the document, its amendment, and the import of the captioning of the document; (5) an agreement respecting application of the doctrine of waiver; (6) an agreement binding the successors and assigns of the parties, and (7) agreements regarding the method of notification of any default and the time within which the same may be cured.[66]

Some of the clauses with respect to the above covenants are well known to corporate and commercial practitioners and need no further mention. In this class are the agreements relating to: (1) the addresses to which all notices shall be sent; (2) the severability of the clauses of the deed; (3) the requirement of written concurrence from all parties in order to effectuate any change in the provisions of the document; (4) the non-substantive nature of the captioning; (5) the non-application of the doctrine of waiver (i.e., the failure to exercise a right in the past does not bar the future exercise of that same right), and (6) the applicability of the document to the successors and assigns of the parties. Other clauses relating to the covenants enumerated above are somewhat unique and require additional clarification.

One of the underlying mandates of the Sagamore Amendment was to secure "the natural and historic nature of the

66. *See* Indenture, *supra* note 28.

lands and buildings to be conveyed by the state."[67] To this end, many affirmative and negative covenants have been included in the deed and are hereafter discussed. In order to ensure that all parties, their respective successors and assigns, and any subsequently involved court or other tribunal or dispute resolution forum begin from the same reference point, the parties have agreed that certain maps and reports accurately depict the condition of the 10.9+ acre parcel on the date of the deed and may be used by any party for the purpose of establishing such condition on such date.[68] This term is a necessity in an agreement such as this which not only prohibits certain specific activities, but also prohibits broad classes of actions such as any change in topographical condition. Without an agreed-upon reference point from which to begin and against which to measure any subsequent actions, the matters of proof for the trial court would be needlessly multiplied and, indeed, made impossible once this generation has passed on.

It is a familiar axiom of contract law that, unless otherwise agreed to by the parties, strict performance is not always necessary. Substantial performance may be sufficient to save a party from default.[69] Whether a covenant is personal or real (i.e., runs with the land), has often been a difficult question of interpretation.[70] Accordingly, the agreement contains a paragraph which makes the intent of the parties clear by stating that (1) the document is to be strictly construed so as to effectuate its stated purpose of perpetual preservation of the Great Camp[71] and (2) the covenants contained therein are real.[72] Notwithstanding the recitation that the successors and assigns are bound, both of these expressions of intent are necessary since (1) the binding of successors and assigns does not give any indication of whether or not the parties intended the doc-

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67. N.Y. Const. art. XIV, § 1 (1894, amended 1983).

68. Indenture, *supra* note 28, at para. 15.

69. Restatement (Second) of Contracts § 241 (1979).

70. R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 8.16 (1984); R. Powell & P. Rohan, Powell on Real Property 673 (1968).

71. Indenture, *supra* note 28, at para. 22.

72. *Id.* at para. 26.

ument to be strictly construed and (2) successors and assigns are not bound to personal covenants as distinguished from real covenants.[73]

Where the jural relationships of the parties involve both perpetual and on-going interaction, it seems advisable that the document which establishes and regulates such relationships contain clear provisions regarding default. The parties to the deed under discussion recognized this principle and provided a very detailed framework governing default, including: (1) notice thereof, including a specification of the provisions of the Indenture claimed to have been breached; (2) an opportunity for the grantee to cure the default within a time certain during which no action or proceeding may be commenced against the grantee; and (3) reasonable extensions thereof so long as grantee is diligently pursuing the cure.[74] The state and the League, in addition to exercising their right of reacquisition, may also commence such proceedings or actions, severally or jointly, for injunctive or other relief as may be appropriate or advisable. Additionally, the state and the League may enter upon the premises on thirty days notice to cure the default by direct action and charge the same to the grantee.[75]

Thus, it is evident that the parties have gone to substantial lengths to define, with some certainty and specificity, the framework within which their respective rights and obligations will be exercised. While several of the substantive covenants yet to be discussed contain procedural provisions, they are incidental and integral to that particular substantive covenant and shall be discussed within that context.

B. *Affirmative Obligations*

Within this class of clauses are agreements relating to: (1) indemnification; (2) insurance; (3) public viewing; and (4) the rehabilitation and restoration of the improvements. The last category is at the center of the entire document and will be

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73. R. Powell, *supra* note 70.
74. Indenture, *supra* note 28, at para. 18.
75. *Id.* at para. 19.

discussed at some length.

Since there is continuous oversight of the grantee's performance under the Indenture, the state and the League may be subject to suit or other claim or demand. However, any liability of these parties is limited and secondary, at least with respect to physical implementation of the Indenture and its provisions. Accordingly, the grantee agrees to save and hold harmless the state and the League. Such is evidenced by the Institute's agreement to procure, maintain, and provide proof of necessary liability insurance.[76] Casualty insurance provisions will be discussed below.

One of the constitutional mandates underlying this exchange was the requirement that the premises conveyed "will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state."[77] In fulfillment thereof, the parties have agreed, in accord with the prior agreement between the League and the Institute relating to the 7.7+ acre parcel, that the public has the right to view the Great Camp at least one day weekly during the summer period.[78] This period has been defined as commencing with the weekend before the summer solstice and continuing through the weekend following the autumnal equinox.[79] The parties have the ability, by mutual agreement, to substitute any comparable schedule.[80]

The Sagamore Amendment did not make any provisions with respect to the charging of any fee for this right of public viewing. The parties, however, recognized that the Institute incurred certain expenses in making the Great Camp available for public inspection and accordingly afforded the Institute the right to charge a fee, provided that (1) such fee be reasonable and not inconsistent with the fees charged by comparable museums and/or historic sites and (2) the proceeds of such fee be used for the public viewing and/or the restoration and

76. *Id.* at para. 17.
77. N.Y. Const. art. XIV, § 1 (1894, amended 1983).
78. Indenture, *supra* note 28, at para. 3.
79. *Id.*
80. *Id.*

preservation of the Great Camp.[81]

Since the expressed purpose of the Sagamore Amendment was "to facilitate the preservation of historic buildings listed on the national register of historic places,"[82] one of the principal tasks of the parties was the drafting of the rehabilitation and restoration covenant and the accompanying rehabilitation plan.

The grantee covenanted as follows: (1) to rehabilitate the improvements on the 10.9+ acre parcel within ten years from the date of recording of the Indenture;[83] (2) to keep all such improvements that are so rehabilitated, and the improvements on the 7.7+ acre parcel that were previously rehabilitated, in good order and repair;[84] (3) to perform all work in accordance with the standards of the Secretary of the Interior[85] as the same existed on the date of the Indenture, and only after approval of the plans by the state and the League.[86] There is an exception from the advance approval requirement in emergency situations and for ordinary and necessary repairs and maintenance.[87] Emergency situations are defined as actions necessary to rectify a condition that poses an immediate and substantial risk of injury to persons or property.[88] Ordinary and necessary repairs and maintenance are defined as tasks which do not affect the exterior or interior architectural features of the improvements.[89] However, the emergency exception requires notification within twenty days following the action.[90]

In support of this obligation, grantee agreed that the state and the League may inspect the property.[91] Such inspections may be either: (1) unannounced, occurring at any time

81. *Id.*
82. N.Y. Const. art. XIV, § 1 (1894, amended 1983).
83. Indenture, *supra* note 28, at para. 1(a).
84. *Id.* at para. 1(b).
85. 36 C.F.R. § 68 (1985).
86. Indenture, *supra* note 28, at para. 1(d).
87. *Id.* at para. 1(f).
88. *Id.* at para. 1(f)(i).
89. *Id.* at para. 1(f)(ii).
90. *Id.* at para. 1(f)(i).
91. *Id.* at para. 2.

but no more than once per month[92] or (2) announced, occurring at any time but only after notice to and consent by the grantee.[93] Additionally, grantee agreed to procure, maintain and provide proof of casualty insurance.[94] To ensure that the insurance proceeds are used in a manner consistent with the constitutional mandate of rehabilitation and restoration, there are two requirements incorporated in this clause. If the parties agree that the structure is salvageable, the proceeds must be used to restore the structure. If the structure is totally or substantially destroyed, the proceeds must be used to secure the area and continue with the restoration and rehabilitation of the remaining improvements.[95] In the event of a dispute, a qualified preservation architect is to be retained to advise the parties.[96]

Implementation of the covenant to restore and rehabilitate is contained in the Rehabilitation Plan, annexed to and made a part of the Indenture.[97] In addition to specifying the work plan for all structures for the two years immediately following the recording of the Indenture, this agreement also outlines the long term stabilization plan for the ten year period and sets a minimum schedule, in terms of buildings per year, to be completed.[98] The plan also requires an annual report outlining the work completed the prior year and the work planned for the coming year.[99]

One of the most involved questions to arise in the course of drafting the Indenture was to what degree the Secretary's standards and the provisions of the Indenture would apply to work on the interiors. All agreed that the Indenture, and through it the standards, applied to all exterior architectural features and all interior architectural features which, if not restored, would cause the exterior architectural features to fall

92. *Id.* at para. 2(a).
93. *Id.* at para. 2(b).
94. *Id.* at para. 17(a).
95. *Id.* at para. 17(b).
96. *Id.*
97. Indenture, *supra* note 28, Exhibit C.
98. *Id.*
99. *Id.*

into a state of disrepair.[100] But what of the balance of the interior architectural features?

The ultimate resolution was that any optional work undertaken on the interiors would be accomplished in conformity to the Secretary's standards.[101] However, upon notice to the state and the League of forty-five business days, such work could be performed without prior approval of the state or the League when such work would be necessary to the grantee's uses or programs.[102]

The Indenture sets forth rather stringent reply times on requests for approval made by the grantee. A failure to object within the time frame specified is deemed an approval.[103] Additionally, except for emergencies and ordinary and necessary repairs, no work may be undertaken on the exteriors without the prior approval of the state and the League.[104] Any approvals required by the state and the League may not be unreasonably withheld, and no approval is necessary to comply with lawful governmental orders provided that all work necessary to so comply is accomplished in accordance with the Secretary's standards.[105]

When read together, the ultimate effect of all of these provisions is to accomplish the constitutional mandate—to preserve the historic structures. A plan of rehabilitation is provided; objective, extrinsic standards are defined; a timetable is established; prior approval requirements are mandated; a reporting system is adopted; inspection authority is provided; restrictions (with certain exceptions) on non-preauthorized work are imposed; and finally, the obligation to maintain the structures once they are restored and rehabilitated, is clearly enunciated.

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100. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

101. Indenture, *supra* note 28, at para. 1(e).

102. *Id.* at para. 1(e). Accordingly, any interior work that would affect the structural integrity or the original floor plan, or would change the building material used on the interior and would not be necessary to the grantee's uses or programs, requires the prior approval of the state and the League.

103. *Id.* at para. 1(d).

104. *Id.* at para. 1(e)(ii), (iii).

105. *Id.* at para. 1(d).

C. *The Prohibitions*

To meet the constitutional requirement of securing the natural and historic character of the lands and buildings to be conveyed by the state, certain prohibitions are imposed by the Indenture. Within this class of clauses are provisions dealing with construction, signage, agriculture, topographical change, soil and water conservation, and roadways. A second class of restrictions were designed to ensure that the Great Camp remains an historical asset of the People of the state. This class deals principally with usage including types of activities permitted, refuse disposal, and vehicle use. This class also includes a prohibition against subdivision and includes rights of a first and a second refusal. Finally, a prohibition against the sale of alcohol is incorporated[106] due to its presence in the back title and about which no further comment will be made.

The first group of restrictions dealing with the protection of natural surroundings was incorporated as an enforcement tool to aid in the protection of the natural resource base of the Great Camp, the adjoining lake, and the abutting forest preserve lands of the People. Thus, no new construction is permitted, with the exception of a single maintenance structure;[107] no new signage is permitted, with exceptions for historical and natural markers, posted signs, traffic control signs and a sign identifying the name and address of the owner;[108] no additional exterior artificial illumination is permitted;[109] no pesticides may be used, nor any agricultural activities conducted, except for a one-half acre vegetable garden;[110] no timbering is allowed, with exceptions for normal maintenance and removal of dangerous trees;[111] and no disturbance or change in the natural habitat or soil cover is permitted.[112] The existing roadway system may be maintained, but

106. *Id.* at para. 12.
107. *Id.* at para. 4.
108. *Id.* at para. 5(a).
109. *Id.* at para. 5(b).
110. *Id.* at para. 6.
111. *Id.* at para. 7(a).
112. *Id.* at para. 7(b).

not expanded;[113] no new roadways[114] or utilities[115] may be placed on the Great Camp, nor may any use thereof be made that would be adverse to drainage, flood control, water conservation, preservation of fish or wildlife habitat, erosion control or soil conservation.[116]

Even this summary listing of the areas included in the "protective restrictions" illustrates the comprehensive approach taken by the drafters of the Indenture as well as by the drafters of the underlying constitutional amendment upon which this series of covenants is based. The protection of natural resources serves to enhance the historic asset by providing it with a site that is as rustic and pristine as possible.[117]

The prohibition against subdivision was included to ensure unitary ownership of the Great Camp in perpetuity. Likewise, rights of first and second refusal are included to afford the League a first opportunity and the state a second opportunity to acquire the Great Camp prior to any sale.[118] Since both an outright prohibition of sale and a prior approval of any subsequent purchaser are repugnant to public policy and the law,[119] the desire for some measure of protection at the time of sale was met by including these rights of first and second refusal, each applying to the entire Great Camp. Their use is not anticipated, but the mechanism exists in the event the need develops.

Also included in this grouping of usage-oriented restrictions are provisions dealing with vehicular use, the disposal of refuse, and the storage of materials. With respect to vehicles, the following provisions apply: (1) snowmobiles, dune buggies, motorcycles, all terrain vehicles, and other recreational vehi-

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113. *Id.* at para. 10.

114. *Id.*

115. *Id.* at para. 7(c).

116. *Id.* at para. 9.

117. The usage-oriented restrictions were in some ways the easiest to draft; in other ways the most difficult. While the provision against subdivision was readily seen by all to be consonant with the Sagamore Admendment's desire for unitary ownership, the provision dealing with permitted uses was the subject of much discussion. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

118. Indenture, *supra* note 28, at para. 21.

119. *See* N.Y. Est. Powers & Trusts Law § 9-1.1 (McKinney 1985).

cles are not permitted to operate on the Great Camp except for ingress and egress; (2) no off road use of automobiles, trucks, vans or other motor vehicles is permitted except in connection with inspection, maintenance, fire protection or other emergency needs; (3) no power boats or aircraft may be used on the lake, except in emergencies.[120] With regard to the disposal of refuse and the storage of materials, the Great Camp may not be used for the dumping or the storing of ashes, sawdust, sewage, garbage, scrap material, sediment discharges, oil and its by-products, leached compounds, toxic fumes or any other unsightly or offensive material; there is an exception for the temporary storage of garbage generated by normal usage, provided that the same is legally disposed of within a reasonable period of time, and there is an exception for the temporary storage of any material (*e.g.*, roofing tiles) necessary for the operation of the Great Camp, provided that the same is neatly stored in appropriate locations that are relatively unobtrusive.[121]

The use to which the Great Camp may be put was a topic of much discussion at the practical, legal, and philosophical levels. On the one hand, an argument was made that there should be no use restrictions whatsoever since the historical asset is otherwise sufficiently protected.[122] On the other hand, attention was drawn to the argument that some uses are inherently inimical to the preservation and availability of the historical resource and therefore should not be allowed. Furthermore, any use that is likely to cause substantial deterioration in a relatively short period of time should not be permitted.[123] As is evidenced by the prohibitions contained in the Indenture, the latter position was ultimately accepted by the parties.

In comparison to the other "usage" issues, the question of leasing the Great Camp was simply resolved. The same is permitted upon the prior approval of the state and the League,

120. Indenture, *supra* note 28, at para. 11.

121. *Id.* at para. 8.

122. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

123. *Id.*

and such approval is not to be unreasonably withheld.[124]

Lastly, it is necessary to distinguish the use restrictions that were ultimately included in the Indenture from any exercise of the police power with respect to land use regulation (*e.g.*, zoning). The intent of the parties to the Indenture is to ensure that an historical asset is preserved and is available to the People. There is no effort to regulate land use beyond the bounds of the Great Camp, nor to counter any applicable land use controls, which, with certain exceptions,[125] are basically adopted and enforced locally.[126] The effect is to ensure that Camp Sagamore shall remain. To the extent that this requires land-use regulations, the parties have incorporated them into the Indenture.

Various approaches were discussed in an attempt to meet the concerns of both asset protection and fee owner freedom.[127] The final resolution was to adopt a relatively short enumeration of permitted uses of right (subject always of course to all the other terms and provisions of the Indenture), together with an enumeration of classes of activities that are permitted with approval of the state and the League (which may not be unreasonably withheld).

IV. Critical Questions

It can be seen from the summary review of the Indenture[128] that a comprehensive and hopefully adequate plan for the protection and availability of the historic resource was prepared. One critical question that arose was whether the In-

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124. Indenture, *supra* note 28, at para. 14.

125. The principal example of non-local (*i.e.*, state) land use regulation is the Adirondack Park Agency's authority over private lands. N.Y. Exec. Law § 800-820 (McKinney 1984). Other examples of state law land use control are: N.Y. Envtl. Conserv. Law §§ 25-0101 to -0601 (McKinney 1976) (Tidal Wetlands Act); *id.* §§ 24-0101 to -1305 (McKinney 1979) (Freshwater Wetlands Act); *id.* §§ 34-0101 to -0113 (McKinney 1985) (Coastal Erosion Hazard Areas); *id.* §§ 15-2701 to -2723 (McKinney 1985) (Wild, Scenic and Recreational Rivers System).

126. It should be noted that property owners are permitted to be more restrictive than local land use regulations, but not less so.

127. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

128. The text of the Indenture, without the description and Rehabilitation Plan, is 19 single-spaced short pages.

denture was too comprehensive, leaving the owner without any value.

On one level, the question can be summarily answered by saying that since the Indenture is voluntarily agreed to by the named grantee of the property, there is no "taking" in the sense that term is used in eminent domain law. At a different level, there is no doubt that the post-closing obligations and restrictions affect the value of the Great Camp (i.e., the price that would be paid by a willing buyer on the open market). This diminution of value was recognized, and to some degree quantified by the consultant appraiser.[129] The diminution in value was thus taken into account with respect to the consideration flowing from Sagamore Institute to the state.[130] Finally, as a policy matter, the protection of this historic asset has been mandated by the state's electors who have also indicated the mechanism to be employed, i.e., private ownership under covenants and restrictions. The voice of the People, as expressed in the constitution, may not be lightly disregarded.

One interesting and critical question that arose during the course of securing passage of Chapter 773 of the Laws of 1985 was the necessity for legislative approval of the covenants which would secure the natural and historic character of the Great Camp and the public viewing agreement.[131] There was no doubt that the Sagamore Amendment required legislative approval of the tracts to be exchanged, and a determination that the value of what the state received was at least equivalent to the value of what the state was conveying. The doubt arose because of the following wording contained in the Sagamore Amendment:

> on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured

129. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).
130. *Id.*
131. *Id.*

> by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state.[132]

A missing colon subjects the amended language to the following two interpretations:

> on condition that the: legislature shall determine that the lands to be received . . .

or

> on condition that the legislature shall determine that: the ands to be received . . . .

Under the former interpretation, a determination by the legislature regarding value would be one of three independent conditions requiring fulfillment in order to effectuate the exchange authorized by the Sagamore Amendment. The latter interpretation would require legislative determinations of all three factors. Based on the earlier statement in the amendment, "subject to legislative approval of the tracts exchanged,"[133] as well as the prior practice with respect to exchange amendments and legislation, it was concluded that the former interpretation was the correct one.[134] Nevertheless, the chapter law does contain a legislative finding that all provisions and requirements of the constitution relating to this exchange have been met.[135]

Another critical question that could be raised is whether the Indenture is a contract of adhesion. While there is certainly no question that the state would be a superior party in terms of size and resources to either the League or the Institute, that fact alone does not end the inquiry. In fact, the Institute was the constitutionally named grantee; the state had

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132. N.Y. Const. art. XIV, § 1 (1894, amended 1983).
133. *Id.*
134. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).
135. 1985 N.Y. Laws 773

no choice with respect to the question of with whom to deal. In addition, as is the case in most protracted negotiations,[136] all parties had an opportunity to fully state their positions.[137] The resulting document is carefully drawn and is as responsive to the varying positions of the parties as careful drafting and considerate compromise can assure. This case, notwithstanding the disparity in size of the parties, is not a "take it or leave it" situation which is typical of the classic adhesion contract.

The question as to whether this is an attempt by the state, without authorization, to regulate a private owner's usage of his land, has been previously dealt with.[138] In any event, the only parties that have standing to bring such a challenge are the owner and the town. The owner has consented to the restrictions, and the town is not harmed since these restrictions do not violate any existing zoning regulations and apply only to the lands which are the subject of the conveyance. Lastly, it should be noted that prior to this conveyance, the use of power boats and aircrafts on the lake was prohibited by mutual agreement of all shoreline owners.[139]

V. Conclusion

This Article has attempted to trace the history of, need for, provisions of, and rationale behind the Indenture which, via the conveyance of a 10.9+ acre parcel of Adirondack land from the People of N.Y. State to Sagamore Institute, Inc., accomplished the reunion of the Great Camp Sagamore. The conveyance was mandated by the 1983 amendment to Article XIV of the N.Y. Constitution, which has become known as the

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136. Meetings of the parties commenced in December 1984 although there was substantive correspondence among the parties prior thereto. The negotiations were substantially completed in January 1986. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

137. Author's personal notes (Dec. 1984 - Jan. 1986) (unpublished).

138. *See supra* text accompanying notes 125-127.

139. Agreement between DEC and Nat'l Humanistic Educ. Center, Inc. [Sagamore Inst.'s predecessor in title], dated June 1, 1979, recorded on Oct. 5, 1979 in Liber 177 of Deeds at page 23, Hamilton County, New York.

"Sagamore Amendment."[140]

The author hopes that the reader has gained an appreciation of the various legal considerations involved in the entire exchange process and in the protection of this historic asset. The author also hopes that the Indenture, whose birth has been herein described, is well adapted to its purpose and can serve as a model for future historic preservation attempts. Of the former hope, the reader is the judge; time, and perhaps the courts, will be the judges of the latter.

140. N.Y. Const. art. XIV, § 1 (1894, amended 1983).