

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ESSEX

TOWN OF ESSEX

and

JAMES Z. MORGAN, Jr., as Superintendent  
of Highways of the Town of Essex,  
Plaintiffs,

-Against-

LEWIS FAMILY FARM, INC.,  
Defendant.

**AFFIRMATION**

INDEX # 000047-07

R.J.I.# 15-1-20070-0014

Date Purchased:

January 7, 2007

STATE OF NEW YORK )

) ss.:

COUNTY OF ESSEX )

**DARRELL W. HARP, ESQ.**, an attorney being duly licensed to practice before the Courts of the State of New York, pursuant to CPLR §2106, hereby affirms under the penalty of perjury that the following is true.

1. I am the Special Counsel for Plaintiffs<sup>1</sup> in the subject Action and your affirmant is familiar with the matter involving Cross Road in the Town of Essex, and Plaintiffs' and Defendant's actions relative to Cross Road and have had extensive experience with public highway right of way and drainage matters throughout the State. Thus, your affirmant is in the position to make this Affirmation in support of Plaintiffs' request for an Order to Show Cause and Plaintiffs' request for a Preliminary Injunction in order to correct a conspicuously dangerous situation that

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<sup>1</sup> See, attachment "D" for a copy of the Resolution of the Town of Essex appointing your affirmant as a Special Counsel.

exists on and along Cross Road in the Town of Essex. In addition to this Affirmation, an Affidavit of James X. Morgan, Jr., one of the Plaintiffs in the Action and the Town Highway Superintendent, is submitted with this Affirmation.

2. I offer this Affirmation to the Court in support of Plaintiffs' request for an Order to Show Cause and Plaintiffs' request for a Preliminary Injunction as quickly as possible and in support of Plaintiffs' Verified Complaint in the subject Action.
3. The Town Highway Superintendent must annually certify the lengths and widths of the traveled portion of the Town Highways to the New York State Department of Transportation pursuant to subdivision 13 and 15 of §10 and §10-C of the Highway Law.<sup>2</sup>
4. The width of a highway right of way use easement is controlled by case law to the extent of actual use.
5. By case law, a highway right of way use easement includes such uses as "appertain directly or indirectly to right of passage and **tend in some way to preserve or make more easy the exercise of such right.**" (See, *Ferguson v. Producers Gas Co.*, 286 AD 521 (2<sup>nd</sup> Dept. 1955).
6. In the Town of Essex, Cross Road is a part of the Town Highway System.
7. Cross Road became a public highway pursuant to the provisions of §189 of the

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<sup>2</sup> Pursuant to CPLR §4520, these certifications are prima facie evidence of the facts stated therein.

Highway Law or its prior Highway Law section.<sup>3</sup>

8. A portion of Cross Road lies adjacent to Defendant's properties.
9. The certified width of the traveled way by Highway Superintendent Morgan for Cross Road is 20 feet for the roadway, with 5 feet of shoulders on each side.
10. I have become aware that at least one resident of the Town is elderly and may require emergency services at any time via Cross Road. Thus, Cross Road must be kept opened at all times for such emergency service situations.
11. I am informed that there is a drainage culvert that passes under Cross Road in the area adjacent to Defendant's properties that has been in place for more than ten(10) years.
12. Drainage has flowed from the low end of the drainage culvert onto adjacent property of Defendant for more than ten(10) years.
13. By case law, this drainage culvert and its drainage system is a part of the public highway system of the Town. (See, *Dutcher v. Town of Shandaken*, 23 AD3d 781 (3<sup>rd</sup> Dept. 2005).
14. The drainage culvert and its drainage area were open, obvious and continuously maintained by the Town of Essex for more than ten(10) years.
15. Thus, Defendant had notice thereof.

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<sup>3</sup> Prior to 1936, §209.

16. The drainage culvert under Cross Road and its drainage area are necessary to preserve the public's right of passage. Thus, they constitute a portion of the public highway to be maintained by the Town of Essex (See, *Thompson v. Orange & Rockland Elec. Co.*, 254 NY 366 (1930).
17. The situation of obstructing the drainage culvert on Cross Road clearly establishes all of the elements of an easement by prescription for the drainage area across Defendant's property (See, *Village of Schoharie v. Coons*, 34 AD2d 701 (3<sup>rd</sup> Dept. 1970), *affd.* 28 NY2d 568).
18. Thus, the Town of Essex has prescriptive easement rights to continued to have uninterrupted flow of water from the drainage culvert on to the adjacent lands of Defendant.
19. If the drainage culvert is blocked, water will pool along Cross Road thereby creating dangerous conditions for the travelers using Cross Road.
20. Thus, the drainage culvert and the flow therefrom must be kept opened at all times.
21. In 2006, Defendant blocked the culvert at both ends and its drainage area with debris.
22. Defendant has refused to remove the obstructions.
23. I understand that representatives of Defendant were warned that Defendant should not so block the drainage culvert.

24. By letter dated December 8, 2006 your affirmative sent a Notice by certified mail return receipt to Defendant which placed it on Notice that blocking the drainage culvert violated §319 of the Highway Law and that Defendant must remove such highway obstructions within 48 hours of receipt of the Notice.<sup>4</sup>
25. Upon information and belief, Defendant and/or its representative received the Notice on December 11, 2006.<sup>5</sup>
26. More than 48 hours have passed since receipt of the Notice by Defendant and Defendant has not removed the obstructions to the drainage culvert.
27. Cross Road is elevated from the surrounding area for a large portion thereof.
28. The toe of the slopes of Cross Road along its elevated section is approximately 10 to 12 feet from the furthest outside edge of the shoulders of Cross Road.
29. I am informed that during winter conditions for more than ten(10) years, the snow removal operations of the Town Highway Department have cast the snow up to 40 feet from the centerline of Cross Road onto the highway right of way and onto adjacent lands of Defendant.
30. Thus, by case law, the width of the highway use right of way use area is 80 feet

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<sup>4</sup> See Attachment "E" for a copy of this Notice.

<sup>5</sup> See Attachment "F" for a copy of the Return Receipt. It should also be noted that a copy of the Notice was sent to the process service agent that is found in the files of the New York State Department of State. However, since Defendant has failed to up date the information on file with the New York State Department of State as required by law since 1993 the process service agent information is incorrect.

relative to Plaintiff Town's snow removal operations. (See, *Ferguson v.*

*Producers Gas Co.*, 286 AD 521 (2<sup>nd</sup> Dept. 1955).

31. In the winter months the availability of this 80 foot width area is absolutely necessary for proper maintenance of Cross Road, particular with respect to the snow removal and snow storage operations.
32. The area adjacent to Cross Road is used for storage of the plowed snow.
33. Storage of the plowed snow is necessary so that the snow does not drift back onto Cross Road after it has been removed therefrom.
34. Drifting snow also cause icing conditions on the public highways, including Cross Road.
35. Drifting snow will cause dangerous conditions for travelers using Cross Road.
36. I am informed that during year 2006 Defendant built elevated private roadways, in part within the highway right of way use area and in part immediately adjacent to the Cross Road right of way use area.
37. Along some areas, the private roadways lie on both sides of Cross Road. As a result, Cross Road lies in a depressed area between the private roadways.
38. The portions of these private roadways within the highway right of way use area will effectively prevent the plowing and storage of snow along Cross Road.
39. Thus, this will cause dangerous conditions, including, but not limited to severe

use area violated §319 of the Highway Law and that it must remove such highway obstructions within 30 days of receipt of the Notice.<sup>6</sup>

47. Upon information and belief, Defendant and/or its representative received the Notice on December 11, 2006.<sup>7</sup>
48. More than 30 days have passed since receipt of the Notice by Defendant and Defendant has not removed the obstructions to the public highway.
49. The Town of Essex needs immediate relief that it requests so that the dangerous condition does not continue to exist.

**WHEREFORE**, on behalf of Plaintiffs, I request that the Court ex-parte grant Plaintiffs' request for an Order to Show Cause, and after the return date for the Court Hearing to grant Plaintiffs' request for a Preliminary Injunction, and grant Plaintiffs' requests for Declaratory Rulings, and grant Plaintiffs' request for a Permanent Injunction.

Dated: January 12, 2007



DARRELL W. HARP

Attorney at Law  
Attorney for Plaintiffs  
12 Rolling Brook Drive  
Clifton Park, NY 12065  
(518) 371-4836

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<sup>6</sup> See Attachment "E."

<sup>7</sup> See Attachment "F."

## **ATTACHMENT “D”**



# **TOWN OF ESSEX**

PO Box 355

2313 Main Street

Essex, New York 12936

Tel. (518) 963-4287 / Fax (518) 963-4288

[essexny@willex.com](mailto:essexny@willex.com)

Ronald E. Jackson  
**Supervisor**

Audrey Hoskins  
**Town Clerk**

## **COUNCILMEN:**

Claire LaPine  
Stephen Sayward  
Mark Wrisley  
James LaForest

At a Special Town Board Meeting on December 7, 2006  
The Following Resolution was moved by Councilman Sayward:

WHEREAS, the Town Officials have reviewed the situation of obstruction and interference with the maintenance and operation of Cross Road that has resulted from the activities on the lands on Lewis Family Farms, Inc.;

WHEREAS, the obstructions to the drainage facility may cause water to pool along sides of the highway which is a dangerous condition and/or interferes with the proper drainage of the highway;

WHEREAS, the construction of private roads on the lands of Lewis Family Farms, Inc. that are in part on the highway right of way and at elevations that are higher than Cross Road will seriously interfere with snow removal operations since the private roads inhibit the use of adjacent areas for casting of the snow and for snow storage, cause additional drifting of snow on the highway, cause icing conditions on the highway and/or flooding of the highway;

WHEREAS, these obstructions have the potential to endanger the health, safety, and welfare of persons using Cross Road as well as the health, safety, and welfare of persons who depend on Cross Road in emergency situations;

WHEREAS, the services of an attorney who is an expert in such situations is required by the Town; and

WHEREAS, Town Officials have reviewed the credentials of Attorney Darrell W. Harp and have had discussions with Mr. Harp relative to the obstructions.

NOW THEREFORE BE IT RESOLVED that the Town of Essex hereby appoints Darrell W. Harp as Special Counsel to the Town for all purposes, including any necessary Court processes, in connection with the Town's efforts to cause the removal of obstructions along Cross Road;

NOW BE IT FURTHER RESOLVED that the rate of compensation to Attorney Darrell W. Harp is set at \$200.00 per hour for the time spent by Mr. Harp on behalf of the Town as well as reimbursement of necessary disbursements incurred in connection with Mr. Harp's efforts.

The motion was seconded by Councilwoman LaPine and passed with the following roll call vote:

Councilwoman LaPine:	YES
Councilman LaForest:	YES
Supervisor Jackson:	YES
Councilman Wrisley:	YES
Councilman Sayward:	YES

## ATTACHMENT “E”

7004 2510 0007 7181

U.S. Postal Service™  
**CERTIFIED MAIL™ RECEIPT**  
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at [www.usps.com](http://www.usps.com)

ESSEX NY 12936 **OFFICIAL USE**

Postage	\$	\$0.39	0065
Certified Fee		\$2.40	21
Return Receipt Fee (Endorsement Required)		\$1.85	Postmark Here
Restricted Delivery Fee (Endorsement Required)		\$0.00	
Total Postage & Fees	\$	\$4.64	12/08/2006

Sent To	LEWIS FAMILY FARM, INC
Street, Apt. No., or PO Box No.	1212 WHALLON'S BAY ROAD
City, State, ZIP+4	ESSEX, NY 12936

PS Form 3800, June 2002 See Reverse for Instructions

**DARRELL W. HARP, ESQ.**

Attorney at Law  
12 Rolling Brook Drive  
Clifton Park, New York 12065

Telephone: (518) 371-4836

Fax: (518) 371-9292

E-Mail [dwharp@prodigy.net](mailto:dwharp@prodigy.net)

December 8, 2006

**CERTIFIED MAIL RETURN RECEIPT**

Lewis Family Farm, Inc.  
1212 Whallon's Bay Road  
Essex, NY 12936

**NOTICE OF OBSTRUCTIONS AND INTERFERENCE WITH MAINTENANCE  
AND OPERATION OF CROSS ROAD, TOWN OF ESSEX, COUNTY OF ESSEX,  
STATE OF NEW YORK.**

GENTLEMEN:

Please be informed that I have been duly appointed as Special Counsel to the Town of Essex in connection with the above matter.

Cross Road in the Town of Essex is a public highway that lies in part on lands owned by Lewis Family Farm, Inc. Highway Law, §189, provides that all lands used and maintained by the public as a highway for at least ten years shall be a public highway with the same effect as if laid out and recorded as such. In this case, Cross Road has also been laid out and recorded as a public highway by the Town of Essex. Cross Road has been used and maintained as a public highway for many years, far in excess of ten years, and has been so certified by the Essex Town Highway Superintendent to the New York State Department of Transportation.

A public highway includes the traveled portion thereof and also includes the adjacent lands that are necessarily used or incidental to the highway purposes. Drainage facilities on the public highway and the land areas where water flows therefrom are, by law, parts of the public highway. The lands on which a public highway lies are burdened by the public highway rights which include the rights to use such lands for public highway travel and maintenance purposes.

Sections of Cross Road within the lands of Lewis Family Farm, Inc. have slopes on the sides of the roadway that are intrinsic parts of the public highway facility. Further,

for many years, far in excess of ten years, snow has been cast by the Town Highway maintenance efforts onto areas of the Lewis Family Farm, Inc. lands adjacent to Cross Road. Thus, such areas of the Lewis Family Farm, Inc. lands must remain available for Town Highway snow removal activities. If such areas are not available for highway purposes as they have been in the past, the public highway may be endangered by inability to remove snow therefrom, drifting snow, icing conditions, and/or flooding conditions. Further, the health, safety, and general welfare of the traveling public and/or the general public may be endangered if the proper maintenance cannot be performed by the Town. Such areas are thus used for such activities and/or are necessary as incidental to such activities.

At a point on Cross Road within the lands of Lewis Family Farm, Inc. there is a drainage facility that passes surface drainage thereunder. Drainage rights can be acquired by prescription through ten years of drainage use and drainage flow. Thus, in this case the Town has the right to have the flow unimpeded through drainage facility and onto the lands of Lewis Family Farm, Inc.

A review of the situation by Town Officials demonstrates that obstructions involving materials and debris has been placed on both sides of this highway's drainage facility that impedes the flow through and drainage from the highway facility. Such obstructions may cause water to pool along the sides of the highway which is a dangerous condition. It is believed that these obstructions on the lands of Lewis Family Farm, Inc. were placed there by you or with your consent.

A review of the situation by Town Officials also demonstrates that private roads were built along the sides of Cross Road that are considerably higher in elevation than Cross Road. These private roads lay on the lands of the Lewis Family Farm, Inc. over the areas that the Town has the right to be available to it for public highway use and maintenance purposes. Upon information and belief, these roadways were built by or for Lewis Family Farm, Inc. In the wintertime the private roadways will seriously impede the necessary snow removal operations of the Town by restricting the available area to cast snow and be used for snow storage, cause additional drifting of snow onto the public highway, cause icing conditions, and/or flooding conditions on the public highway.

Thus, the reviews of these situations by Town Officials result in the determination that the obstructions set forth above must be immediately removed.

**THEREFORE**, the following Notice is given to you:

1. Pursuant to Highway Law §319, within 48 hours of your receipt of this Notice you must remove the obstructions to the drainage facility on Cross Road specified

above. Please be informed that if you fail to remove these obstructions, the Town Highway Superintendent is authorized to go on the lands of Lewis Family Farm, Inc. to remove these obstructions. Any costs and expenses incurred by the Town will be backcharged to Lewis Family Farm, Inc. as authorized by law.

2. Pursuant to Highway Law §319, within 30 days of your receipt of this letter you must remove the obstructions to Cross Road specified above as private roads on the lands of Lewis Family Farm, Inc. that rise above the elevation of Cross Road and lay in part on the highway right of way and/or on other lands that prevent effective removal of snow and highway maintenance as set forth above and may cause icing conditions on Cross Road and/or increased snow on Cross Road due to drifting. Please be informed that if you fail to remove these obstructions, the Town Highway Superintendent is authorized, by law, to go on the lands of Lewis Family Farm, Inc. to remove these obstructions, and/or the Town may undertake legal action to cause you to remove these obstructions. Any costs and expenses incurred by the Town will be backcharged to Lewis Family Farm, Inc. as authorized by law.
3. Further, you are placed on Notice that any highway conditions or defects causing damage to any person or entity that result from the above obstructions are your responsibility and liability until the same are removed.

Very truly yours,



DARRELL W. HARP  
Special Counsel to  
Town of Essex

cc:

Process Service Agent for  
Lewis Family Farm, Inc.  
Barbara A. Lewis  
66 Montview Avenue  
Short Hills, NJ 07078

# ATTACHMENT “F”



**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**

LEWIS FAMILY FARM, INC  
1212 WHALLON'S BAY ROAD  
ESSEX, NY 12936

**COMPLETE THIS SECTION ON DELIVERY**

**A. Signature**

X 

☐ Agent

☐ Addressee

**B. Received by (Printed Name)**

ARMSTRONG, LUIS

**C. Date of Delivery**

12/11/06

**D. Is delivery address different from item 1?**

If YES, enter delivery address below:

☐ Yes

☐ No

**3. Service Type**

☒ Certified Mail

☐ Express Mail

☐ Registered

☐ Return Receipt for Merchandise

☐ Insured Mail

☐ C.O.D.

**4. Restricted Delivery? (Extra Fee)**

☐ Yes

**2. Article Number**

(Transfer from service label)

7004 2510 0007 3039 7181

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540