

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

TOWN OF ESSEX and JAMES Z. MORGAN, :
JR. as SUPERINTENDENT OF HIGHWAYS, : RJI 15-1-2007-0014
: Index No. 47-2007

Plaintiffs :

-versus- :

HEARING

LEWIS FAMILY FARM, INC., :

Defendant. :

Essex County Government Center
Elizabethtown, New York
April 4, 2007

P r e s i d i n g :

THE HONORABLE MARK L. POWERS
Acting Justice Supreme Court

A p p e a r a n c e s :

DARRELL W. HARP, Esq.
Appearing on behalf of Plaintiff.

BRENNAN & WHITE, LLP
BY: JOSEPH R. BRENNAN, Esq.
Appearing on behalf of Lewis Family Farm.

DAVID COOK, Esq.
Appearing on behalf of Lewis Family Farm.

R e p o r t e d B y :

AMIE MARTINA, RPR
Official Court Reporter

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For the Plaintiff:

Ronald E. Jackson	5	20	42	44	
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For the Defense:

Todd Deyo	46	62	80		
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EXHIBITS

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2 THE COURT: At this time, I would call the
3 case of the Town of Essex and James Morgan, Jr.,
4 a Superintendent of Highways against the Lewis
5 Family Farm, Inc. Please note your appearances
6 for the record.

7 MR. HARP: My name is Darrell W. Harp, 12
8 Rolling Brook Drive, Clifton Park, New York
9 12065. I'm special counsel for the Town of Essex
10 and the Highway Superintendent.

11 MR. BRENNAN: Joseph Brennan for the
12 defendant, Lewis Family Farm, Inc.

13 MR. COOK: David Cook for the defendant
14 also.

15 THE COURT: Please be seated. We're here
16 for the taking of proof to be offered in
17 connection with certain temporary relief
18 requested, in particular, a preliminary
19 injunction.

20 At the outset, I would propose that we will,
21 of course, begin with the movant's proof. I
22 would like to limit what testimony is offered to
23 that of any expert witness and any other witness
24 the parties want to offer, lay person or the
25 like, but I don't want this to become cumulative

2 where we're offering a number of lay witnesses,
3 and I reserve the right to limit the proof in
4 regard to that. Because there are certain issues
5 in contention, I thought it was necessary that we
6 have at least some taking of proof here.

7 I've read what you have submitted to the
8 Court already, and I believe that I understand
9 the argument. What we will do is we'll proceed
10 forward with the proof the parties want to offer.
11 We will conclude then with argument from counsel
12 with regard to their respective requests.

13 Mr. Harp, is there a witness you wish to
14 call?

15 MR. HARP: Yes. I'd like to call the town
16 supervisor, Ronald Jackson.

17 THE COURT: Is there any request with regard
18 to witnesses in the courtroom?

19 MR. BRENNAN: I would request, Judge, that
20 anybody that may be called by either party be
21 excluded during the testimony of any witness.

22 THE COURT: Mr. Harp?

23 MR. HARP: I'm going to only call
24 Mr. Jackson unless there is a dispute relative to
25 the pictures, which are put in affidavit.

2 THE COURT: I think you're acting in good
3 faith so I'm not going to excuse someone if this
4 is your witness.

5 MR. HARP: I would like to have these marked
6 please.

7 (People's Exhibit 1 - photographs - marked for
8 identification.)

9
10 RONALD E. JACKSON
11 called herein as a witness, being duly sworn,
12 testified as follows:

13 DIRECT-EXAMINATION BY MR. HARP:

14 Q. Mr. Jackson, would you please state your name and
15 your position relative to this matter.

16 A. My name is Ronald E. Jackson. I'm the Supervisor
17 of the Town of Essex.

18 Q. How long have you been the Supervisor of the Town
19 of Essex?

20 A. I'm working on year number six.

21 Q. And are you familiar with the situation that
22 we're in court here?

23 A. Yes, sir, I am.

24 Q. Relative thereto, did you take any pictures
25 recently?

1
2 A. Yes, sir, I did. On Sunday, I went out to take
3 some photos showing the drainage situation, a series of
4 photos and then the last photo was a picture of the woods
5 that are part of the Lewis Family Farm that are northeast
6 of the area in question, in case the issue arises as to
7 why it didn't drift in this year. The only blizzard we
8 had was from the northeast and these woods protected the
9 area --

10 MR. BRENNAN: Your Honor, I object, as this
11 is unresponsive to the question.

12 THE COURT: Well, it is. I'll sustain the
13 objection unless there's a little more foundation
14 laid.

15 Q. Could you please look at Exhibit No. 1.

16 A. Yes, sir.

17 Q. Would you mark it Plaintiff's Exhibit 1 please?

18 A. Yes, sir.

19 Q. Do you recognize those photographs?

20 A. Yes, sir, I do.

21 Q. The first two, did you take?

22 A. No, sir. Mr. Morgan's department, I don't know
23 who in the Highway Department took it, but the Highway
24 Department took these photos.

25 Q. The next four, did you take those pictures?

A. Yes, sir, I did.

Q. You just indicated that you took them on this past Sunday; is that correct?

A. Yes, sir.

Q. Would you go through -- would it help if we gave the Judge a copy maybe?

THE COURT: I can't look at them until they're admitted into evidence. But once they are, if you have the extra copy it would be helpful because I presume you're going to be asking questions about them and to look along with the witness would be helpful.

MR. HARP: Do you have any objection to them being introduced into evidence?

MR. BRENNAN: Could I inquire as to when -- I assume you referred to the first two?

THE COURT: Sure, you can inquire, Mr. Brennan.

MR. HARP: The first two were part of Mr. Morgan's affidavit, were in the summer of 2006.

MR. BRENNAN: No objection.

THE COURT: All right. They're admitted.

MR. HARP: You like to have copies so you

can follow?

THE COURT: Yes.

(People's Exhibits 1 through 7 - photographs - marked and received into evidence.)

Q. Looking at the ones that you took last Sunday which are -- I think start off two of two, et cetera?

A. Yes, sir.

Q. Could you explain to the Court what they represent?

A. Yes, sir, I can. The top one of the four I took is back a ways showing my car and --

MR. HARP: Your Honor, I believe the other -- it's the one with the clip on that we're on.

THE WITNESS: The top one shows --

THE COURT: Wait just a moment. I want to be sure that what's been admitted into evidence are the photos contained with a clip handed to me and there are four in all, and you confirm that, Mr. Brennan; is that your understanding?

MR. BRENNAN: I believe it appears to be five.

THE COURT: If counsel could come forward. I want these clear. I want to be clear.

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9

THE WITNESS: Five I took and two that the highway took.

THE COURT: Those are four within the clip which I assume have been admitted, and there are two others here, so were they admitted in that same group?

MR. HARP: Yes.

THE COURT: So these are all the pictures that have been offered?

MR. BRENNAN: There's five of them, Judge.

THE WITNESS: Five and two.

THE COURT: Okay, so they're all admitted. And to make this easier for our record, let me go through and with regard to the picture that you're testifying about which shows your vehicle, and I show that to you, I'll note that as Plaintiff's 1. The next one --

THE WITNESS: It's a little bit closer.

THE COURT: -- I'll note that as Plaintiff's 2.

THE WITNESS: Very good.

THE COURT: Plaintiff's 3 -- can you see, Mr. Brennan, as I mark these?

MR. BRENNAN: Yes, sir.

THE COURT: That way we'll all know what we're talking about. Plaintiff's 4 I'm marking appears to be an open end of a culvert.

THE WITNESS: Yes, it is.

THE COURT: Plaintiff's 5, I'll mark that. I would propose to mark the closer view of the truck here as Plaintiff's 6 and the last photo, Plaintiff's 7. Okay. Please continue, Mr. Harp.

Q. Okay. If you will look at starting with Plaintiff's 1, can you please take us through the sequence of those photos and what they represent?

A. Yes, sir, I'll be very happy to do that. The first photo was taken at somewhat of a distance of the area in question. If you look at it you can see that the hill that comes down and where my car is parked is a bit of a dip, and then the road continues on, goes up and then tapers back down again and the dip is the area of the question on the drainage part of this issue.

If you look you can see the road to the left-hand side of the picture is more or less completed unless they're going to put a top on it, and one on the right is not quite as far along, it hasn't been smoothed out. This is just a general picture.

If you move on to picture 2, you can see the

1 culvert that's on the way on the left-hand corner, that's
2 part of the Lewis Family Farm drainage system, has
3 nothing to do with the drainage on the road, just happens
4 to be located at that spot.
5

6 Where that is located, if you look back at
7 picture 1, your Honor, you'll see there's a little bit of
8 a wet spot in front of it that we'll be focusing on
9 later, and if you look across the road, you can see
10 there's a little area that looks like it's kind of caved
11 in towards the road, a lower spot. That's where that
12 culvert that's in your latter picture started.

13 So you can see there's a white spot in the Lewis
14 Road and if you just come angle down towards the center
15 from that, that's where that culvert that's in there
16 later is shown.

17 THE COURT: Are you referring to this right
18 here?

19 THE WITNESS: No, on this picture here, I'm
20 sorry. You see right here, this white spot right
21 here? This is where that culvert is shown.

22 THE COURT: Well, we have to make a record
23 here so we're looking at Plaintiff's 1 and
24 there's a white spot to the right.

25 THE WITNESS: And then this little dark spot

1 R. JACKSON - DX by MR. HARP 12

2 is that culvert that's shown I think in number 4.

3 THE COURT: Counsel, you're able to follow
4 along?

5 MR. BRENNAN: I'm not sure where he's
6 pointing.

7 THE WITNESS: Right here. This black spot
8 right here I got -- is where this culvert later
9 on, I show you in picture -- this one here,
10 that's where this is located and that wet spot
11 over here we'll show you later is where the end
12 used to be of that culvert's been filled in.

13 Going back to 1 again, just for clarity, the
14 dark spot on the right is where the culvert
15 starts and that wet spot --

16 THE COURT: And that's right near where the
17 wet spot is on the top of the hill if you want to
18 identify the particular dark spot we're talking
19 about in the photograph, correct?

20 THE WITNESS: Yes, sir. Then on the other
21 side you can see a bit of a wet spot. That's
22 where the culvert used to end. It's been filled
23 in by the obstruction in the road.

24 MR. BRENNAN: I'd object to his conclusions,
25 Judge, with regard to what's been filled in, et

cetera, et cetera.

THE COURT: I'll sustain that, although you can describe it without making reference.

It's a minor elevation is what you're saying now; is that correct?

THE WITNESS: I'm saying from my memory and knowledge of living in this town my whole life that that's where the culvert used to end and it no longer is visible. So the only conclusion I can draw is --

MR. BRENNAN: I'm going to object to his conclusion, your Honor.

THE COURT: Well, he's talking to his own experience apparently. He's a witness who's been over this road many times and knows that at one point there was not filled and there is now, and that's what you're saying?

THE WITNESS: Yes, sir. My family lived on that road for many years.

THE COURT: I understand. Please continue, Mr. Harp.

THE WITNESS: Okay. If you'd go to picture 2 --

THE COURT: Wait just a moment. We're

waiting for a question here from Mr. Harp.

MR. HARP: I'd asked him to go through the sequence of pictures and describe what they represent.

THE COURT: All right, go ahead.

THE WITNESS: Picture 2 is just in the series, focusing on that wet area in front of the culvert drainage system top there, that was installed by the Lewis Family Farm. Just trying to tie it together.

And then if you go on to 3, it's a further close-up of that wet area. In that picture is where the culvert -- I should have dug and got a shovel I guess to expose the culvert, but that is where --

MR. BRENNAN: Judge, I'll object to that.

THE COURT: Sustained. Limit your testimony to what the picture shows.

THE WITNESS: What is the wet spot that my opinion is what formed the culvert --

MR. BRENNAN: Your Honor, I'd object to that.

THE COURT: I'm going to sustain the question.

THE WITNESS: We can go back and have questions again, I guess.

THE COURT: That is the way it works.

THE WITNESS: Very good.

Q. What does picture number 4 show?

A. Picture number 4 shows the north side of the culvert that crosses the crossroad. It's still open and pretty much as it's been for many years.

Q. From your experience, picture number 3 shows the end of the culvert, in other words, the outlet of the culvert covered; is that correct?

A. Yes, sir, that is my opinion.

Q. Well, from your observation?

A. From my observation and memory of having gone over this road for 50 years, that's where the culvert ends, and no longer anywhere on that whole area, if you go back to 3, there's no place where the culvert daylights anymore. It obviously starts, it goes somewhere and there's no place where you can see an end of it in any of the photos.

THE COURT: Mr. Jackson, are you saying that from some time before there was a culvert and are you saying that it was similar to what's shown in Plaintiff's 4 there?

THE WITNESS: Correct. This is the north end. There is a south end to that culvert that's no longer visible in any of those photos. I can assure you that the culvert has run from what you see to over to that area, that's no longer visible, any sign of the exit.

THE COURT: All right.

THE WITNESS: This is the entrance in picture 4 and the other ones showing in any one of them, there is no south end or exit from the culvert.

THE COURT: Just so that I'm clear, you say the entrance to the culvert as you described, the entrance as Plaintiff's 4 and on Plaintiff's 3, you're saying that's where it was otherwise draining out of before what is shown in this picture?

THE WITNESS: Yes, sir, that is correct.

THE COURT: All right.

Q. Prior to 1996 was the outlet, in other words, the one area that is shown in picture 3, open and visible?

A. Yes, sir.

Q. Had you ever observed water flowing from that pipe?

A. Yes, sir.

Q. Where did the water flow?

A. Prior to '96 the water flowed out from that pipe.

Q. 2006?

A. 2006. It flowed out that pipe and goes out before the road was built. It went out onto the fields that now belong to the Lewis Family Farm. If you want to go back, I thought you're referring to '96 because in '96 there was a ditch that went from that culvert across the field that was then filled in, and it all smoothed out. So it made better, smoother farming area.

Q. Where the water flowed whenever it rained and from the highway drainage through that pipe out into the fields; is that correct?

A. Yes, sir.

Q. Prior to 2006?

A. Yes, sir.

Q. Before -- and I know we're past the snow season, before we move to picture 5 can I give you cites to some cases that support our position that --

THE COURT: No, not at this point. We're strictly taking testimony now. At the conclusion you may.

1
2 Q. Picture 5, would you explain why you took that
3 picture and what it represents?

4 A. Yes, sir. The defendant has made claims that --

5 MR. BRENNAN: I'm going to object to --
6 object to him testifying to --

7 THE COURT: Well, I'll sustain the
8 objection.

9 THE WITNESS: I can --

10 THE COURT: Just a moment, Mr. Jackson. You
11 might indicate just what it shows strictly and
12 Mr. Harp can ask a follow-up question based upon
13 that.

14 THE WITNESS: Very good. The picture is
15 taken from the low spot in the road facing
16 northeast to some woods that are owned by Lewis
17 Family Farms. You can see the road that they
18 have installed, built. That's also visible in
19 picture 1 from a different angle, and the woods
20 over behind that, that are northeast of the area
21 in question.

22 Q. Why did you take that particular picture?

23 A. I took that particular picture because the
24 defendant has told me that he feels that his roads are
25 not a problem, that it didn't drift in during this

1 blizzard, Valentine's blizzard, and that during that
2 Valentine's blizzard it was a Noreaster and the wind was
3 from the northeast, and I feel in my opinion that the
4 woods protected it.
5

6 MR. BRENNAN: May I object to his opinion,
7 your Honor?

8 THE COURT: Well, I will sustain the
9 objection. Please continue with why you took the
10 picture basically.

11 THE WITNESS: That's why I took the picture,
12 just showing it was northeast of this area and if
13 they don't make any claims I guess you can ask
14 later anything on that.

15 Q. All right. Don't speculate please.

16 A. Sure.

17 Q. You lived there and have observed the area for
18 many, many years; is that correct?

19 A. Yes, sir. I lived in Essex my whole life.

20 Q. Do you know whether or not they ever used snow
21 fences to retard drifting snow along crossroad?

22 A. Yes, sir. For many, many years up until I'm
23 going to say late '60s, maybe early '70s - I'm not sure
24 when they quit, just became very expensive - they quit
25 putting them up.

Q. Whereabouts did they put the snow fences?

A. They put the snow fences I'm going to say 30, 40 feet away from the road all the way along that area of the crossroad as well as other places in town, but that's one of the places they put them.

MR. HARP: I have no further questions.

THE COURT: Thank you, sir.

MR. BRENNAN: I have no questions, your Honor.

THE COURT: I have just a couple.

THE WITNESS: Okay, sure.

THE COURT: Mr. Jackson, when were these snow fences that you've testified to last used?

THE WITNESS: I'm going to say -- I can't say exactly, but it was around 1970 give or take a few years.

THE COURT: Okay. I don't have any more questions.

MR. BRENNAN: Judge, I'd like to ask just a couple questions.

THE COURT: Sure.

CROSS-EXAMINATION BY MR. BRENNAN:

Q. Mr. Jackson, if you look at the photographs, what is the surface of this road?

A. The surface of this road is wollastonite tailings, mainly diopside incarnate.

Q. Where is that obtained from?

A. It's obtained from the NYCO plant in Willsboro, New York. It's the tailings after they crush the ore and remove the wollastonite and --

THE COURT: He's asking how did they get there. How did it get there?

THE WITNESS: How did it get there?

THE COURT: Yes.

THE WITNESS: Okay. It was loaded at -- they have a place at the plant where they pile the tailings, it was loaded on town dump trucks, spread there and then spread with a grader, smoothed out to make the surface. DEC recommends that for this use, so it's available, very inexpensive, close, so we don't have to haul and all of our dirt roads are topped with wollastonite.

THE COURT: So the town is doing this?

THE WITNESS: Yes, sir, the town does this as regular maintenance.

Q. What you refer to as the Lewis Family Farm Road that's shown in Exhibit 6, do you have that in front of

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you?

A. Yes, sir.

Q. What is the -- from your observation, what is the composition of that road?

A. The Lewis Family Farm Road?

Q. Yes.

A. That's crushed limestone, Chazy blue limestone, crushed on the Lewis Family Farm on Ager Hill Road on a pit they've established there, about a mile from this location, half a mile, something like that.

Q. That's a type of gravel?

A. Yes sir, it is.

Q. Would you look at Plaintiff's Exhibit 3, do you have that?

A. Yes, sir, just a second.

Q. Also -- do you have it?

A. Yes, sir, I do.

Q. There appears to be a vertical culvert of some sort that looks to be made of this concrete material in the upper left-hand corner of that photograph?

A. Yes, sir.

Q. That was installed for drainage purposes not by the town, but by Lewis Family Farming?

A. That is correct, sir, that's part of the drainage

1
2 system for that whole northern part of the road and
3 actually across Whallons Bay area.

4 Q. Your answer is yes?

5 A. Yes, sir, it is.

6 Q. Plaintiff's Exhibit 3, the area that you indicate
7 is a wet area --

8 A. Yes, sir.

9 Q. There isn't any wet areas shown anywhere else in
10 that photograph, correct?

11 A. That is correct.

12 Q. And on the left side of the photograph, running
13 diagonally from the upper right-hand corner down to the
14 left, bottom left-hand corner, that shows the slope of
15 the road that was built by Lewis Family Farm, Inc,
16 correct?

17 A. That is correct.

18 Q. And the material in the wet area that you've
19 referred to which should be the bottom, essentially the
20 bottom right corner of that photograph, right, Exhibit 3?

21 A. Basically the bottom middle, yes, sir.

22 Q. That material is not the gravel or anything from
23 the Lewis Family Farm Road, is it?

24 A. No, sir, that's --

25 Q. That's the wollastonite, isn't it?

1
2 A. If I can be exact, sir, that's wollastonite
3 covering the stone from the Lewis Family Farm, yes, sir.

4 Q. What appears on the surface of that photograph on
5 the bottom right-hand corner, that's the wollastonite
6 that's depicted in that photograph, right?

7 A. The surface is wollastonite, yes, sir.

8 Q. And then if you look at Exhibit 4, that shows the
9 end of the culvert, correct?

10 A. Yes, sir, that's the north end of the culvert.

11 Q. The north end of the culvert, and what color is
12 wollastonite?

13 A. It's whitish-tannish, very light brown. I guess
14 you'd call it light tan.

15 Q. What's the diameter of that culvert from your
16 observation?

17 A. I'm going to say it's a two foot culvert, 24 inch
18 culvert.

19 Q. Now, the bottom right-hand corner of that
20 photograph appears to be the whitish-grayish material --

21 A. Yes, sir.

22 Q. -- does it not? That's the wollastonite?

23 A. Yes, sir.

24 Q. And it looks like the wollastonite that is
25 flowing toward the end of the culvert in Exhibit 4; is

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that correct?

A. It looks somewhat similar, yes, it does, sir.

Q. What's the length of that culvert --

A. That's a road I'm going to say is --

Q. -- from your observation?

A. 35, 30 feet, something like that. 35, 30 feet.

Q. You took Plaintiff's Exhibit 4; when did you take that?

A. I took that Sunday about noontime.

Q. Did you look in the end of that culvert?

A. Yes, sir, I did.

Q. And that culvert's about 35 feet long, your estimate?

A. Yes, sir.

Q. Did you see a buildup of wollastonite inside the culvert?

A. As you can see in the photo, there is a slight buildup, yes, sir.

Q. Did you look through the entire end of the culvert?

A. I looked as far as I could with a flashlight. The amount of wollastonite tapers off and then becomes less, and then you can't see anything at the other end.

You can't see 35 foot through a culvert, but this

1
2 end you can see a little bit here and it became less and
3 less, and then there's virtually none, just a small
4 amount. It's a corrugated culvert and the bottom
5 corrugations are full, but then the corrugations
6 themselves are sticking up once you get in, I'm going to
7 say four feet, something like that. I didn't measure it.

8 Q. Now, with regard to the wollastonite, has the
9 Town of Essex ever obtained a beneficial use
10 determination from the Department of Environmental
11 Conservation of the State of New York to --

12 A. Yes, sir.

13 Q. -- use that material?

14 A. Yes, sir, we have.

15 Q. When was that obtained?

16 A. I don't know when it was first obtained. I've
17 only been in office for five years and working on four
18 months. Wollastonite has been used for 50 years. I know
19 the BUD that I got a copy of was dated I believe ten
20 years ago. I don't have it in front of me so I don't
21 want to say exactly.

22 Q. And that's such a permit from the Environmental
23 Department of Conservation?

24 A. It's not a permit, sir, it's a recommendation.
25 It's a recommended use.

Q. My question is has the town ever obtained a beneficial use determination or a permit from DEC, not a recommendation; have you ever received that?

A. We have the BUD from the DEC, yes, sir.

There is no permit required. If you're familiar with DEC recommendations, they have the BUD list, which is Beneficial Use Determination. It's been tested, it's beneficial and then they have another list of prohibited. If it's not on the prohibited, you do not need a permit to use it.

Q. When you were there it was on April 3rd. Is that the date you were there to take these photos?

A. Today -- let me look at the calendar. It was on Sunday which would have been April 1st.

Q. When was it?

A. According to that calendar 2007, Sunday was April 1st -- no, excuse me, March 31st. March 31st was the date I was there.

Q. When was the last time you were there at that location before that?

A. I go down that road at least every week if not more frequent.

Q. When you were there on March 31st was there any water on the surface of crossroad?

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2 A. No, sir. All the snow was melted. There was no
3 water anywhere in that area.

4 Q. Was there any flooding of crossroad in that area?

5 A. Not on that date, no, sir.

6 Q. At any time this spring?

7 A. There was minor -- I wouldn't call it flooding.
8 There was surface water standing in that area by the
9 drainage. I wouldn't call it flooding because it wasn't
10 all the way across the road, but it was landing on the
11 side of it, yes, sir.

12 Q. Is that the only time you saw that this winter?

13 A. No, there was some earlier, I believe it was in
14 January. We had a lot of rain and the same situation
15 existed, it was not a flood, but the end of the culvert
16 shown in picture 4 was covered with water, and it was up
17 just a little bit onto the road.

18 Q. And the road was still passible, correct?

19 A. Yes, sir, it was.

20 Q. And there was no time during the winter of 2006,
21 2007 that crossroad was in any fashion closed for travel,
22 was it?

23 A. No, sir, it was not.

24 Q. And you had a major snowstorm I presume on
25 Valentine's Day, February 14?

1
2 A. Yes, sir, we had a Noreaster on that date.

3 Q. What was the total accumulation of snowfall from
4 that storm in Essex?

5 A. In the Essex area I'm going to say it was
6 probably varied, but some areas like that were protected,
7 had very little like the area in question, I don't think
8 we got a foot there. Other areas it drifted up it was
9 well over 30 inches. Overall, I'm going to say we had a
10 little better than two foot of snow in Essex.

11 Q. The town employees to the highway department were
12 able to plow crossroad?

13 A. Yes, sir, they were.

14 Q. Now, you say the crossroad in that area was
15 protected?

16 A. Yes, sir, in my opinion it was protected.

17 Q. There are fields on the north and south sides of
18 that road of the Lewis Family Farm, Inc, correct?

19 A. Yes, sir, you are correct.

20 Q. The road in that area, the farm road of Lewis
21 Family Farm, Inc, according to the photograph, is some
22 elevation above the surface for travel on crossroad,
23 correct?

24 A. Yes, sir. If you ask my estimate I'd say about
25 six, maybe a little more than six foot.

1 Q. What is the length of that area where a crossroad
2 is above the elevation -- or excuse me, where the Lewis
3 Family Farm Road in that area is above the elevation of
4 crossroad?
5

6 A. Well, if you look back at picture number 1, if I
7 may refer back to that, you can see that actually it's
8 from the top of the hill all the way down through it
9 varies, and most of it is not as high over, is not six
10 foot, but the whole length of it, it's a little above our
11 road from anywhere from one foot to six foot where that
12 drain culvert is.

13 Q. Would you look at what I have marked as Plaintiff
14 Exhibit 6?

15 A. Yes, sir.

16 Q. I want to make certain we have the same
17 photograph.

18 A. Yup.

19 Q. Is that the photograph that you have marked as
20 Plaintiff's Exhibit --

21 A. Yes, sir.

22 Q. What direction is the camera facing?

23 A. Almost due west. This road in this area is
24 almost west at the top of the hill heading east down the
25 hill.

1
2 Q. In that photograph, Plaintiff's Exhibit 6, the
3 Lewis Family Farm Road appears to the left of crossroad,
4 correct?

5 A. Yes, sir. At that time, they'd only built that
6 one road.

7 Q. And the truck that is depicted in that photograph
8 is on the surface of crossroad facing in what direction?

9 A. It's facing east.

10 Q. And from the top of the hill at the top of the
11 photograph, it appears in that photograph that the level
12 of the farm road and the level of crossroad as one goes
13 down the hill proceeding in that direction appears to be
14 very little difference in elevation, doesn't it?

15 A. Yes, sir, I'd guess a foot, foot and a half.

16 Q. I'm talking about how about in the area in the
17 central left portion of that photograph, from your
18 observation what's the difference in elevation between
19 the farm road and crossroad?

20 A. Looking at the person standing there, I'm going
21 to say it's approximately six foot.

22 Q. How about from your observation?

23 A. I'm going to say about six foot, my guesstimate.

24 Q. As one proceeds in a what, easterly direction
25 toward the camera?

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A. Yes, sir.

Q. For what length would the farm road be of approximately that elevation above crossroad?

A. I'm going to say less than a hundred foot.

Q. And then it goes back down where there's just a slight difference in elevation?

A. Yes, sir. I'm going to say that not in this photo or any of these photos, a little bit more visible in number 7, but it gets back down at the top of that next -- a little bit of a rise, and from then on it's approximately a foot, foot and a half above the crossroad.

Q. From the area of travel on Exhibit 6?

A. Yes, sir.

Q. On the edge of crossroad to the farm road going in that direction, that would be going south right from the edge of the road toward the Family Farm Road?

A. From the picture of the truck towards the family road, yes.

Q. Yes?

A. That's on the south side of the road.

Q. There are no shoulders on that road, correct?

A. Used to be, but there are not now.

Q. From the edge of the area of travel on crossroad

1
2 down to the base of the farm road, it appears to slope
3 downward, does it not?

4 A. Yes, sir.

5 Q. And if you look at --

6 A. Called the toll of the road I believe.

7 Q. If you look at Exhibit 6 --

8 A. Yes, sir.

9 Q. -- on what would be the north side of crossroad,
10 what is depicted there as one goes up the hill appears to
11 be the natural condition of the level of the land, is it
12 not?

13 A. Well, I don't know if it's natural, but it's what
14 it's been for several years, yes.

15 Q. And the road was put there by the Town of Essex,
16 correct?

17 A. Yes, sir.

18 Q. And in that photograph, Exhibit 6, on the north
19 side in the top portion of that photograph where the
20 elevation of the land or the trees along the edge of
21 crossroad are depicted appears to be at a level above the
22 elevation of the surface of crossroad, does it not?

23 A. Yes, sir, the road is below the surrounding land
24 in that area.

25 Q. And that would appear to be from that photograph

two to three to four feet above the level of the road?

A. No, sir, I don't believe it's that much. Might be two foot. I'm going to say foot and a half, two foot. I don't believe it's any more than two foot.

Q. Plowing activity took place in that area during the winter, correct?

A. Yes, sir, it did.

Q. And as one proceeds to the area not depicted in this photograph, the camera would be facing in the opposite direction in Exhibit 7; is that correct?

A. That's correct, sir. That's basically facing the other way.

Q. So you're talking about an area, this increased elevation of the farm road that's about a hundred feet in length?

A. Good guess.

Q. And then as one proceeds in that direction toward the top of the photograph, the farm road is only slightly above the elevation of crossroad, correct?

A. That is correct, sir.

Q. And the elevation in that area of the farm road really has not increased above the level of the condition that existed prior to the construction of the farm road, correct?

1
2 A. Not quite true, it's a little higher. If you
3 look at the road, it's harder to see, I know, but it's
4 probably about let's say approximately a foot higher than
5 the field was before the road was put there. It was
6 where the -- from where the top of the hill, if you look
7 at 7 from that area on, it was basically flat across that
8 whole area and now the road is I'm going to say about a
9 foot and a half above.

10 Q. Look at Plaintiff Exhibit 3, will you?

11 A. Yes, sir.

12 Q. You described that area which appears to be
13 darker in color when you were there on March 31st as a
14 wet area, correct?

15 A. Yes, sir, that's the term I used.

16 Q. And that's an area that is lower between the
17 Family Farm Road and the edge of crossroad on the south
18 side, correct?

19 A. Yes, sir, that's the ditch where the two tows
20 (CHECK (TOLLS, UP) of the roads come together. The tow
21 of the town road and the tow of the Lewis Family Farm
22 Road come together, and that acts as a ditch in that
23 area.

24 Q. The ditch area, what would be the depth of the
25 ditch in relation to the elevation of the farm -- of the

crossroad?

A. I'm going to say it's approximately foot, foot and a half.

Q. What was the length of the wet area from east to west that you observed there that day?

A. It's easier to see in one of the other photos. If I may refer back to number 2, you can see it there a little clearer. I'm going to say it's about five foot area, maybe six foot area, something like that.

MR. BRENNAN: I have nothing further, Judge.

THE COURT: Mr. Harp, before I allow you to ask a few questions which I know you must, I have a couple of questions here again for Mr. Jackson.

Mr. Jackson, with regard to Plaintiff's Exhibit 3, you've already testified that that is the other end of a culvert, and in which the water has made that area wet; is that correct?

THE WITNESS: Yes, sir. It's where the culvert used to daylight or come out into the ditch and it's been filled up, no longer daylights. Yes, sir.

THE COURT: What concerns do you have as supervisor of the town relative to that condition?

1 THE WITNESS: Thank you for asking that
2 question. My concern is this was a very unusual
3 winter. Normally we have a lot more snow than
4 this. We're very fortunate that it melted
5 gradually. If we'd have had a big rain and that
6 would've gone quickly, the water would not have
7 been able to go through that culvert, in my
8 opinion, and flow through.
9

10 MR. BRENNAN: Judge, I'm going to --

11 THE WITNESS: And back up and flood the
12 road.

13 THE COURT: Wait a minute. There has been
14 an objection. I'm going to note that I'm going
15 to allow the witness to answer this in terms of
16 concerns, but, sir, you're not an expert, so to a
17 certain extent Mr. Brennan is correct indicating
18 that really we can't have testimony to be used in
19 a way where a decision will be made. But I'm
20 going to allow you to express yourself based upon
21 concerns on behalf of the town.

22 THE WITNESS: Thank you.

23 THE COURT: Whether that is realistic or not
24 we're going to have to take up with other
25 witnesses. So please continue.

THE WITNESS: Okay. Well, that's my concern. There's two concerns, this whole thing, the flooding issue.

THE COURT: When you say flooding, you're talking about where if there's a heavy amount of water through this culvert it's likely to flood over the road, is that what you mean?

THE WITNESS: That's exactly what I'm saying, sir. That whole area, if you go back to Picture 1 where my car is, it's not very clear in here. Might be clearer if you look at Picture number 7, but there's a dip in the road there, and that's where the culvert's located at that lowest basic location.

If you look at Picture number 7 where the People are standing, that's where the culvert goes across the road, and if that can't handle the flow, then the water will flood over that and that whole area will become unsafe for traffic.

THE COURT: And you can concede in essence of this past year that didn't occur, but you have also indicated that you believed it was a lighter year than what might otherwise have clearly been expected?

THE WITNESS: Yes, sir, that's one concern. The other concern is the wollastonite and leaves and organic matter will make that stone, which now flows water pretty good, not flow water as good in the future, and then as a result of that, it will be even more likely to happen as time goes on than it was this year.

THE COURT: Now, do you have any other concerns with regard to this road in terms of your position as supervisor of the town?

THE WITNESS: Yes, sir, I do, and it's based on my experience of my people in my highway department. When you plow the roads --

MR. BRENNAN: Your Honor, I'm going to object to him testifying to what these concerns of people on the Highway Department --

THE COURT: I'm going to overrule the objection because I'm assuming as town supervisor they are directly under your charge; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

THE WITNESS: When you plow a road you can only throw the snow up so high, and with a foot

1 and a half along the rest of it, two foot, that's
2 not a problem. When you plow the roads you can
3 throw the snow up, but when you start getting six
4 foot and then you throw snow on top of that, it
5 becomes very difficult to plow the snow out, and
6 also it's more likely with this higher area, this
7 is a problem area. We've had problems in the
8 past.
9

10 THE COURT: Is that because you're saying
11 the Family Farm Road presents a barrier to the
12 snow in a heavy year, is that what you're saying?

13 THE WITNESS: Almost. Not quite, sir. When
14 snow goes across an area, the wind is up on the
15 top and there isn't wind down in the bowl area.
16 The snow being heavier in there tends to settle
17 out more and I'm afraid that this area, if we'd
18 have had a south wind during the blizzard, this
19 whole area probably would've been seven, eight,
20 ten foot of snow. I have no idea, way of
21 knowing.

22 Certain that whole basin would have been
23 full and the plows could not have plowed it out.
24 The only way we could have cleared out the road
25 is a front-end loader. We've had to do that in

1 the past. Never that amount of snow, it's about
2 three, four feet of snow, but with this basin
3 created there with the Family Farm Road on the
4 both sides being a six foot basin, it will fill
5 up with that plus whatever the height of the
6 natural snow, and be very difficult for the
7 Highway Department to clean the snow out of this
8 area.
9

10 The rest of the road's not a problem. The
11 one foot area, the foot and a half, two foot area
12 that's raised, we can plow that out of there.
13 That's not that bad, but when you get that six
14 foot dip, if that drifts in with snow from the
15 south wind, if you have that during the snowstorm
16 the only way we can clear it out is with
17 front-end loaders and, of course, the road would
18 be closed and impassable for any traffic at that
19 time.

20 I want to add there is school bus that goes
21 over that every day. It would have to be
22 diverted and other use during that time period.

23 THE COURT: All right, thank you. Those are
24 your concerns; is that correct?

25 THE WITNESS: Yes, sir.

R. JACKSON - CX by MR. BRENNAN

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THE COURT: All right.

THE WITNESS: If the road was down, if they lowered that road down the same as the risk of a foot and a half and restored the rest of it, I have no problem with the Family Farm Road.

THE COURT: All right, thank you. Mr. Harp?

MR. HARP: I'd like this to be marked. I guess we're up to Plaintiff's 8 now.

THE COURT: Yes.

(Plaintiff's Exhibit 8 - marked for identification.)

REDIRECT-EXAMINATION BY MR. HARP:

Q. Mr. Jackson, would you please look at Plaintiff's Exhibit 8, and do you recognize that?

A. Yes, sir, I do.

Q. I'd like to offer it in evidence.

THE COURT: Well, what is it, Mr. Jackson?

THE WITNESS: Sir, this -- if you go on the Department of Environmental Conservation website and you go look for the recommended uses, recycle uses that Department of Environmental Conservation recommends item, if you come down from the top, item 2 and 3 is NYCO minerals and then you go across from the Willsboro plant, the tailings wollastonite they recommend for using on

1 R. JACKSON - CX by MR. BRENNAN

42

2 THE COURT: All right.

3 THE WITNESS: If the road was down, if they
4 lowered that road down the same as the risk of a
5 foot and a half and restored the rest of it, I
6 have no problem with the Family Farm Road.

7 THE COURT: All right, thank you. Mr. Harp?

8 MR. HARP: I'd like this to be marked. I
9 guess we're up to Plaintiff's 8 now.

10 THE COURT: Yes.

11 (Plaintiff's Exhibit 8 - marked for identification.)

12 REDIRECT-EXAMINATION BY MR. HARP:

13 Q. Mr. Jackson, would you please look at Plaintiff's
14 Exhibit 8, and do you recognize that?

15 A. Yes, sir, I do.

16 Q. I'd like to offer it in evidence.

17 THE COURT: Well, what is it, Mr. Jackson?

18 THE WITNESS: Sir, this -- if you go on the
19 Department of Environmental Conservation website
20 and you go look for the recommended uses, recycle
21 uses that Department of Environmental
22 Conservation recommends item, if you come down
23 from the top, item 2 and 3 is NYCO minerals and
24 then you go across from the Willsboro plant, the
25 tailings wollastonite they recommend for using on

town roads and parking lots as a beneficial use for this waste product, and that's what BUD stands for, Beneficial Use Determination.

THE COURT: Mr. Brennan?

MR. BRENNAN: Judge, I would object to this. Apparently there are arrows drawn on it and this is being offered. From what I can see here is this has nothing to do with the Town of Essex as the request to --

THE COURT: I'm going sustain it. If you want to lay a different foundation, someone from the appropriate entity to come in and indicate what that is.

MR. HARP: Your Honor, he asked the question of whether or not wollastonite had ever been recommended or they had clearance with relevant use to it, and this document shows that was on the approved list for use.

THE COURT: Well, he testified already that that's what his understanding was and that's already in our record.

Q. Now, with respect to I think it's photo number 5 -- 4, excuse me, you were asked relative to the whitish product along the entrance to the culvert?

A. Yes, sir.

Q. And you indicated it was wollastonite?

A. The tailings, yes, sir. Wollastonite tailings.

Q. Did the town place those there?

A. No. Some of it -- the wollastonite tailings are different textures, different sized particles, and the finer particles sometimes will wash when the water drives by and carry it, something like mud.

Q. So it was washed onto the slope of the farm road; is that correct?

A. Yes, sir.

MR. HARP: No further questions.

THE COURT: Thank you. Anything further, Mr. Brennan?

MR. BRENNAN: I just have a couple questions.

RECROSS-EXAMINATION BY MR. BRENNAN:

Q. What was the total snowfall in the Town of Essex this past winter?

A. Well, I would say -- have to guess.

Q. I'm not asking you to guess.

A. What's that?

Q. I'm not asking you to guess.

A. I cannot answer your question. I don't have that

knowledge.

Q. Does the town Highway Department keep statistics every year as to snowfall?

A. Not to my knowledge. If they do, I'm not aware, but they possibly could. I can't answer that question. I don't have that knowledge.

Q. Is there any record of the Town of Essex to show what the annual snowfall has been in the Town of Essex during the last ten years of winters?

A. I'm sure we could obtain that, but I don't have that record. I mean, if you go on the weather site you can find that information out, if you choose to go back and find out each year what the snowfall is in the area.

Q. But you have no idea what it is?

A. No, sir, just theory, and those are not exact by any means.

MR. BRENNAN: Nothing further.

THE COURT: Anything further?

MR. HARP: No.

THE COURT: You may step down. Thank you very much. I take it, Mr. Harp, you have no further witnesses so at this time, we'll take any witnesses to be heard by the Lewis Family Farm.

MR. COOK: Your Honor, we would call

Mr. Todd Deyo.

T O D D D E Y O

called herein as a witness, being duly sworn,
testified as follows:

DIRECT-EXAMINATION BY MR. COOK:

Q. Mr. Deyo, would you state your name for the
record.

A. Todd E. Deyo.

Q. What is your current employment?

A. I'm a self-employed contractor.

Q. Can you describe for the Court what your
contracting business consists of?

A. Land clearing, road building, street work,
highway work.

Q. How long have you been engaged in this business?

A. Approximately twenty years.

Q. How long have you done work in the North Country?

A. Approximately twenty years.

Q. How much of your work consists of building roads?

A. Indirectly on and off, 20 years, 21 years, 19
years.

Q. And in the course of your work as a building
contractor, have you designed and installed drainage

systems in roads?

A. Yes, we have.

Q. Are you familiar with the Lewis Family Farm?

A. Yes, I am.

Q. And how are you familiar with that company?

A. We have done work for the Lewis Farms for eight plus or minus years.

Q. Are you familiar with the roads that are the subject of this litigation in particular?

A. The crossroad in particular, yes, I am.

Q. How are you familiar with the crossroad?

A. We designed and built the flanking roads adjacent to the crossroad.

Q. What is the business of Lewis Family Farm?

A. They are an organic producer of materials, grains, hays, soybean, that type of commodity for what they do.

Q. And are you familiar with the term organic certification?

A. A little bit, yes.

Q. As an organic farmer, are they subject to different regulations for that certification?

A. They are extremely scrutinized for no pesticides, herbicides, certain chemicals they can't use and getting

the soil out of PH and out of their sink for what they need for crop rotation is critical.

Q. Are you familiar with the Town of Essex's use of wollastonite mine tailings?

A. Yes, I am.

Q. Why did the Lewis Family Farm contact you and request that you build roads adjacent to crossroads?

A. There was a couple different reasons. First is wanted to improve the drainage for the farm. Less water going to the town ditches on certain fields that laid toward Whallons Bay Road or crossroad, Clark Road in different areas. And secondly, the erosion problem with the wollastonite getting into the lower lying areas of this particular area, which is on the crossroad causing major problems.

Q. And have you personally observed areas on the Lewis Family Farm where wollastonite had run off into farm fields?

A. Yes, sir.

Q. What did you observe in those areas?

A. Well, there was nothing that grew and on the outskirts of what didn't grow was very lightly populated with any types of plant growth that they would be trying to grow.

Q. In your opinion as a building contractor, is wollastonite an optimal product to use in road construction?

A. No.

Q. Why not?

A. There's no aggregate to it. There's no consistency to it. There's no basis of it passing water. When water hits it on a slope grade, it erodes very easily, very quickly. Obviously water runs downhill and that's where three quarters of this problem is with the wollastonite that it doesn't stay in place.

MR. COOK: Your Honor, if I approach, I have several photographs and I apologize, I thought I had enough copied for everyone. So if the Court can do us some indulgence and work with the witness.

THE COURT: Sure.

(Defendant's Exhibits A through H - marked for identification.)

Q. Mr. Deyo, if you can look at the first photograph, is this the one that you're looking at, Exhibit A?

A. Yes, sir.

Q. Could you describe what that photograph depicts?

1
2 A. Well, that indicates that there is erosion beside
3 the road prior to the ditch. The water isn't getting to
4 the ditch, it's staying in the road, washing the road
5 out, and you can clearly see that there's been another
6 dump of wollastonite graded on this road freshly with a
7 grader and not rolled. So the first rain it gets, what
8 just got put on is going to be washed off again.

9 Q. Do you know when the town last applied
10 wollastonite to the crossroad?

11 A. I can't specifically say to the date because I
12 haven't been here every day in the last three or four
13 weeks. Perhaps -- no, I don't even want to say. No, no,
14 I don't even want to say when it was because last time I
15 was there I know it was just freshly done.

16 Q. So the last time you were there --

17 A. I was there on Sunday and it had been done not
18 long before Sunday of this past week.

19 Q. So as far as you're aware, there was an
20 application within the last week or so?

21 A. That is correct.

22 Q. Okay. Could you turn to Exhibit B, just this
23 photo?

24 A. Yes, sir.

25 Q. Would you describe what that shows?

1
2 A. Well, that's a low lying area on the crossroad.
3 You can see by the photos that when the plow goes by in
4 the winter that he kicks part of the road off, which is
5 going to be normal, a gravel type application, but this
6 is a little bit worse because there's no gravel. And
7 they kick it off the side of the road. Hence, they're
8 filling their ditch up and you know they're just creating
9 a problem.

10 Now, also on the top of this photo right just
11 east of that orange cone that's there --

12 Q. East would be to the right?

13 A. Just straight ahead looking down toward the tree
14 line. There's a crown in the road right there. And
15 there's a clear evidence of regrading that particular
16 area with wollastonite in this photo and I don't know
17 when this photo was taken.

18 Q. Are you able to tell from this photo
19 approximately where the town culvert was located?

20 A. Well, I can because I know where it is. If
21 you're looking at the manhole on the right-hand side
22 which you can just see a little bit of the concrete, if
23 you slid over on the side of the road and go up
24 approximately eight to ten feet, that's where the culvert
25 is going to cross the road.

1
2 Q. Did the construction of the Lewis Family Farms
3 that you were involved in in any way impact the drainage
4 of that culvert?

5 A. No, it was two-thirds full when we got to it and
6 it's still two-thirds full.

7 Q. Is it full from any of the product used in the
8 road construction?

9 A. No, there's no rock in there. It's only
10 wollastonite.

11 Q. Turn to Exhibit C. Can you describe what this
12 photo depicts?

13 A. Well, this is a new application of wollastonite.
14 This appears to be an extenuation of Exhibit 2 on top of
15 the crown that I was talking about earlier, and you can
16 clearly see that the grader made multiple passes,
17 basically looks like the ditch has been filled on top of
18 the hill, so that any water that goes either east or west
19 will use the road as a ditch, as it's lower than the
20 Stone Road that we constructed.

21 Q. And that's because the grading on the right side
22 of the photograph, the ridges that are left in the
23 grading prevent the drainage off of the road?

24 A. Yeah, that particular piece of the road isn't
25 ground, that piece of the road is flat.

1 Q. And in your opinion as a road contractor, is that
2 proper building maintenance procedure?
3

4 A. Not of the course I've ever seen, but that's my
5 opinion.

6 Q. Exhibit E, this appears to be a close-up
7 photograph of the road surface; is that what it appears
8 to be?

9 A. That's what it appears.

10 Q. Could you describe the consistency of the
11 wollastonite as depicted in this photo?

12 A. Well, it goes from either chunky that's on the
13 left side of the photo - perhaps there's frost in it, I
14 don't know that - to, you know, the rest of the road
15 is -- just looks like it's graded flat.

16 Q. Is it a fine consistency?

17 A. It's a very fine consistency.

18 Q. Similar to sand?

19 A. Very similar to sand and it behaves very much the
20 same as sand.

21 Q. How so?

22 A. You put water to it and it erodes, it moves, it
23 doesn't stay stable.

24 Q. When you say it doesn't stay stable, what do you
25 mean?

1
2 A. Well, if you have a slope and you add water to it
3 it's going to destroy the road. You're going to have a
4 washout. You're going to have erosion, and this material
5 is going to be deposited in a low lying area, going to a
6 stream, going to a wetlands, going to someplace other
7 than where it was intended to stay.

8 Q. Could you turn to Exhibit D. What does that
9 photograph depict?

10 A. That looks like it was just graded, I see grader
11 tracks. And again, it was graded very poorly, not rolled
12 and again, the first rain, this material is moving.

13 Q. Would you turn to Exhibit F. Could you describe
14 where there appears to be a light strip running
15 diagonally through the center of the photograph, is that
16 the ditch on the side of crossroad?

17 A. That would appear to me as if the grader cleaned
18 the edge of the road and swept a tailings on the upwards
19 side of the ditch if there was or perhaps right in the
20 base of the ditch, and therefore, the ditch will fail.

21 Q. So it appears that the ditch has been filled by
22 the town in their use of the wollastonite?

23 A. That's what this photo indicates.

24 Q. Turn to G please, Exhibit G, can you describe
25 what that depicts?

1
2 A. There's a classic example of what wollastonite
3 does. You can see there's a culvert. It's washed by the
4 culvert. If you're looking up, the photo coming back
5 towards, you're going to see bottom of the wollastonite
6 in the low lying area. Now, I don't know for sure, but
7 perhaps that culvert also got a deposit of wollastonite
8 in it and that will fail.

9 MR. COOK: Your Honor, I would move for
10 admission of the evidence A through G. I will
11 not use H. Your Honor, I move for admission of
12 Exhibits A through H.

13 THE COURT: Mr. Harp?

14 MR. HARP: No objection.

15 THE COURT: No objection, they have been
16 admitted.

17 (Defendant's Exhibits A through H - received in
18 evidence.)

19 Q. Mr. Deyo, I'd like to discuss with you the
20 construction of the farm roads that run parallel to the
21 crossroads. When did you build those?

22 A. Those were done, started perhaps in July of '06
23 and finished sometime late November, early December of
24 '06.

25 Q. And what material are they constructed from?

1
2 A. It's a limestone rock, I don't have the exact
3 name of that particular limestone.

4 Q. And in your experience as a road contractor, do
5 the standards of construction to these farm roads meet
6 professional standards?

7 A. They're highly above what the state would require
8 to do state projects.

9 Q. Why are they built to higher standards?

10 A. Because we want something that lasts and doesn't
11 fall apart.

12 Q. When you constructed those roads, were you aware
13 of the location of the town's highway easements?

14 A. We were.

15 MR. HARP: Objection. How does he know
16 about the highway easement?

17 THE COURT: Well, he's going to tell us. I
18 will overrule the objection.

19 Q. How were you aware of the --

20 A. We had recently put in a NYSEG right-of-way.
21 Sandy had -- of the Lewis Farm had made arrangements with
22 NYSEG to get their overhead lines out of farm fields and
23 bury into a conduit and with a spare conduit along the
24 right-of-way, around the town's right-of-way that flanked
25 most of these roads that we're in discussion about.

NYSEG also required that they retain an easement ten feet past. In other words, the town's easement was zero to 25 feet and NYSEG's easement was 25 to 35 feet.

Q. Were the farm roads built at all in any portion within the town easement?

MR. HARP: Objection again.

MR. BRENNAN: He's just testified, your Honor, that he's aware of what the town's easement was and what NYSEG's easement was.

THE COURT: Sir, obviously you're a road contractor and, of course, in performing that kind of work you have to be aware of what easements exist in favor of town roads, correct?

THE WITNESS: That is correct.

THE COURT: What is the source of your information with regard to what you're testifying about here?

THE WITNESS: It was set 25 feet from center line to highway.

MR. HARP: Again, I object to it, there's no basis for him to know what a user road is. It isn't limited to 25 feet.

THE COURT: Well, I believe we're making reference here to provisions of the Town Law,

1
2 right, which is what is being referred to here,
3 correct?

4 MR. HARP: No. A user road is whatever is
5 used in connection with maintenance or --

6 MR. COOK: That gets into the argument, your
7 Honor. I think that does get into the argument.

8 MR. HARP: He's testifying to what the
9 easement is, your Honor.

10 THE COURT: Well, I'll note that that's in
11 dispute, but the construction of the roadways,
12 it's understood that there's a certain specific
13 delineation for that.

14 I realize what's in dispute here is the use
15 of certain words as to appurtenances or what may
16 constitute an additional right by the town, but
17 certainly there's a minimal amount that we can
18 agree upon, what is in dispute, whether or not
19 there's a larger extension of the easement. But
20 we're talking about the expressed provisions of
21 the town law; is that correct?

22 MR. COOK: That's correct, your Honor.

23 MR. HARP: And that basically indicates 25
24 feet, is that what we're talking about?

25 MR. COOK: That's correct.

MR. HARP: Your Honor, I object, that the statute section of 180 Highway Law does not specify the width of a highway.

MR. COOK: Your Honor, again, that gets into the argument that if there were the case there would be no ability to --

THE COURT: Well, I'm going to overrule the issue because it's an issue in contention, but certainly there's a standard here, and that's understood. Whether it's beyond that because of the circumstances, that's a matter we're going to have to decide.

Q. Mr. Deyo, is there a shoulder on the sides of the town road?

A. Many roads do not have a shoulder on it.

Q. Is there a shoulder on crossroad? Are you aware of -- let me rephrase that.

How wide generally, and I know it may vary from place to place given the location of the road. Generally how wide is just the road surface of crossroad?

A. It changes from the start of the road to the base of the hill to a quarter mile down.

Q. Approximately what would that width be?

A. 21, 22 feet.

1
2 Q. How far is the setback from the town road to the
3 farm road?

4 A. Approximately 34, 35 feet.

5 Q. Are you aware of what the elevations are of the
6 farm road?

7 A. In reference to?

8 Q. The town road?

9 A. We are above that.

10 Q. Why was that higher elevation selected for that
11 construction?

12 A. The higher elevation was selected because if we
13 didn't raise the farm road, they added more wollastonite
14 in the town road, then what would happen is their town
15 road would still spill over our stone road and still end
16 up by going into the field.

17 Q. You testified that the farm roads are built with
18 crushed rock, correct?

19 A. Crushed rock.

20 Q. What are the benefit of using crushed rock for
21 road construction?

22 A. It passes water rather quickly, it acts like a
23 mini detention basin, retention basin. So it will absorb
24 water and release water at a slower rate causing less
25 volatility in storm runoffs certain times of the year,

fifty year events, hundred year events.

Q. And this spring have there been some heavy rains in that area that you've observed?

A. I physically haven't been there, but I know we had a lot of heavy rain home. That's 30 miles away.

MR. HARP: I'll object.

THE COURT: Sustain the objection.

Q. Are you aware of any flooding along crossroad?

A. I am not aware of any flooding.

Q. Is that because the construction of the farm roads are designed to convey water away?

A. It is.

Q. Does the increased elevation at the farm roads act as a natural snow barrier?

A. It will keep snow off from crossroad.

Q. You're aware of a major snowfall on Valentine's Day of this winter?

A. 30 something inches we were working.

Q. Are you aware of whether crossroad was ever closed as a result of that snowfall?

A. You know, I took note of that especially and there was no closure on that road.

Q. I'd like to go to the issue of the town's culvert of the road. When you constructed the farm roads, did

you observe any blockage or drainage or -- excuse me, any blockage in the culvert?

A. It was half to two-thirds full of appears to be wollastonite.

Q. Was it blocked more on one end or the other?

A. Didn't really seem to notice any difference from one end to the other.

MR. COOK: I have no further questions, your Honor.

THE COURT: Thank you. Mr. Harp?

CROSS-EXAMINATION BY MR. HARP:

Q. I don't know what photo it is, but I think photo 4, our photo. From your knowledge of the area is that picture of the upside or upstream side of the culvert?

MR. COOK: Objection, your Honor. I'm not sure what upstream would be.

Q. The higher end of the culvert?

THE COURT: Rephrase.

MR. COOK: Why don't we use designation of north, south, east, west.

MR. HARP: I don't know which side the road is on.

THE COURT: Well, perhaps your witness can tell you.

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2

Q. Okay. It's at the entrance to the culvert?

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5

A. I would think it is. I would also think it's on the north side of the road, but I'm not sure what angle this photo was taken at. It's not marked.

6

7

Q. Does that show two-thirds, three quarters filled up --

8

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11

A. Actually, what happened in this particular photo, and I'm kind of glad you brought this out because when we did our road construction on the backside of this we shoveled out what we could of this particular photo.

12

13

Q. You shoveled it out of a photo that was taken months later, right?

14

15

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18

A. We shoveled this photo out when we built the road which would have been prior to this photo, which would also lead me to believe that with the amount of sediment that you have back in the bottom, the same occurrence is happening.

19

20

21

Q. Now, from your observations of the area, did water flow from the culvert onto the field prior to the road -- the farm road being constructed?

22

23

24

25

A. I don't understand your question.

Q. Did water flow from the drainage pipe under the crossroad onto the fields prior to your construction of the farm roads?

A. There was -- the only thing that culvert was intended to do --

Q. I'm not asking what it was intended to do. I'm asking you whether or not water flowed onto the field. You said you were there frequently, et cetera, et cetera and you built a road to block the flowage, didn't you?

A. We didn't block the flow.

Q. Did water flow from the pipe out onto the fields?

A. Yes, it did.

Q. And you built the farm road in an area that water flowed, is that not correct?

A. That is correct.

Q. What substance in wollastonite is harmful or has properties that increase the PH of a soil?

MR. COOK: Objection, your Honor. Mr. Deyo is not an expert in soils.

THE COURT: Mr. Harp, I'm going to sustain the objection. I don't think you can derive that information from this witness.

Q. Are you aware that in the 1960's the very same area, the same farm that is now Lewis Family Farm was used to test wollastonite as a lime substance substitute for farm?

MR. COOK: Objection, your Honor.

THE COURT: The question was, Mr. Harp, whether he was aware whether there was any prior attempt to use a substitute for wollastonite?

MR. HARP: No, to use wollastonite as a substitute lime on the very farm that consisted of Lewis Family Farm.

THE COURT: What's your objection?

MR. COOK: He's asking him to testify about something that happened in the '60s, I believe. Mr. Deyo may have been two years old in the '60s or older.

THE COURT: I'm going to overrule the objection. Are you aware of it?

THE WITNESS: No.

Q. The photographs A through F I think it is, did you take those photographs?

A. I did not.

Q. So you don't know -- do you know who took them?

A. I do not.

Q. Do you know when they were taken?

A. I do not.

Q. So you don't know what conditions prevailed when they were taken, whether the farm roads were in place or not in place; is that correct?

A. No, ask the question again please.

Q. When you built the farm roads in relationship to these photos you don't know whether the photos were taken before or after or when?

A. Well, actually, I do because one of those photos show my John Deere dozer sitting on the side of the road and that dozer's only been there about four and a half, five weeks. So those roads were built prior to these photos.

Q. You had indicated that wollastonite was used on crossroad recently. Did you observe it being used on the crossroad recently?

A. I didn't see it being put down. I did observe through the photos and on Sunday that there was fresh wollastonite graded on that particular piece of the road.

THE COURT: But not placed on there; is that correct?

THE WITNESS: I didn't see the dump truck dump it out, that is correct.

Q. So if I call the highway superintendent, who placed wollastonite on crossroad the last time, he did, and it was many months ago, your observation wouldn't be proper, would it?

MR. COOK: Objection, your Honor.

THE COURT: You have a good faith basis for knowing when the supervisor did that or are you just speculating, Mr. Harp?

MR. HARP: I do know when he last placed --

THE COURT: Then I'll overrule the objection if you have a good faith basis for asking. Would your answer change with that information that he's telling you, sir?

THE WITNESS: It was regraded within the last week to ten days.

Q. I asked placement.

A. Yeah, and I told you that I didn't see it come out of the dump truck.

Q. Okay.

A. But you also asked if it was regraded, and it was regraded.

Q. I did not ask if it was regraded, I asked the placement. The ditches, as you observed them, had wollastonite in them from your photos, from these photos A through F, right?

A. Yes.

Q. What happens when wollastonite builds up and against the farm road, will it act as a barrier?

A. Over time, it is possible, but if there were

1
2 water bars put in on the crossroad, erosion was stopped,
3 water preventions put in place. You didn't have an
4 erosion problem, this problem would never exist, but
5 being that you have an erosion problem, this may be an
6 issue.

7 Q. Have you ever performed work for the state under
8 the state specs?

9 A. We have.

10 Q. Under what entity? Under what entity?

11 A. What do you mean by --

12 Q. What company or firm?

13 A. We worked through Rifenburg, we worked through
14 Kubricky.

15 Q. As a subcontractor?

16 A. As a sub.

17 Q. You indicated that the farm road combined with
18 the wollastonite in the ditch of crossroad would cause
19 the water in the one photograph -- would cause the water
20 to come down on the road, is that correct, down
21 crossroad?

22 A. Say that again.

23 Q. Let me see if I can find the photos. Because I
24 did not have the photos when -- now I guess I need their
25 photos.

THE COURT: Counsel, I have photos.

MR. HARP: If he can establish -- let's see, they're my photos.

THE COURT: Looking for the photos that were admitted --

MR. HARP: Yeah, A through F, there he testified that in one photograph that the wollastonite in the ditch caused the water to flow down the crossroad. Can you show him the photographs and maybe he can identify which one it is?

THE COURT: Do you understand the question, Mr. Deyo?

THE WITNESS: Please repeat the question.

Q. You testified that in one of them that you observed the wollastonite in the ditch area which would cause the water to flow down across the road, is that correct? Isn't that correct?

MR. COOK: I think I know which --

MR. HARP: What number is this?

MR. COOK: C and F.

Q. Look at C and F. Can you tell how close those photographs were taken to the culvert underneath crossroad?

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A. C is approximately 80 to 90 feet away.

Q. What's the other one?

A. F, I'm not sure.

Q. You testified that the wollastonite in the ditch would cause the water run down crossroad, did you not?

A. Well, it will. It will because this ridge of material in the center of the photo would represent the bottom of the ditch, and if that is the bottom of the ditch then the water will run on the street side of that ditch, which will erode the crossroad.

Q. The farm road was not there, wouldn't the water run out into the field?

A. It perhaps may.

Q. It perhaps may?

A. With that wind row of dirt there or wollastonite there it may not hit the field anyways as far as what you're saying, run out into the field there. It will probably have a different source of origin, but perhaps not there.

Q. Can you tell me why you would build a road six feet higher than the elevation of crossroad to block the flowage of water out into the field?

A. I don't understand your question.

Q. Why would you build a road six feet higher than

crossroad to block water flowing out into the field?

A. Well, that's a two-sided question, but part of your answer is going to be that NYSEG went in the line, is going to be in one of these photos if you want to reference that, and their line required 30 inches of cover over the line. They established a grade where they wanted their conduit. We needed to provide 30 inches of cover over the NYSEG line. When you play both ends against the middle, the top of the road was where 30 inches was required for the NYSEG line.

Q. So the NYSEG line was about three and a half feet higher than crossroad?

A. Yes, it is.

Q. I thought you said it was buried in conduit?

A. It is.

Q. You buried conduit three and a half feet high above the road?

A. We did.

Q. And you're definitely saying that there is NYSEG lines along crossroad; is that correct?

A. That is correct, and the south side of crossroad there is a NYSEG line.

THE COURT: Sir, you can't say anything.

You can speak to counsel privately.

MR. HARP: I'm just trying to establish what happened there relative to that line.

THE COURT: I understand.

Q. Now, the storm on, let's see, it was Valentine's Day. Was that a northeast storm, Noreaster they call it, come from the northeast?

A. It came out of the sky, I don't know where it came from.

Q. You testified that it was a storm, you were there, et cetera, but you don't know which direction it came from, correct?

A. We were there, we were working and it came out of the sky. I wasn't interested in if it was a Noreaster or a wester or a souther or a California or --

Q. Well, would it make any difference?

A. No, it wouldn't have made any difference.

Q. And you also testified that in snowstorms your farm road would prevent drifting; that's not correct, is it? Doesn't snow drift downward into valleys, et cetera?

A. That particular road didn't.

Q. On that particular storm?

A. On any particular storm this winter.

Q. We only had two major storms up there, right?

A. What do you call a major?

THE COURT: Well, let's not become argumentative here. At least for the two occasions that we know about.

Q. That there were major storms, one in March and one in February. Did you get permission from the town to construct farm road in an area that water flowed from the drainage pipe?

A. I don't understand your question.

Q. Did you get any permission from the town to construct the farm roads?

A. The town was aware.

Q. I'm asking you did you get permission, did you get authorization? I didn't ask whether they were aware. Did you get permission to construct the farm roads?

A. On private property, no, we did not.

THE COURT: Wait just a moment. They presuppose a permission is necessary. He might want to ask whether or not he believed consent of the town was necessary and then ask whether or not he pursued that or sought that.

Q. Is there any basis for you to believe that you did not need permission from the town?

MR. BRENNAN: Object to the form of the question.

THE COURT: I'll overrule the objection.

You know what he's asking?

THE WITNESS: If he's asking me that I know that we need town permission for private property, no, I don't require -- I don't feel that we needed permission to build a road on private property. If that's what your question is, that's my response.

Q. But you did observe that water flowed from the pipe through the same area that you constructed the farm road, isn't that not correct?

MR. COOK: Objection, your Honor, that's not his testimony.

THE COURT: Well, I'm going to sustain the objection, and I think we've covered this ground.

MR. HARP: I have no further questions.

THE COURT: I have a couple. Mr. Deyo, I didn't have the other exhibits. On the exhibits that were admitted through counsel, do any of these show the area just beyond the culvert that is depicted in Plaintiff's 4 and in Plaintiff's 3? And I'll show you Plaintiff's 3 and 4 which purport to show both ends of a culvert. Are any of those conditions shown in any of the exhibits

that have recently been admitted?

THE WITNESS: Photo 3.

THE COURT: Thank you very much.

THE WITNESS: Is right here in Exhibit B.

THE COURT: Thank you. Now, with regard to Defendant's Exhibit B, you can't see whether the culvert there is open or closed, can you?

THE WITNESS: No, you can't, but you can clearly see there's a heavy layer of wollastonite from the street that just got deposited prior to the manhole, and if you do a reverse picture which is on your left-hand, that would probably be taken last year prior to the snowplowing.

THE COURT: To your knowledge, what is the condition of what is depicted in Plaintiff's 3 presently, is it covered like that?

THE WITNESS: Yes, it is.

THE COURT: How long has it remained that way, to your knowledge?

THE WITNESS: To my knowledge, since the snowplowing season started, Novemberish, Decemberish of last year, I'm not sure what day they had to send the plow out for their first excursion.

1 THE COURT: And what is there in your
2 opinion came from the snowplows; is that correct?

3 THE WITNESS: That is correct.

4 THE COURT: And you described this as
5 wollastonite; is that correct?

6 THE WITNESS: That is correct.

7 THE COURT: And so that's what leads you to
8 your conclusion that it was the snowplows that
9 did that; is that correct?

10 THE WITNESS: That is correct.

11 THE COURT: If that's the case, do you have
12 any knowledge whether or not this occurred before
13 the construction of the family farm roads?

14 THE WITNESS: It would have been done after
15 the road, because that road was completed late
16 November, early December prior to snow
17 activities. This is one year of plowing of what
18 happens when they plow that road.

19 THE COURT: But Mr. Deyo, when they plow
20 that road, I mean, that's presumably a yearly
21 event; is that correct?

22 THE WITNESS: Yes.

23 THE COURT: And in past years before the
24 construction of the family farm roads which are
25

1
2 at an elevation higher, do you have any knowledge
3 to whether or not these same conditions occurred?

4 THE WITNESS: What happened was instead of
5 throwing it up on the farm road, would fall down
6 on the ground and then basically run into the ag
7 field.

8 THE COURT: Okay. Are you saying that when
9 it was -- when the farm road didn't exist it
10 didn't cover it because it went beyond it?

11 THE WITNESS: That is correct, it went --

12 THE COURT: And it can no longer do that
13 because of the roadway that's there?

14 THE WITNESS: That is correct.

15 THE COURT: Now --

16 THE WITNESS: We also have an 18 inch pipe
17 below that manhole that is perforated and it goes
18 underneath crossroad.

19 THE COURT: That's what I'm getting at.
20 What do you have in place with regard to the
21 drainage if this situation arises?

22 THE WITNESS: There's an 18 inch tile
23 perforated and it goes through that manhole. If
24 you pull the cover off that manhole and look down
25 23, 24 feet, you're going to see a two foot tile,

1 goes right through underneath crossroad.

2 On the other side of crossroad you're going
3 to see another manhole. You're going to see
4 another structure. You pull the cover off that,
5 you look down, you're going to see that that pipe
6 continues to go through the ag field.
7

8 If you'd get to Whalens Bay Road which is a
9 different road, you're going to pull the cover
10 off and you're going to see it 18, 20 feet below
11 Whalens Bay Road. If you're going to go on the
12 north side of Whalens Bay Road, see another
13 manhole open up, the cover, there's going to be
14 another pipe, 18 inch pipe, same pipe continues
15 northward to the Perry-Lewis boundary line.

16 THE COURT: Tell me what happens if there's
17 a heavy rainfall and this part of the culvert is
18 obstructed, so to speak, because of the
19 conditions in which the town has placed these
20 matters, and since the road is there it falls
21 back on the culvert. What happens to this water?

22 THE WITNESS: This water gets absorbed into
23 the stone, goes through and then down to the 18
24 inch pipe.

25 THE COURT: That's what you're referring to?

THE WITNESS: Yes. And then from that 18 inch pipe it goes down to the Redway Swamp, which is not in any of these photos.

THE COURT: When you constructed this, did you do so in conjunction with a civil engineer?

THE WITNESS: Ask that question --

THE COURT: The road with regard the drainage system that you have here and what you used.

THE WITNESS: There was a private consultant at the time that that pipe was put in. That pipe was put in about six -- five, maybe six years.

THE COURT: What would happen in extreme situation, an unusual occurrence, a 1 in 25 year event or something along those lines?

THE WITNESS: Are we talking a three inch rainfall, are we talking a five inch rainfall?

THE COURT: We're talking an excessive rainfall as you define it.

THE WITNESS: What would probably happen on a three inch rain event is the top of crossroad would erode. This photo of -- and I will give it back to you of Exhibit A.

THE COURT: Thank you.

1
2 THE WITNESS: The right side of Exhibit A,
3 you're going to see erosion and you're going to
4 see a ditch. If you had a three inch event that
5 would grow, probably close the top of that road
6 off and deposit all that down in the bottom of
7 where the town's culvert is as we see it.

8 THE COURT: You said close the top of the
9 roads off did you say?

10 THE WITNESS: Yeah, it would. It would.
11 There would be going washers, there's no water
12 bars in that photo. There's no diversion photos
13 of a check, any diversion measures of a silk or
14 sediment control. There's no indication of that
15 and you get that much rain, that road will fail.
16 Prior on the top down first.

17 THE COURT: Are you in the position to know
18 how often that can happen?

19 THE WITNESS: No way of knowing.

20 THE COURT: I didn't think so. Thank you.
21 Any more questions?

22 MR. HARP: I have some.

23 RECROSS-EXAMINATION BY MR. HARP:

24 Q. You brought up a point there that's very
25 interesting. You say that there's an 18 inch perforated

pipe underneath crossroad?

A. Yes, it is.

Q. And this was installed five to six years ago?

A. Yes, it is.

Q. Did you construct it?

A. We did.

Q. Did you get permission from the town to dig through or go underneath --

A. Yes.

Q. -- crossroad?

A. We did, we did.

Q. Do you know if a copy exists of that permission?

A. I believe it was a verbal.

Q. You -- in other words, you didn't have written permission to go in the right-of-way, dig up the road; is that correct? You dug the road or did you jack it under?

A. No, we dug the road. And I may have a copy of that, if one exists, I would have it, but I don't know that we were given a written permission other than a verbal. Same with Whalens Bay Road. Whalens Bay Road is a county road. We were given permission to dig Whalens Bay Road. It was closed -- different issue, but same time we were given permission to close Whalens Bay Road, dig Whalens Bay Road, put our pipe in and put the road

back together.

Q. You say it's a county road. Did you get oral permission there too?

A. Yes, we did, that would've been from Mr. Buck.

Q. You are aware that the Highway Department requires a written permit to go within the right-of-way of a county road, don't you?

MR. COOK: Objection, your Honor, county road is not the subject of this litigation.

THE COURT: Well, that's true, but he testified to the consent that he received with regard to a county road as an example with regard to this matter.

Are you aware or not, can you answer that question?

THE WITNESS: I wasn't aware we needed written permission other than a verbal.

MR. HARP: No further questions.

THE COURT: All right.

MR. COOK: Nothing, your Honor.

THE COURT: You may step down, thank you. Any other witnesses?

MR. COOK: I have none.

THE COURT: We're going to break for lunch,

come back at 1:00.

MR. HARP: Your Honor, can we give you some argument or not?

THE COURT: Probably do that when we get back.

MR. HARP: Oh, okay.

MR. COOK: Your Honor, I'm not sure our closing argument would be very long at all.

THE COURT: Do you want to just do it now then?

MR. COOK: I think we probably can.

THE COURT: All right, let's do it.

MR. HARP: I'll try to do it very, very briefly. Just cite you to the cases that which control the situation, the Village of Schoharie versus Coons case involved -- is a 1970 Appellate Division decision and it was affirmed by the Court of Appeals. It involved Mr. Coons blocking off some drain -- under drain off into a swampy area.

Prior to 1970, most people who worked in this area were of the view that it had to be in a swale or some other clear form of area where the water flowed. Clearly the swamp area was not

1
2 such an area, but they did demonstrate that water
3 flowed from the village drainage system out into
4 this swamp area and Mr. Coons was required to
5 restore the drainage.

6 In the case of Dutcher versus the Town of
7 Shandaken, which I was losing counsel on, my
8 client, Mr. Dutcher, placed material about 20
9 feet from the highway and away from the drainage
10 ditch which basically had been covered over by
11 plowing and other things of soil over many years,
12 but it was about 20 feet away, and the Court
13 ruled in that case that the drainage rights had
14 been established and that Mr. Dutcher had no
15 right to interfere with them, and that the
16 drainage area is part of the highway system and
17 is required to preserve the public's right of
18 passage over the highway.

19 And they certainly -- the use of drainage
20 area which Mr. Deyo clearly testified to that
21 water did flow out into the fields for many
22 years, we've established, and the town has a
23 right to have someone get their permission before
24 they interfere with any drainage, and clearly
25 Mr. Deyo testified that in a heavy rain the

1 water's going to end up back damaging crossroad.

2 When proper notices were given, the law goes
3 back, goes back into the 1800's, 319 and it was
4 clearly designed to get obstructions and
5 interferences with the proper maintenance and use
6 of a highway away, clear it out of the way very
7 rapidly.
8

9 This case has been pending since January and
10 fortunately we didn't have a very severe storm.
11 We probably won't get snow any time this summer,
12 but if this case would have dragged on, we could
13 have a problem there. The basic things that
14 we're asking for is that the drainage right be
15 re-established clearly, in other words, that
16 there be either a pipe which is A, maintained
17 that goes out into the field or that they're B,
18 restored in an open area, that the water will be
19 able to flow so that it doesn't flow across the
20 road.

21 THE COURT: Are you saying then that if they
22 were to ensure that the -- that it was left open
23 that that would be satisfactory to the town?

24 MR. HARP: They could put a pipe through
25 there to pass the water down under past the farm

1 road. The other factor is the lowering that we
2 are seeking, the lowering down of the farm roads
3 so that they are not higher than --
4

5 THE COURT: That would be a drastic remedy
6 and really should only occur after a full and
7 complete hearing.

8 MR. HARP: But right now we're very
9 concerned about heavy rains and we have not
10 experienced -- if we had experienced that
11 situation, why would the material have gone out
12 into the fields all these years when we did have
13 heavy rains?

14 So obviously the fields were used and were a
15 drainage area for umpteen years. I don't know
16 when, but it was certainly more than ten years
17 ago, and you don't normally build a road higher
18 to stop leaching or drainage, you build it so
19 that it is going down and blocking it downward.

20 We don't understand how you can possibly do
21 that. And with respect to the right-of-way,
22 there were assumptions made and that's clear that
23 the law and usage and that -- I'll take you to a
24 case relative to plowing that says the plowing
25 area is also part of the road facility so that

there's no question about that.

The case of Gray versus the Town of Oppenheim, 289 AD2d 743, was a 2001 Third Department case said that this disposition of plowed snow, et cetera, in the snow storage area are part of a highway maintenance requirement and a part of an area that's part of the highway.

So we believe that we can't endanger the People of the Town of Essex in case there is a very heavy rainstorm. There is no assurance that it's going to not cause problems relative to crossroad.

THE COURT: I appreciate what you're saying, but do we know what kind of rainstorm would be required in which there could be a problem? I mean, the proof here today doesn't indicate at what point this would become a problem, does it?

MR. HARP: Well, the only thing I can say to you, your Honor, is that in the Dutcher case, after the material was placed out into the fields there was a hurricane with about six inches of rain and the drainage facility still flushing and the Court said even that required the material to be removed from that area. So I don't know,

1
2 three inch rain, two inch rain, a five inch
3 rain --

4 THE COURT: But we're not even sure of the
5 frequency of such occurrences. And I respect
6 your point, which is the fact it could occur
7 should be sufficient for some kind of relief is
8 what you're arguing to me; is that correct?

9 MR. HARP: That's correct. But it's also
10 correct that you don't normally wait to have a
11 fire to establish a fire department, you take and
12 you look at the potential, and the potential is
13 that crossroad could be unusable or we could have
14 a disaster like they have down near Binghamton
15 where a car drove down the road, thought the road
16 was there and it wasn't there, and two little
17 children were killed.

18 We have a right and they had the obligation
19 to seek our permission to interfere with that
20 drainage area before they put it in there and
21 they were warned. They said we were aware, yes,
22 we were aware that they were putting those roads
23 in and we told them not to put them there and not
24 to block the drainage. So we request that we
25 meet I believe all the criteria relative to

issuance of a preliminary injunction.

THE COURT: Thank you. Counsel?

MR. BRENNAN: Your Honor, the town's argument seems to be predicated on numerous assumptions. Possible explanation --

THE COURT: Except for one in which your own witness testified that if we receive the equivalent to the 3 inch rainfall that that road would be flooded, wasn't that correct?

MR. BRENNAN: Well, he indicated that, Judge, but I'm not sure about his qualifications to do that.

THE COURT: And I understand that. Because that's the difficulty I'm having with the case overall. There's really been arguably very little expert testimony, if you want to call it that.

MR. BRENNAN: Your Honor, I didn't understand Mr. Deyo's argument to be precisely that. Mr. Deyo indicated the manner of maintenance of that road, et cetera, and I appreciate the Court stating what Mr. Deyo said with regard to the potential of the 3 inch rainfall. Mr. Deyo, I did not understand his

1
2 testimony to be that that was caused by the
3 construction of the farm roads.

4 He's indicated that, in fact, the town
5 itself by the manner in which it operates and
6 maintains the road has, in fact, blocked the
7 culvert. He's also testified that, in fact, that
8 the farm road as constructed is made of a
9 material --

10 THE COURT: But it appears he's blocked the
11 culvert because of the existence of the higher
12 elevated farm road.

13 MR. BRENNAN: I don't believe that's the
14 testimony, your Honor. I believe that the
15 testimony of Mr. Deyo is that at the end of the
16 culvert was blocked by the town's maintenance
17 methods, the grading, et cetera, in that area.

18 Now, obviously water, even in the photograph
19 offered by the town, shows that there is a wet
20 area where it's coming to the surface. If you'd
21 look at the various photographs, you can see that
22 there is a ditch along there and I don't think
23 it's proper to speculate as to what the total
24 rainfall that could have.

25 Yes, if you got enough rain, but the

1 situation here is that Mr. Harp cites Dutcher.
2 Dutcher is predicated on something being
3 necessary to preserve the public's right of
4 passage. That's what the essence of that
5 decision is.
6

7 Now, we've had -- there's been speculation,
8 lot of snow, more snow in prior years. There's
9 nothing here in this record to show that there
10 was any less snowfall than there normally is in a
11 year. We've had a snowfall February 14th in
12 excess of 30 inches. The testimony here is there
13 was never any blockage of that road, any
14 interference whatsoever with the right of
15 passage.

16 With regard to water passing through,
17 Mr. Deyo's testified as to the line that was
18 installed that this material that is used that is
19 permeable. It delays the passage of water
20 through it to allow it to disburse, but the farm
21 roads have been specifically constructed for the
22 purpose of letting water pass through them.
23 There is nothing to refute the fact that these
24 farm roads as constructed in this area was built
25 to the standards of the New York State Electric

and Gas --

THE COURT: Shouldn't this really be elicited through the use of expert testimony?

MR. BRENNAN: Yes, it should be, Judge, and I believe I know where the Court is going. The Court is fully aware there are three elements that must be satisfied in order for a preliminary injunction to issue. We submit that none of those three elements have been satisfied. The burden is on the town to show clear likelihood of success on the merits. The testimony of the proof they have offered we submit is insufficient to do that.

Further, they fail to satisfy the requirement of irreparable injury, and on the balancing of the equities and on the speculative nature, the proof that the town has offered here without really any evidence to substantiate the conclusions, I think that the proof has failed to justify the issuance of a preliminary injunction.

I would suggest to the Court that the Court may wish to consider an expedited scheduling in order that this matter could be finally resolved, but at this point, I submit that the proof is not

1
2 sufficient to justify the issuance of a
3 preliminary injunction.

4 THE COURT: Thank you. I've heard from
5 counsel here. I'm going to deny the request for
6 preliminary injunction, but I'm doing so largely
7 because I'm going to need expert testimony at
8 trial and quite frankly, with such testimony, I
9 may have to reconsider such relief.

10 I am concerned about what's been alleged
11 here today, but as you note, Mr. Brennan, the
12 burden is on the movant here in a number of ways,
13 and I don't think it's been established
14 sufficiently or sufficiently for me to issue such
15 drastic relief.

16 I also note that in doing so, it may entail
17 a hardship to your client, which is that these
18 roads are now constructed, now in place, and part
19 of the relief requested by the town is that those
20 roads be effected so as to allow the requested
21 snow removal in extreme cases, and perhaps even
22 to assist with the drainage which would come by
23 through the culvert, but those matters are going
24 to have to await a full trial in regard to this
25 matter. On the record before me, I cannot issue

the related relief.

I'll give you an expedited trial schedule because I assume that there's not much else to do other than to come forward at the time of trial. What date can we have?

THE CLERK: How much time do you need before the trial?

THE COURT: How much time do you want, couple months?

MR. BRENNAN: I believe a couple months would be adequate for us, your Honor.

MR. HARP: There is a deposition relative to a Notice of Claim that is in May and that's a month off already. That would mean that we wouldn't have any opportunity to do any EBTs probably.

THE COURT: I will give you whatever you want. It's your case, Mr. Harp. You want three months, you want four?

MR. HARP: Let's go four months.

MR. COOK: July, your Honor, I'm on trial.

THE COURT: How about August?

THE CLERK: August date? August 8th is your August date here.

MR. HARP: As long as we complete this
before the wintertime.

THE COURT: How about September?

THE CLERK: September 12th.

THE COURT: Mr. Brennan, you'll submit an
order in connection with this application?

MR. BRENNAN: Yes, your Honor.

THE COURT: On notice.

MR. BRENNAN: Yes, sir.

THE COURT: All right. I thank you. That
will conclude our proceedings.

MR. HARP: Do you want a note of issue
filed, your Honor?

THE COURT: Yes. I think you -- would you?
Actually, file it right after you complete your
discovery because I don't want to get here and
have that raised as a barrier to us proceeding
with our trial.

MR. HARP: Okay, thank you.

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C E R T I F I C A T I O N

I, Amie Martina, hereby certify that I
am an Official Court Reporter in the Fourth Judicial
District, State of New York;

That I reported by machine shorthand the
proceedings had in Supreme Court on the 4th day of April,
2007 before the HONORABLE MARK L. POWERS in the Matter of
TOWN OF ESSEX versus LEWIS FAMILY FARM, INC.;

And the foregoing transcript, pages numbered
2 through 95 is a true, accurate and correct record of my
machine shorthand notes.

Amie Martina
Amie Martina, RPR
Official Court Reporter
Registered Professional Reporter
Dated: May 16, 2007