

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ESSEX

TOWN OF ESSEX

and

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

-Against-

LEWIS FAMILY FARM, INC.,  
Defendant.

**SUMMONS**

INDEX # 000047-07

R.J.I.# 15-1-2007-0014

Date Purchased:

FEE WAIVED

January 7, 2007

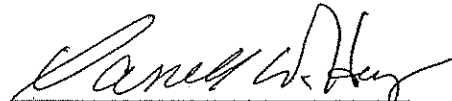
To the above-named Defendant:

**YOU ARE HEREBY SUMMONED** and required to serve upon Plaintiffs'

attorney an answer to the verified complaint in this action within 20 days after the service of this summons, exclusive of the day of service, or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken by default for the relief demanded in the complaint.

Trial is desired in the County of Essex. The basis of venue designated above is that the Plaintiffs are a municipality in the County of Essex and the Town Highway Superintendent is a Public Official of the Town of Essex.

Dated: January 12, 2007  
Clifton Park, New York



Darrell W. Harp, Esq.  
Attorney for Plaintiffs  
12 Rolling Brook Drive  
Clifton Park, New York 12065  
(518) 371-4836

DARRELL W. HARP  
ATTORNEY AT LAW  
12 ROLLING BROOK DRIVE  
CLIFTON PARK, NY 12065

**Nature of Action:**

**Request for a Preliminary Injunction**

**Request for Declaratory Rulings**

**Request for a Permanent Injunction**

**DARRELL W. HARP  
ATTORNEY AT LAW  
12 ROLLING BROOK DRIVE  
CLIFTON PARK, NY 12065**

STATE OF NEW YORK

SUPREME COURT

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and

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

LEWIS FAMILY FARM, INC.,

Defendant.

VERIFIED

COMPLAINT

INDEX # 000047-07

R.J.I.# 15-1-2006-0014

Date Purchased:

FEE WAIVED

January 17, 2007

Plaintiffs, by their attorney, Darrell W. Harp, as and for a complaint herein allege as follows that:

#### PARTIES

1. Plaintiff, TOWN OF ESSEX (hereinafter called "Town") is a municipal corporation located in the County of Essex, State of New York with offices at PO Box 355, 2313 Main Street, Essex, New York 12936.
2. Plaintiff, JAMES Z. MORGAN, Jr. (hereinafter called "Morgan" or "Town Highway Superintendent") is the Town Highway Superintendent of the Town of Essex.
3. Defendant, LEWIS FAMILY FARM, INC. is a domestic business corporation incorporated on or about September 25, 1985 with offices at 1212 Whallon's Bay Road, Essex, New York 12936.

#### BACKGROUND

4. Plaintiff Town has a Town Highway System that is maintained by the Town Highway Department under the direction and supervision of Plaintiff Morgan.
5. This public highway system is annually certified to the New York State Department of Transportation pursuant to subdivision 13 and 15 of §10 and §10-C of the Highway Law by Plaintiff Morgan.
6. Cross Road in the Town is a part of the Town Highway System and became a public highway pursuant to the provisions of §189 of the Highway Law or its prior Highway Law section.
7. A part of Cross Road lies adjacent to Defendant's property.

8. The certified width of the traveled way by Plaintiff Morgan for Cross Road is 20 feet of roadway with 5 feet of shoulders on each side.
9. At least one resident of the Town is elderly and may require emergency services at any time that would get to her via Cross Road. Thus, Cross Road must be kept opened at all time for such emergency services.
10. There is a drainage culvert that passes under Cross Road in the area adjacent to Defendant's property that has been in place for many years, far in excess of ten.
11. By law, this drainage culvert and its drainage system is a part of the public highway system of the Town.
12. Drainage has flowed from the low end of the drainage culvert onto adjacent property of Defendant for many years, far in excess of ten.
13. Thus, the Town has prescriptive easement rights to continued to have uninterrupted flow of water from the drainage culvert on to the adjacent lands.
14. If the drainage culvert is blocked, water will pool along Cross Road thereby creating dangerous conditions for the travelers using Cross Road. Thus, the drainage culvert and the flow therefrom must be kept opened at all times.
15. Upon information and belief, during 2006 Defendant blocked the drainage culvert on both ends.
16. Representatives of Defendant were warned that Defendant should not so block the drainage culvert.
17. By letter dated December 8, 2006 from Special Counsel to the Town, that was served by certified mail return receipt, Defendant was placed on Notice that blocking the drainage culvert violated §319 of the Highway Law and that Defendant must remove such highway obstructions within 48 hours of receipt of the Notice.
18. Upon information and belief, Defendant and/or its representative received the Notice on December 11, 2006.
19. More than 48 hours have passed since receipt of the Notice by Defendant and Defendant has not removed the obstructions to the drainage culvert.

20. Cross Road is elevated from the surrounding area for a large portion thereof.
21. The toe of the slopes of Cross Road along its elevated section is approximately 10 to 12 feet from the furthest outside edge of the shoulders of Cross Road.
22. During winter conditions for many years, far in excess of ten, the snow removal operations of the Town Highway Department have cast the snow up to 40 feet from the centerline of Cross Road onto the highway right of way and onto adjacent lands of Defendant.
23. Thus, by operation of law, the width of the highway use right of way use area is 80 feet relative to Plaintiff Town's snow removal operations.
24. In the winter months the availability of this 80 foot width area is absolutely necessary for proper maintenance of Cross Road, particular with respect to the snow removal and snow storage operations.
25. The area adjacent to Cross Road is used for storage of the plowed snow.
26. Storage of the plowed snow is necessary so that the snow does not drift back onto Cross Road after it has been removed therefrom.
27. Drifting snow also cause icing conditions on the public highways, including Cross Road.
28. Drifting snow will cause dangerous conditions for travelers using Cross Road.
29. Upon information and belief, during year 2006 Defendant built elevated private roadways, in part within the highway right of way use area and in part immediately adjacent to the Cross Road right of way use area.
30. Along some areas, the private roadways lie on both sides of Cross Road. As a result, Cross Road lies in a depressed area between the private roadways.
31. The portions of these private roadways within the highway right of way use area will effectively prevent the plowing and storage of snow along Cross Road.
32. Thus, this will cause dangerous conditions, including, but not limited to severe drifting of snow back onto the public highway, for travelers using Cross Road.

33. Therefore, the portions of these private roadways within the highway right of way use area must be immediately removed.
34. Further, sections of the private roadways also are approximately 6 feet above Cross Road.
35. These elevated sections of the private roadways not only seriously interfere with snow removal, they will cause snow to drift on and over Cross Road because they are at a higher elevation than Cross Road.
36. This will cause dangerous conditions for travelers using Cross Road.
37. The elevated sections portions of these private roadways that lie outside the highway right of way use area must be immediately lowered so that they are not higher than Cross Road..
38. Representatives of Defendant were warned that Defendant should not build the private roadways within the highway right of way use area and that they should not be built the private roadways at a higher elevation than Cross Road if built outside of the highway right of way use area.
39. By letter dated December 8, 2006 from Special Counsel to the Town, that was served by certified mail return receipt, Defendant was placed on Notice that the private roadways built within the highway use area violated §319 of the Highway Law and that it must remove such highway obstructions within 30 days of receipt of the Notice.
40. Upon information and belief, Defendant and/or its representative received the Notice on December 11, 2006.
41. More than 30 days have passed since receipt of the Notice by Defendant and Defendant has not removed the obstructions to the public highway.

**AS AND FOR A FIRST CAUSE OF ACTION (PRELIMINARY INJUNCTION)**

42. Plaintiffs restate and reallege the allegations set forth in paragraphs 1 through 40 above, as if the same were set forth completely herein.
43. Plaintiffs have presented sufficient law, facts and evidence in their papers that establish a likelihood of success on the merits in the action and thus satisfy the

requirement of CPLR, §6313 for the issuance of a preliminary injunction.

44. Plaintiffs must also show the prospect of irreparable injury if a provisional relief is withheld. To satisfy this additional requirement of CPLR §6313, and to demonstrate that plaintiffs are entitled to a Preliminary Injunction, plaintiffs show hereafter that the irreparable harm and/or danger to the travelers using Cross Road is immediate.
45. Cross Road must be kept opened at all times so that emergency services can reach residents of the Town who need such services.
46. The drainage culvert under Cross Road in the Town of Essex has been blocked at both ends by the activities of Defendant. Drainage can no longer flow from the highway drainage culvert as it has for many years, far in excess of 10 years.
47. Pursuant to §319 of the Highway Law these obstructions must be removed within 48 hours of receipt of the Notice to the landowner who authorized or permitted the obstructions to be placed or be maintained.
48. Defendant has received such Notice and has failed to remove the obstructions.
49. Upon information and belief, Plaintiff Town has the easement rights, through prescription, to have the uninterrupted flow of water from the drainage culvert over and through the lands of Defendant.
50. When the flow of water is blocked, it pools along the public highway which causes serious unsafe conditions to the travelers along Cross Road.
51. The drainage culvert and drainage flow area that are owned by Plaintiff Town are part of the highway right of way use area.
52. The blockage of the drainage culvert must be immediately corrected so that the travelers along Cross Road are not endangered.
53. Upon information and belief, the private roadways constructed by Defendant lie in part within the highway right of way use area of Cross Road.
54. These private roadways were constructed in part so that they are at a higher elevation than Cross Road in the Town.

55. Along some areas, these private roadways lie on both sides of Cross Road. As a result, Cross Road lies in a depressed area between the private roadways.
56. Upon information and belief, these private roadways will seriously interfere with the proper maintenance, particularly with respect to snow control activities for Cross Road in the Town by the Town Highway Department. This situation will be serious in winter months due to snow drifting conditions caused by the higher elevated private roadways that lie next to the public highway and icing conditions resulting from snow and water remaining on the public roadway when such snow and water conditions were successfully controlled by the Town Highway conditions for many years prior to the construction of the private roadways.
57. Upon information and belief, the portions of the private roadways that lie within the highway right of way, including the normal snow removal storage areas, are obstructions to the public highway within the provisions of §319 of the Highway Law.
58. These obstructions must be immediately removed so as to not endanger the travelers that use Cross Road in the Town of Essex.
59. Upon information and belief, there is no practical way to prevent the actions of the Defendant relative to blockage of the drainage culvert and maintaining obstructions within the highway right of way use area that will seriously interfere with the proper maintenance and repair of Cross Road, particularly in winter months except for the Court's issuance of a Preliminary Injunction while the matter is being considered by the Court.
60. Thus, irreparable harm to Plaintiffs and the travelers of Cross Road is immediate and irreparable harm and danger will result if not immediately corrected.
61. Thus, the requested Preliminary Injunction should be issued by the Court..

**AS AND FOR A SECOND CAUSE OF ACTION  
(DECLARATORY JUDGMENTS)**

62. Plaintiffs restate and reallege the allegations set forth in paragraphs 1 through 61 above, as if the same were set forth completely herein.
63. Plaintiffs seek Declaratory Relief, pursuant to CPLR §3001, for a Declaratory Judgment that Defendant lacks any right to built private roadways within the



highway right of way use area and/or immediately adjacent to the public highway, Cross Road, in a way that it interferes with the proper maintenance and repair of the public highway.

64. Further, Plaintiffs seek Declaratory Relief, pursuant to CPLR §3001, for a Declaratory Judgment that Defendant is responsible and liable for any damages that result from the obstructions to Cross Road set forth above until such obstructions are removed.

**AS AND FOR A THIRD CAUSE OF ACTION  
(PERMANENT INJUNCTION)**

65. Plaintiffs restate and reallege the allegations set forth in paragraphs 1 through 64 above, as if the same were set forth completely herein.
66. Defendant, its agents, representatives, and employees should be permanently enjoined from blocking the drainage culvert and the out flow thereof that exists on Cross Road.
67. Defendant, its agents, representatives, and employees should be permanently enjoined from building or maintaining private roadways within the highway right of way use area, including, but limited to, the snow removal and snow storage right of way use area.
68. Defendant, its agents, representatives, and employees should be permanently enjoined from building or maintaining private roadways adjacent to the highway right of way use area that are at a higher elevation than Cross Road.

**NOW THEREFORE**, based on all papers submitted in this matter, Plaintiffs request the Court:

1. To grant an Order to Show Cause in order to obtain expedited Court review of this urgent matter;
2. Following the Court's Hearing pursuant to the Order to Show Cause, to grant a Preliminary Injunction to compel Defendant to immediately remove all obstructions to the drainage culvert on Cross Road;
3. Following the Court's Hearing pursuant to the Order to Show Cause, to grant a

Preliminary Injunction to compel Defendant to immediately remove all private roadway materials there exist within the public highway right of way use-area;

4. Following the Court's Hearing pursuant to the Order to Show Cause, to grant a Preliminary Injunction to compel Defendant to immediately remove all portions of the private roadways that are at elevations that are highway than Cross Road;
5. To grant Plaintiffs' request for Declaratory Rulings; and
6. To grant Plaintiffs' request for a Permanent Injunction.
7. To grant to Plaintiffs such other relief as the Court deems just.

Dated: January 12, 2007  
Clifton Park, New York



DARRELL W. HARP  
Special Counsel to Plaintiffs  
12 Rolling Brook Drive  
Clifton Park, New York 12065  
Tel: (518) 371-4836

#### CERTIFICATION BY ATTORNEY

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: January 12, 2007

Signature   
Print Signer's Name: DARRELL W. HARP

# VERIFICATION

State of New York                    )  
County of Essex                    ) ss.:

The undersigned states that he is one of the Plaintiffs in the within Action; that he has read the foregoing Verified Complaint and is familiar with the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

The undersigned affirms that the foregoing statement is true, under the penalties of perjury.

  
JAMES Z. MORGAN, Jr.

Duly sworn to before me this  
12<sup>th</sup> day of January, 2007.

  
NOTARY PUBLIC

**LOIS A. SAYWARD**  
NOTARY PUBLIC, STATE OF NEW YORK  
REG. NO. 4953812  
QUALIFIED IN ESSEX COUNTY  
MY COMM. EXPIRES 7/31/09

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ESSEX

TOWN OF ESSEX

and

JAMES Z. MORGAN, Jr., as Superintendent

of Highways of the Town of Essex,

Plaintiffs,

-Against-

LEWIS FAMILY FARM, INC.,

Defendant.

**AFFIDAVIT**

INDEX # 000047-07

R.J.I.# 15-1-2007-0014

Date Purchased:

FEE WAIVED

January 17, 2007

STATE OF NEW YORK )

) ss.:

COUNTY OF ESSEX )

**JAMES Z. MORGAN, Jr.**, being duly sworn, depose and say that:

1. I am a Plaintiff in the subject action and I am the duly elected Town Highway Superintendent for the Town of Essex.
2. I have been the Town Highway Superintendent for the Town of Essex for more than 15 years.
3. I offer this Affidavit to the Court in support of Plaintiffs' request for an Order to Show Cause and Plaintiffs' request for a Preliminary Injunction and in support of Plaintiffs' Verified Complaint in the subject action.
4. I annually certify the lengths and widths of the traveled portion of the Town Highways to the New York State Department of Transportation pursuant to subdivision 13 and 15 of §10 and §10-C of the Highway Law.<sup>1</sup>

<sup>1</sup> See Attachment "A" for a copy of the 2006 Certification.

5. Cross Road is a Town Highway. It appears on the Certification with a traveled width of 20 feet and 5 foot shoulders on either side.
6. Upon information and belief, Cross Road became a public highway pursuant to the provisions of §189 of the Highway Law or its prior Highway Law section.
7. The total width of the public highway right of way use area for Cross Road is approximately 80 feet, which width area includes the area that snow is cast by the removal operations and snow storage areas.
8. There is a drainage culvert that passes under Cross Road in the area of Defendant's property that has been in place for far in excess of ten years.
9. Upon information and belief, this drainage culvert and the drainage therefrom is a part of the public highway system of the Town.
10. Drainage has flowed from the low end of the drainage culvert onto adjacent property of Defendant for far in excess of ten years.
11. Upon information and belief, the Town has prescriptive easement rights to continued to have uninterrupted flow of water from the drainage culvert on to adjacent lands of Defendant.
12. From my experience as a Town Highway Superintendent, if the drainage culvert is blocked, water will pool along the public highway thereby creating dangerous conditions for the travelers using Cross Road. Thus, the drainage culvert and the flow therefrom must be kept opened at all times.

13. Upon information and belief, during 2006 Defendant blocked the drainage culvert on both ends.
14. Representatives of Defendant were warned by me that Defendant should not block the drainage culvert.
15. By letter dated December 8, 2006, from Special Counsel to the Town, Defendant was placed on Notice that blocking the drainage culvert violated §319 of the Highway Law and that Defendant must remove such highway obstructions within 48 hours of receipt of the Notice.
16. Upon information and belief, Defendant and/or its representative received the Notice on December 11, 2006.
17. More than 48 hours have passed since receipt of the Notice by Defendant and Defendant has not removed the obstructions to the drainage culvert.
18. Cross Road is elevated from the surrounding area for a large portion thereof as it passes through the lands of Defendant.
19. The toe of the slopes of Cross Road along its elevated sections are approximately 10 to 12 feet from the furthest outside edge of the shoulders of Cross Road.
20. During winter conditions for far in excess of ten, the snow removal operations of the Town Highway Department have cast the snow up to 40 feet from the centerline of Cross Road onto the highway right of way and onto adjacent lands.
21. In the winter months, the availability of the 80 foot wide area is absolutely

necessary for proper maintenance of Cross Road, particular with respect to the snow removal and storage operations.

22. The area adjacent to Cross Road is used for storage of the plowed snow and has been so used for many years.
23. Storage of the plowed snow is necessary so that the snow does not drift back onto Cross Road after it has been once removed therefrom.
24. Drifting snow from elevated terrain areas also cause icing conditions on the public highways, including Cross Road.
25. Drifting snow will cause dangerous conditions for travelers using Cross Road.
26. Upon information and belief, during year 2006 Defendant built elevated private roadways, in part within the highway right of way use area and in part immediately adjacent to the Cross Road right of way use area.<sup>2</sup>
27. Along some areas, the private roadways lie on both sides of Cross Road. As a result, Cross Road lies in a depressed area between the private roadways.<sup>3</sup>
28. The portions of these private roadways within the highway right of way use area will effectively prevent the plowing and storage of snow along Cross Road.
29. This will cause dangerous conditions for travelers using Cross Road.
30. The portions of these private roadways which are obstructions within the highway

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<sup>2</sup> Attachment "B" shows the elevated private roadways in relation to Cross Road.


<sup>3</sup> Attachment "C" shows the elevated private roadway on one side of Cross and the start of construction of another private roadway on the other side of Cross Road.

Defendant has not removed these obstructions to the public highway.

39. The above obstructions to the proper use and maintenance of Cross Road create extremely dangerous conditions for the travelers using Cross Road and pose a danger to persons who depend on Cross Road in emergency situations. Therefore, the obstructions must be immediately removed.

**THEREFORE**, I request that the Court grant the requested Order to Show Cause and that a Preliminary Injunction be granted to the Town so that the immanent dangers from the obstructions can be reduced.

Dated: January 12, 2007

  
JAMES Z. MORGAN, Jr.

STATE OF NEW YORK                    )  
COUNTY OF ESSEX                    ) ss.

On this 12<sup>th</sup> day of January, 2007 before me, the undersigned, a Notary Public in and for said State, personally appeared, JAMES Z. MORGAN, Jr., personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is subscribed to the within instrument and acknowledged to me that (s)he executed the same in his/her capacity, and that by his/her signature on the instrument the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

  
NOTARY PUBLIC

LOIS A. SAYWARD  
NOTARY PUBLIC, STATE OF NEW YORK  
REG. NO. 4953812  
QUALIFIED IN ESSEX COUNTY  
MY COMM. EXPIRES 7/31/09