

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,

- vs -

LEWIS FAMILY FARM, INC.,

Defendant.

**SURREPLY
AFFIRMATION**

Index No. 000047-07

DAVID L. COOK, ESQ., an attorney being duly licensed to practice before the Courts of the State of New York, pursuant to N.Y. C.P.L.R. § 2106 (McKinney 2006), hereby affirms under the penalty of perjury that the following is true.

1. I am co-counsel for Defendant Lewis Family Farm, Inc. (Lewis Family Farm). I am familiar with this matter and offer this Surreply Affirmation in further opposition to Plaintiffs' request for a preliminary injunction. This Surreply Affirmation is submitted in conjunction with, and in reliance upon, the accompanying Affidavit of Fred Watrous and Surreply Memorandum of Law.
2. Lewis Family Farm owns and operates an organic farm (the "Farm") located in the Town of Essex, County of Essex, State of New York.
3. Portions of the Farm are adjacent to Cross Road, an unpaved public highway created under N.Y. High. Law § 189. Cross Road is located in the Town, and measures twenty feet wide, and has five foot shoulders.
4. Lewis Family Farm has converted portions of the Farm into protective roads (the "Farm Roads") in an effort to protect the Farm's soil from the Wollastonite rich mine tailings that the Town spreads on Cross Road.

5. The width of an easement created under N.Y. High. Law § 189 is limited to the actual width of the road and any accompanying improvements. *Schillawski v. New York*, 9 N.Y.2d 235, 238 (1961) ("Where a road has obtained its character as a public highway by user, its width is determined by the width of the improvement."); *In re Matter of Robert Danial*, 185 A.D.2d 500, 502-03 (3d Dep't 1992) (holding that the width of a § 189 easement is limited to the actual width of the road).
6. The width of the Cross Road easement is thirty feet, the actual width of the road plus improvements (i.e., shoulders).
7. The Farm Roads lie at least twenty-seven feet from the center of Cross Road, whereas the Cross Road easement only extends fifteen feet from the center of Cross Road. Therefore, the Farm Roads do not lie within the Cross Road easement.
8. Cross Road is oftentimes completely closed in the winter. (Watrous Aff. ¶ 4.)
9. Historically, the Town has used an eighteen foot plow width when plowing Cross Road, leaving a total of eighteen feet for snow storage. (Watrous Aff. ¶ 6.)
10. The Town has not had difficulty storing snow in this area in the past, and has offered nothing to support a claim that it has such difficulty now. (Watrous Aff. ¶¶ 6, 9-10.)
11. The elevation of the Farm Roads is not significantly different than other properties that are adjacent to Cross Road. In some instances, the elevation of properties adjacent to Cross Road is higher than those of the Farm Roads. (Watrous Aff. ¶ 12.)
12. Plaintiffs have no basis to claim that the Cross Road easement extends eighty feet when the actual width of Cross Road is only thirty feet, including shoulders.
13. Lewis Family Farm has taken every care to ensure that the Cross Road culvert drains properly.

14. A twelve foot buffer was left between the end of the Cross Road easement and the Farm Roads. (Deyo Aff. ¶ 12.)
15. The Cross Road culvert was maintained and protected by Lewis Family Farm during the construction of the Farm Roads. (Deyo Aff. ¶ 16.)
16. The Farm Roads were constructed in such a way as to ensure that drainage from the Cross Road culvert is absorbed into the Farm Roads, rather than the Farm itself. (Deyo Aff. ¶ 9.)
17. Any blockage of the Cross Road culvert has been caused by the Town's failure to maintain the culvert. (Deyo Aff. ¶ 17.)
18. Due to the Town's continued use of Wollastonite rich mine tailings on Cross Road, the Cross Road culvert is approximately one-half full of Wollastonite.
19. The sole injury claimed by Plaintiffs is the prospect that Carole Anne Slatkin, an elderly woman living in the only house on Cross Road, could be denied access to emergency services if the Farm Roads are not immediately removed.
20. The Farm Roads do not pose a danger to Ms. Slatkin because they do not impede the removal and storage of snow on Cross Road. (Deyo Aff. ¶ 14; Egglesfield Aff. ¶¶ 8-9; Pratt Aff. ¶¶ 9-13; Turco Aff. ¶ 25; Watrous Aff. ¶¶ 6, 9-10.)
21. The Farm Roads lie completely outside the Cross Road easement and are at least twelve feet away from the shoulders of Cross Road. (Deyo Aff. ¶ 12).
22. The only equitable consideration that Plaintiffs claim in their favor is the incorrectly perceived danger that the Farm Roads pose to Ms. Slatkin. However, the Farm Roads do not pose a threat to Ms. Slatkin, and there are no equitable considerations in favor of Plaintiffs.
23. All equitable considerations favor Lewis Family Farm.

24. The Farm Roads have been constructed, at a cost in excess of \$1,000,000, for the sole purpose of protecting the Farm from the damaging effects of the Wollastonite rich mine tailings that the Town spreads on Cross Road.

25. Removal of the Farm Roads will threaten the very existence of Lewis Family Farm. Absent the protection provided by the Farm Roads, the Farm's organic certification will be in jeopardy.

26. The Farm Roads have been constructed entirely within the private property of Lewis Family Farm, do not lie within the Cross Road easement, and in no way prevent the Town from removing and storing snow on Cross Road.

27. A preliminary injunction requiring Lewis Family Farm to remove the Farm Roads has the potential to ruin Lewis Family Farm, while continued use of the Farm Roads poses no threat of injury to Plaintiffs or Ms. Slatkin, and should therefore be denied.

Dated: February 14, 2007

NIXON PEABODY LLP

By:


David L. Cook

Attorneys for Lewis Family Farm, Inc.
Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(585) 263-1000