

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  
MEMORANDUM OF  
LAW IN OPPOSITION  
TO PLAINTIFFS'  
ORDER TO SHOW  
CAUSE**

Index No. 000047-07

Defendant Lewis Family Farm, Inc. ("Lewis Family Farm") respectfully submits this Surreply Memorandum of Law, along with the accompanying Affidavit of Fred Watrous and Affirmation of David Cook, in further opposition to the Order to Show Cause filed by Plaintiffs Town of Essex (the "Town") and James Z. Morgan, Jr. Lewis Family Farm owns and operates an organic farm (the "Farm") located in the Town of Essex, County of Essex, State of New York. Due to damages the Farm sustained from the Town's use of Wollastonite rich mine tailings on Cross Road, Lewis Family Farm converted portions of the Farm into protective roads (the "Farm Roads"). The Farm Roads serve as buffers between Cross Road and the Farm. While the Farm Roads lie entirely within the private property of Lewis Family Farm, and do not lie within the Cross Road easement, Plaintiffs now seek a preliminary injunction requiring Lewis Family Farm to remove the Farm Roads.

**I. PLAINTIFFS CANNOT SUCCEED ON THE MERITS BECAUSE THE FARM  
ROADS DO NOT LIE WITHIN THE CROSS ROAD EASEMENT**

Plaintiffs continue to confuse the legal standards regarding the width of a public highway easement created under N.Y. High. Law § 189, and the permitted uses of such an easement. The width of a § 189 easement 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). Conversely, the permitted uses of a § 189 easement are limited to those uses that "appertain directly or indirectly to the right of passage and tend in some way to preserve or make more easy the exercise of such right." *Thompson v. Orange & Rockland Elec. Co.*, 254 N.Y. 366, 369 (1930). Here, 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.

In reaching the erroneous conclusion that the permitted uses of a § 189 easement determine the width of the easement, Plaintiffs rely on *Dutcher v. Town of Shandaken*, 23 A.D.3d 781 (3d Dep't 2005); and *Nikiel v. City of Buffalo*, 7 Misc. 2d 667 (S. Ct. Erie County 1957). Plaintiffs' interpretation of *Dutcher* is misplaced because the court in *Dutcher* actually followed, and cited to, the rule established in *Schillawski* when it limited the width of a § 189 easement to the actual width of the road plus accompanying improvements. *Dutcher*, 23 A.D.3d at 782 (holding that a § 189 easement included a newly installed guard rail because the guard rail was closer to the center of the road than other prior improvements).

Plaintiffs' reliance on *Nikiel* is also misplaced. In *Nikiel* the Erie County Supreme Court addressed the width of the § 189 easement for Dorrance Avenue in the City of Buffalo. *Nikiel*, 7 Misc. 2d at 668. Half of Dorrance Avenue lies in the City of Buffalo, and the other half lies in the City of Lackawanna. *Id.* at 669. The portion of Dorrance Avenue within the City of Buffalo was generally fifty feet wide, including the sidewalk. *Id.* at 671. However, the portion of

Dorrance Avenue in question was only twenty feet wide, and had no sidewalk, despite the fact that it was originally surveyed and mapped to be fifty feet wide. *Id.* at 669. The Erie County Supreme Court held that the Dorrrance Avenue easement was fifty wide throughout the City of Buffalo. *Id.* at 671. In reaching its decision, the court stated that while the width of a § 189 easement is generally limited to the actual width of the road; it also includes "the usual width of the highway in the locality." *Id.* at 670. In the case of Dorrrance Avenue, its usual width was fifty feet, not twenty. *Id.* at 671. Likewise, the Dorrrance Avenue easement included the right to extend the sidewalk because it was "reasonably necessary for the safety of the traveling public." *Id.* at 670.

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. (Compl. ¶ 8.) Historically, Cross Road has only been plowed to a width of eighteen feet. (Watrous Aff. ¶ 6.) The remaining twelve feet of the Cross Road easement that is not plowed has been room enough for snow storage in the past, and Plaintiffs give no reason why it is not so now. (Watrous Aff. ¶ 6, 9-10.) The Town has never had difficulty plowing and storing snow within the thirty foot Cross Road easement, and fails to allege otherwise. (Watrous Aff. ¶ 9-10.) With the addition of the twelve foot buffers left between the Farm Roads and the shoulders of Cross Road, the Town cannot reasonably claim that there is insufficient room for snow removal and storage on Cross Road. Therefore, Plaintiffs cannot show that the Farm Roads lie within the Cross Road Easement.

## **II. PLAINTIFFS CANNOT SUCCEED ON THE MERITS BECAUSE THE FARM ROADS DO NOT BLOCK THE CROSS ROAD CULVERT**

Lewis Family Farm has taken every care to ensure that the Cross Road culvert drains properly. First, a twelve foot buffer was left between the end of the Cross Road easement and

the Farm Roads. (Deyo Aff. ¶ 12.) Second, the Cross Road culvert was maintained and protected by Lewis Family Farm during the construction of the Farm Roads. (Deyo Aff. ¶ 16.) Third, Lewis Family Farm constructed the Farm Roads to with rock that drains exceptionally well. This rock, combined with the size of the Farm Roads, ensures that drainage from the Cross Road culvert is absorbed into the Farm Roads, rather than the Farm itself. (Deyo Aff. ¶ 9.) Any blockage of the Cross Road culvert has been caused by the Town's failure to maintain the culvert. (Deyo Aff. ¶ 17.) 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. Therefore Plaintiffs cannot show that Lewis Family Farm has blocked the Cross Road culvert.

### **III. THE FARM ROADS DO NOT INJURE PLAINTIFFS**

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. As stated above, 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.) 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). Given the fact that the Town only uses a plow width of eighteen feet on Cross Road, there is at least eighteen feet on which the Town can store snow. (Watrous Aff. ¶ 6.) In addition, Cross Road is oftentimes completely closed in the winter (Watrous Aff. ¶ 4) due to the Town's failure to adequately maintain the road. It is unreasonable for the Plaintiffs to assert that the Farm Roads, which in no way impact snow removal/storage on Cross Road, threaten Ms. Slatkin's safety. Therefore, Plaintiffs cannot show an immediate and irreparable injury.

#### IV. THE EQUITIES FAVOR LEWIS FAMILY FARM

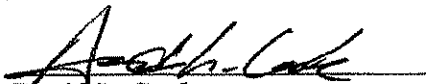
The only equitable consideration that Plaintiffs claim in their favor is the incorrectly perceived danger that the Farm Roads pose to Ms. Slatkin. As shown above, the Farm Roads do not pose a threat to Ms. Slatkin, and there are no equitable considerations in favor of Plaintiffs. All equitable considerations favor Lewis Family Farm. 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 that the Town spreads on Cross Road. Removal of the Farm Roads would threaten the very existence of Lewis Family Farm. Absent the protection provided by the Farm Roads, the Farm's organic certification would be in jeopardy. Furthermore, 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. 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.

#### CONCLUSION

For all the foregoing reasons, Lewis Family Farm respectfully submits that this Court deny Plaintiffs' order to show cause why a preliminary injunction should not be granted.

Dated: February 14, 2007

NIXON PEABODY LLP

By:   
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