

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.

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 my affirmation in opposition to Plaintiffs' request for a preliminary injunction. In addition to this Affirmation, photographs of Cross Road are attached as Exhibit A. This affirmation is submitted in reliance upon and with the Affidavits of Todd Deyo, Dennis Eggesfield, Michael Pratt, and Marco Turco.
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. For several years, Plaintiff Town of Essex (the "Town") has spread mine tailings on Cross Road that contain the mineral Wollastonite. As a result, Wollastonite has leached into the Farm's soil.

5. Wollastonite has severely damaged the Farm's soil and crop production by tying up desirable minerals, raising soil pH, and reducing plant absorption of essential nutrients.
6. A substantial amount of Wollastonite has leached into the Farm's Soil, damaging the Farm and threatening its status as a certified organic farm under the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6522 (2000).
7. Due to the damages the Farm sustained from Wollastonite that leached into the Farm's soil, Lewis Family Farm asked the Town to stop spreading Wollastonite rich mine tailings on Cross Road. The Town refused to do so.
8. Lewis Family Farm has converted portions of the Farm into protective roads (the "Farm Roads") that serve as buffers between Cross Road and the Farm.
9. Lewis Family Farm constructed approximately ten miles of Farm Roads at a cost of more than \$1,000,000.
10. The Farm Roads were built to exacting professional standards that exceed those used by the Town.
11. During the construction of the Farm Roads, the culvert was maintained and protected, and in no way was the culvert blocked or disabled. Since then, the Town has not properly maintained the culvert. Currently, the culvert is approximately one-half full of Wollastonite that has been spread on Cross Road by the Town. When allowed to sit in the culvert, Wollastonite sets up similar to concrete. Therefore, any blockage of the culvert is the direct result of the Town's use of Wollastonite on Cross Road and its failure to maintain the culvert.
12. The Farm Roads lie entirely within the private property of Lewis Family Farm, and do not lie within the Cross Road right-of-way.

13. While the Farm Roads run parallel to Cross Road, they do not lie within the Cross Road right-of-way. The Farm Roads lie entirely within the private property of Lewis Family Farm, some twelve feet from the shoulders of Cross Road.
14. The Farm Roads do not impede the removal of snow from Cross Road. They are far enough back from Cross Road that there is seventeen feet of space on each side of Cross Road for snow storage.
15. The elevation of the Farm Roads is generally similar to the other private property adjacent to Cross Road. See Exhibit A. In Exhibit A, photos A-1, A-2, A-4, A-5, A-6, and A-7 show the natural elevations of private property adjacent to Cross Road; whereas Photo A-3 shows the elevation of the Farm Roads. The Elevation of the Farms Roads is generally similar to the elevation of other private property adjacent to Cross Road.
16. The elevation of the Farm Roads is such that the Farm Roads act as a natural snow fence for Cross Road.
17. Plaintiffs have made no showing that they are unable to remove snow from Cross Road.
18. Plaintiffs are not entitled to a preliminary injunction because the Farm Roads do not lie within the Cross Road right-of-way.
19. The Town is only entitled to exercise rights in the Cross Road right-of-way, not the surrounding property. *Thompson v. Orange & Rockland Elec. Co.*, 254 N.Y. 366, 369 (1930).
20. The boundary of the Cross Road right-of-way is limited to the actual width of Cross Road (twenty feet) and it accompanying improvements (five foot shoulders). *Schillawski v. New York*, 9 N.Y.2d 235, 238 (1961).
21. The Farm Roads lie outside the thirty foot wide Cross Road right-of-way.

22. Plaintiffs are not entitled to a preliminary injunction because continued use of the Farm Roads will not cause Plaintiffs irreparable injury.

23. The sole injury alleged by Plaintiffs is that continued use of the Farm Roads could prevent the Town from removing snow from Cross Road, thus creating the possibility that a citizen could be denied access to emergency services. Plaintiffs have made no showing that there is insufficient room to remove snow from Cross Road.

24. Each side of Cross Road has seventeen feet of space where snow can be stored (five foot shoulder plus twelve foot buffer zone). Plaintiffs have failed to allege or show that seventeen feet is insufficient space to store snow.

25. Plaintiffs are not entitled to preliminary injunction because a denial of their request will cause Plaintiffs no injury, whereas a grant of preliminary injunction against Lewis Family Farm has the potential to put Lewis Family Farm out of business.

WHEREFORE, on behalf of Defendant, I request that the Court deny Plaintiffs request for a preliminary injunction.

Dated: February 9, 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

EXHIBIT A













