

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.

**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 Memorandum of Law in opposition to the Order to Show Cause filed by Plaintiffs Town of Essex (the "Town") and James Z. Morgan, Jr. In opposition to the Order to Show Cause, Lewis Family Farm relies on the Affidavits of Todd Deyo, Dennis Eggesfield, Michael Pratt, and Marco Turco, the Affirmation of David Cook, Esq., and this Memorandum of Law.

SUMMARY OF THE CASE

Lewis Family Farm owns and operates an organic farm (the "Farm") located in the Town of Essex, County of Essex, State of New York. Portions of the Farm are adjacent to Cross Road. For several years, 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. 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.

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. Unfortunately, the Town refused to do so. This forced Lewis Family Farm to convert portions of the Farm into protective roads (the "Farm Roads") that serve as buffers

between Cross Road and the Farm. After notifying the Town of its intention to do so, Lewis Family Farm built the Farm Roads at great expense. While the Farm Roads lie entirely within the private property of Lewis Family Farm, and do not lie within the Cross Road right-of-way, Plaintiffs now seek a preliminary injunction requiring Lewis Family Farm to remove the Farm Roads.

FACTS

Cross Road became a public road pursuant to N.Y. High. Law § 189 (McKinney 2006), and is located in the Town of Essex, County of Essex, State of New York. (Compl. ¶ 6.) Cross Road is twenty feet wide and has five foot shoulders, for a combined road width of thirty feet. (Compl. ¶ 8.) The Town is responsible for the maintenance and upkeep of all roads within its highway system, including Cross Road. (Compl. ¶ 4.) Pursuant to this responsibility, the Town removes snow from its highway system during the winter months. In doing so, the Town uses a variety of snow removal methods, including snow plows, a front-end loader, a street grader, and snow fences. (Pratt Aff. ¶ 10.) The Town regularly uses these various snow removal methods, and buys and maintains the necessary equipment to do so. (Pratt Aff. ¶ 11.)

For several years, the Town has spread mine tailings on Cross Road that contain the mineral Wollastonite (i.e., Calcium Silicate). (Turco Aff. ¶ 6.) Wollastonite is a mining byproduct, has a high pH, and contains calcium, sodium, and other elements. (Turco Aff. ¶ 7.) Because of its properties, Wollastonite damages agricultural soil and crop production by tying up desirable minerals, raising the pH of soil that it contacts, and reducing plant absorption of essential nutrients. (Turco Aff. ¶ 8.) A substantial amount of Wollastonite has leached into the Farms 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). (Turco Aff. ¶ 11.)

After unsuccessfully petitioning the Town to stop spreading Wollastonite rich mine tailings on Cross Road, Lewis Family Farm decided to build protective roads on the Farm. (Turco Aff. ¶ 13.) After notifying the Town of its plan, Lewis Family Farm constructed approximately ten miles of Farm Roads at a cost of more than \$1,000,000. (Turco Aff. ¶ 16.) The Farm Roads reduce the amount of Wollastonite that leaches into the Farm's soil by creating a buffer between Cross Road and the arable portions of the Farm. The Farm Roads were built to exacting professional standards that exceed those used by the Town. (Deyo Aff. ¶ 8.) The rock used in the construction of the Farm Roads was selected in part because it drains exceptionally well, thus further facilitating drainage away from Cross Road. (Turco Aff. ¶ 21.)

During the construction of the Farm Roads, the culvert under Cross Road was maintained and protected, and in no way was the culvert blocked or disabled. (Deyo Aff. ¶ 14.) Currently, the culvert is approximately one-half full of Wollastonite that has been spread on Cross Road by the Town. (Deyo Aff. ¶ 18.) When allowed to sit in the culvert, Wollastonite sets up similar to concrete. (Deyo Aff. ¶ 19.) 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.

While the Farm Roads run parallel to Cross Road, they do not lie within the Cross Road right-of-way. (Deyo Aff. ¶ 11.) The Farm Roads lie entirely within the private property of Lewis Family Farm, some twelve feet from the shoulders of Cross Road. (Deyo Aff. ¶ 10.) In order to reduce the amount of Wollastonite leaching into the Farm's soil, the Farm Roads are elevated above Cross Road. The elevation of the Farm Roads, however, is generally similar to the elevation of other private property adjacent to Cross Road. (Deyo Aff. ¶ 13.) In fact, the elevation of the Farm Roads is such that they act as a natural snow fence for Cross Road. (Turco Aff. ¶ 24.) Therefore, the Farm Roads do not impede snow removal because they are not within

the Cross Road right-of-way, are not more elevated than other private property adjacent to Cross Road, and act as natural snow fences. (Deyo Aff. ¶¶ 13-14; Turco Aff. ¶ 24.)

Plaintiffs erroneously seek preliminary injunctive relief against Lewis Family Farm on the grounds that the Farm Roads have blocked the culvert under Cross Road and made it impossible to remove snow from Cross Road. (Compl. ¶¶ 42-61.) Specifically, Plaintiffs want this Court to order Lewis Family Farm to remove the Farm Roads. Plaintiffs' request for preliminary injunctive relief fails because Plaintiffs have no right to restrict Lewis Family Farm's use of its property that lies outside the Cross Road right-of-way, continued use of the Farm Roads will not injure Plaintiffs, and removal of the Farm Roads would severely damage Lewis Family Farm.

ARGUMENT

A preliminary injunction is a drastic remedy that "prevents the litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits." *Uniformed Firefighters Ass'n of Greater N.Y. v. City of N.Y.*, 49 N.Y.2d 236, 241 (1992) (emphasis removed). For this reason, preliminary injunctive relief is only granted upon a showing of: (1) a probability of success on the merits, (2) the danger of immediate and irreparable injury, and (3) a balance of equities in favor of the requesting party. *See, e.g., Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990). As shown below, a preliminary injunction should not be granted here because Plaintiffs are unlikely to succeed on the merits, Plaintiffs are not in danger of suffering an immediate and irreparable injury, and the equities favor Lewis Family Farm.

I. PLAINTIFFS CANNOT SUCCEED ON THE MERITS BECAUSE THE FARM ROADS DO NOT LIE WITHIN THE CROSS ROAD RIGHT-OF-WAY

To obtain injunctive relief, Plaintiffs must make a prima facie showing that Lewis Family Farm has built the Farm Roads within the Cross Road right-of-way. A Town is only entitled to exercise rights in the land over which it holds a right-of-way. *Thompson v. Orange & Rockland Elec. Co.*, 254 N.Y. 366, 369 (1930) (holding that when a highway right-of-way is taken by use, the rights pursuant to the right-of-way may only be imposed upon the right-of-way). The boundary of a highway right-of-way taken pursuant to N.Y. High. Law. § 189, such as Cross Road, is limited to the 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 town road is limited to its actual width). Therefore, as alleged by Plaintiffs, the Cross Road right-of-way is only thirty feet wide (twenty feet of road plus ten feet of shoulder). The Cross Road right-of-way does not include the Farm Roads because they lie more than twelve feet outside the thirty foot Cross Road right-of-way.

Plaintiffs misstate the law when they claim that the uses permitted within a highway right-of-way determine its width. In *Ferguson v. Producers Gas Co.*, 286 A.D. 521 (4th Dep't 1955), the court addressed the issue of whether a land owner is entitled to additional compensation when a piece of his property, which has become a public highway pursuant to N.Y. High. Law § 189, is used for purposes that do not directly relate to the public's right of passage over his property. The court held that a right-of-way taken pursuant to N.Y. High. Law § 189 can only be used "for such uses as 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." *Id.* at 523. The

court in *Ferguson* never addressed, much less ruled upon what determines the width of a highway right-of-way. New York courts have clearly held that the width of a highway right-of-way taken pursuant to N.Y. High. Law § 189 is limited to the actual width of the road and any accompanying improvements. *Schillawski*, 9 N.Y.2d at 238; *In re Danial*, 185 A.D.2d at 502-03. Therefore, Plaintiffs cannot show a likelihood of success on the merits because they have no interest in the Farm Roads as they lie outside the Cross Road right-of-way.

II. ANY INJURY THAT PLAINTIFFS COULD SUSTAIN AS A RESULT OF LEWIS FAMILY FARM'S USE OF THE FARM ROADS CAN BE ADEQUATELY COMPENSATED FOR BY AN AWARD OF MONEY DAMAGES

Preliminary injunctive relief is inappropriate because Plaintiffs cannot show that the Lewis Family Farm's continued use of the Farm Roads will cause Plaintiffs irreparable injury. *See Aetna*, 75 N.Y.2d at 862. An injury is only irreparable when it is imminent and cannot be adequately compensated for by an award of money damages. *See Dhillon v. HealthNow N.Y., Inc.*, 32 A.D.3d 1197, 1198 (4th Dep't 2006); *39 College Point Corp. v. Transpac Capital Corp.*, 12 A.D.3d 664, 665 (2d Dep't 2004). The only injury alleged by Plaintiffs is the possibility of a citizen being denied emergency services because the Town is unable to remove snow from Cross Road on account of the Farm Roads. However, Plaintiffs have failed to show, and cannot show, that there is insufficient room on Cross Road for snow removal. Between the shoulders and the built in buffer zone left by Lewis Family Farm, there are seventeen feet on each side of Cross Road that can be used for snow storage. Plaintiffs have failed to allege that seventeen feet is insufficient space, and cannot show irreparable injury. Not only have Plaintiffs failed to allege an irreparable injury, they have failed to allege any injury that could not be compensated for by an award of money damages.

III. THE EQUITIES FAVOR LEWIS FAMILY FARM

Lewis Family Farm constructed the Farm Roads to prevent the destruction of the Farm's soil by the Wollastonite rich mine tailings that the Town continues to spread 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. Lewis Family Farm has constructed the Farm Roads at a cost in excess of \$1,000,000. The Farm Roads have been constructed entirely within the private property of Lewis Family Farm, do not lie within the Cross Road right-of-way, have been constructed to the highest professional standards, and in no way prevent the Town from removing snow from Cross Road. A preliminary injunction requiring Lewis Family Farm to remove the Farm Roads has the potential to ruin Lewis Family Farm.

Conversely, Plaintiffs will not be adversely affected if this Court refuses to grant injunctive relief. Snow removal on Cross Road is not adversely impacted by the Farm Roads. There is a twelve foot buffer between the Farm Roads and the shoulder of Cross Road, ample and sufficient room for the removal and storage of snow. Even assuming that an abnormal amount of snowfall made it difficult to store snow on the twelve foot buffer, the Town has various other methods of removing snow, including a front end loader, which it currently uses on other Town roads. Similarly, the elevation of the Farm Roads is substantially similar to that of surrounding properties that are adjacent to Cross Road. Other Town roads are similar to Cross Road, and seem to present no difficulty to the Town when it comes to snow removal. The Town has no right to restrict Lewis Family Farm's right to use its private property lying outside the Cross Road right-of-way. The Town will suffer no additional expense by removing snow from Cross Road as it does every other road in the Town.

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 9, 2007

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**AFFIDAVIT OF
SERVICE**

Index No. 000047-07

STATE OF NEW YORK)
COUNTY OF MONROE) ss:


MARY ELLEN WELCH, being duly sworn, deposes and says:

1. I am over the age of eighteen and am employed by Nixon Peabody LLP, the attorneys for the Defendant in this action.

2. On the 9th day of February, 2007, I personally served a copy of Defendant's reply papers, including but not limited to the Affirmation of David L. Cook, Esq. and the Memorandum of Law by transmitting the papers via facsimile transmission to:

Darrell W. Harp, Esq.
12 Rolling Brook Drive
Clifton Park, New York 12065
Fax No. (518) 371-9292

3. I received a signal from the electronic equipment of the attorney served indicating that the transmission was completed.


Mary Ellen Welch

Sworn to before me this

9th day of February, 2007.



Notary Public RENE E. A. CASE
10305852.1 Notary Public, State of New York
Reg. No. 01CA4941038
Qualified in Monroe County
Certificate Filed in Monroe County
Commission Expires: 8/15/2012