

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.

**REPLY
AFFIRMATION**

INDEX # 000047-07

R.J.I.# 15-1-07-0014

Date Purchased:

January 17, 2007

Assigned Judge:

Hon. Mark I. Powers, J.S.C.

STATE OF NEW YORK)

) ss.:

COUNTY OF SARATOGA)

DARRELL W. HARP, ESQ., an attorney being duly licensed to practice before the Courts of the State of New York, pursuant to CPLR §2106, hereby affirms under the penalty of perjury that the following is true.

1. I offer this Affirmation to the Court in reply opposition to Defendant's papers submitted in the Matter and in support of Plaintiffs' request for a Preliminary Injunction to be issued as quickly as possible.
2. I am fully aware of the situation of the obstructions being placed on the right of way of Cross Road in the Town of Essex. I am an experienced attorney dealing with highway right of way and highway drainage situations. Thus, I am in the best position to make this Reply Affirmation in the Matter.
3. An Order to Show Cause was issued in the Matter by the Hon. James P. Dawson, J.S.C. on January 18th, 2007 to be returned February 16th, 2007 without oral argument before the Supreme Court, County of Essex in Elizabethtown, New

York.. The Matter was thereafter assigned to the Hon. Mark I. Powers, J.S.C. and the return date of the Order to Show Cause was modified to February 14th, 2007.

4. By Court direction, all papers were to be sent to Judge Powers Chambers in Schenectady, New York.
5. The Order to Show Cause was duly served on Lewis Family Farm, Inc. and its Attorney Joseph Brennan. The Affidavit of Personal Service and the Affirmation of Service by Mail have been sent to the Court on February 1, 2007. (Copy of Letter attached).
6. The Matter requires urgent action by this Court in order to require the immediate removal of obstructions placed on Cross Road, Town of Essex, by Defendant, or its agents. These obstructions seriously interfere with the normal use and/or proper maintenance of the public highway. (See, Affidavit of James Z. Morgan, Jr. [hereinafter the "Morgan Affidavit"], the duly elected Town Highway Superintendent, which is dated January 12, 2007).
7. In this Matter, the Plaintiffs are fortunate that to the present date there have not been severe snow storms.

THE HIGHWAY RIGHT OF WAY

8. Defendant's lands are burdened by a Public Highway, Cross Road, pursuant to Highway Law §189. This fact is acknowledged by Plaintiffs and Defendant.
9. A Public Highway easement created by use [Highway Law §189] is as wide as the

actual use for purposes of public travel and maintenance of the highway (See, *Schillawski v. State of New York*, 9 NY2d 235, 238, 213 NYS2d 68, 173 NE2d 793 [1961]). Included in the actual right of way easement areas are "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" (*Thompson v. Orange & Rockland Elec. Co.*, 254 NY 366, 369, 173 NE 224 [1930]; also see, Highway Law §2[4]).

10. The situations that are included in the actual public highway easement use area are clearly set forth in the 1957 case of *Nikiel v. City of Buffalo*, 7 Misc.2d 667, 670 (Supreme Court, Erie Co. 1957) when the Court found:

While the width and extent of a highway established by prescription or use are generally measured by the actual use for road purposes, the easement is not necessarily limited to the beaten path or traveled tract. It carries with it the usual width of the highway in the locality or such width as is reasonably necessary for the safety and convenience of the traveling public and for ordinary repairs and improvements. A highway established by user includes the traveled tract and whatever land is necessarily used or is incidental thereto for highway purposes.

11. This legal principle that a Public Highway by use includes not only the traveled tract, it includes "whatever land is necessarily used or is incidental thereto for highway purposes" is affirmed in the case of *Dutcher v. Town of Shandaken*, 23 AD3d 781, 782 (3rd Dept. 2005).
12. In this Matter, Defendant claims that the right of way only includes the traveled

way and its shoulders or only 17 feet from the centerline of the highway. Nothing could be further from the truth. The Public Highway easement use area extends much further out from the centerline of Cross Road. (See, Morgan Affidavit, ¶ 20).

13. Attachments "B" and "C", photographs of the construction of the Farm Roads by Defendant, to the Morgan Affidavit clearly show that Cross Road is at a higher elevation than the lands immediately adjacent thereto. Therefore, Cross Road has slopes on either side and, under the principle set forth above, the town has control over the slope areas to the toe or bottom of each slope for the purposes of maintenance of the Public Highway. Thus, the Town Highway easement use area includes and extends out at least for this 25 foot additional area on each side.

What is also very important in this Matter is the fact that these photographs show that the Farm Roads were constructed so they lie partially up onto the slope areas. Thus, the Deyo Affidavit, ¶ 12 is not accurate. The Farm Roads, which are less than 27 feet from the centerline of Cross Road, are actually partially within the Public Highway easement use area. (Also see, Morgan Affidavit ¶ 19).

14. Thus, the Farm Roads clearly are partially on the public highway right of way as shown by these photographs and are not completely off of the highway right of way as claimed by Defendant.
15. The Morgan Affidavit states at ¶ 20 that "During winter conditions, for far in excess of ten years, 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.” Thus, Plaintiffs have the right to use an area without interference by Defendant, or its agents, for up to 40 feet from the centerline of Cross Road in order to cast snow. Since Defendant acknowledges that the Farm Roads are built parallel to and only 27 feet from the centerline of Cross Road, Defendant admits that it has placed an obstruction to the proper maintenance of Cross Road within the Public Highway easement use area.

16. Thus, in connection with the Public Highway easement use area, there is no question but that Plaintiffs will prevail on the merits in this Matter since Defendant acknowledges that it has placed obstructions, the Farm Roads, within the Public Highway easement use area.

THE DRAINAGE CULVERT

17. The Defendant claims that it has not blocked the actual highway drainage culvert. However, Defendant does not address the blockage of the drainage flow area by its construction of the Farm Roads. The highway drainage culvert and the flow therefrom has existed for more than 10 years. (See, Morgan Affidavit, ¶ 8 through ¶ 10).
18. The highway culvert and drainage area was open, obvious and has continuously been maintained by Plaintiffs for more than 10 years. Since the culvert under Cross Road and drainage area are necessary to preserve the public's right of

passage, they constitute a portion of the public highway facility and may be maintained by the Town without blockage thereof by Defendant. (See, Morgan Affidavit, ¶ 12, Highway Law §2[4] and *Dutcher v. Town of Shandaken*, 23 AD3d 781, 782 (3rd Dept. 2005).

19. Since Defendant acknowledges that the Farm Roads are only 12 feet from the edge of the highway shoulder, the drainage flow area from the highway culvert has been clearly blocked by Defendant, or its agents. (See, Deyo Affidavit, ¶ 12).
20. Thus, in connection with the Public Highway drainage culvert and its drainage flow area, there is no question but that Plaintiffs will prevail on the merits in this Matter since Defendant acknowledges that it has placed obstructions, the Farm Roads, within the Public Highway drainage flow area.

THERE IS DANGER OF IMMEDIATE AND IRREPARABLE DANGER IF THE PRELIMINARY INJUNCTION IS NOT EXPEDITIOUSLY GRANTED.

21. Attached is a letter, dated January 9, 2007, from Carole Anne Slatkin, of 171 Cross Road, Essex, NY 12936 who sets forth the grave danger that the obstructions constructed on Cross Road by Defendant, or its agents, place on her health and well being if emergency vehicles and emergency personnel are not able to timely reach her.
22. Plaintiffs are obligated by law to protect the health and safety of their citizens.
23. There hardly could be a more serious and distressing situation than to have someone die or be seriously injured because they could not be timely reached by

emergency vehicles and emergency personnel.

24. Recovery of money for such a result, as suggested by Defendant, would never justify such a situation to remain.
25. Thus, the test of danger of immediate and irreparable injury or harm to Plaintiffs and the citizens that they must protect is clearly met.

**THE STATUS QUO IS TO RESTORE CROSS ROAD TO THE
CONDITION THAT EXISTED PRIOR TO THE OBSTRUCTIONS
BEING PLACED THEREON BY DEFENDANT.**

26. Highway Law §319 contemplates that highway obstructions must be timely removed. As required by law, Defendant had 30 days to remove the obstructions and Defendant did nothing. The law contemplates swift action to remove the danger to the users of the Public Highway and the excuses and delays suggested by Defendant interfere with such prompt corrective action..
27. The public highways in the State belong to the State and are held in trust by the Town for the People at large to use for public easement purposes.
28. Such public highways must be kept free from unlawful restrictions, interferences, and/or obstructions by adjacent landowners relative to travel thereon and maintenance thereof.
29. Plaintiffs, pursuant to Highway Law §319, must obtain enforcement against such unlawful restrictions, interferences, and/or obstructions by the adjacent landowner, in this Matter, the Defendant.

30. The status quo is to have the condition that existed before the obstructions were placed on Cross Road rather than to leave the danger while the Court action proceeds.
31. Plaintiffs have the right to have status quo in this Matter and Highway Law §319 demands such a result.
32. In this Matter, a Preliminary Injunction being issued by this Court is necessary since Defendant refuses to comply with the law relative to removal of the obstructions placed on Cross Road by it, or its agents.

THE MANNER THAT DEFENDANT CONSTRUCTED THE FARM ROADS CLEARLY DEMONSTRATES DEFENDANT'S INTENTION TO DESTROY THE PROPER USE AND MAINTENANCE OF CROSS ROAD.

33. The Farm Roads are constructed approximately 6 feet above Cross Road. (See, Morgan Affidavit, 31).
34. Defendant claims that the Farm Roads were build to prevent the leaching of road materials into the soil.
35. If Defendant really wanted to stop leaching, any barrier would be constructed into the soil and not be built 6 feet above and immediately parallel to Cross Road.
36. Thus, Defendant's clear intent to destroy the use and proper maintenance of Cross Road is obvious. (See, the Morgan Affidavit and the Town Board's Resolution, Attachment "D" to Harp Affirmation for details of the effects of the obstructions on the use and proper maintenance of Cross Road).

37. Yet, Defendant has the nerve to ask for mercy from this Court when it engages in such destructive activities that endanger the public's health and safety.

38. The dangers created by Defendant must immediately be corrected.

THE BALANCING OF EQUITIES FAVOR PLAINTIFFS.

39. Defendant claims that the use over many years of a road material by Plaintiffs favors it. This is incorrect. The continued and normal use of the road material favors Plaintiffs..

40. In any future Court action by Defendant, Defendant must prove that Plaintiffs did not have the lawful right to use this road material on its Public Highways. The road material is commonly used on Public Highways and has been so used on public highways for many years. Therefore, Defendant must accept any consequences of the use of the road material on Plaintiffs' Public Highways since, as a result of the long use of the road material by Plaintiffs, Plaintiffs have the prescriptive right to continue the use of this road material.

41. If Defendant wants to block any leaching action of the road material onto its lands, it must build its Farm Roads off of the Public Highway easement use area, at a lower elevation than Cross Road, and the Farm Roads must not block the culvert drainage flow area.

42. The dangers to the public that the obstructions pose are apparent, as set forth above and in Plaintiffs' papers. Thus, the balancing of the equities in this Matter clearly


favor Plaintiffs.

**THE SITUATION REQUIRES THE DRASTIC REMEDY OF THIS
COURT ISSUING A PRELIMINARY INJUNCTION.**

43. The dangers posed by the obstructions require expeditious Court relief being granted to Plaintiffs. In this Matter, a Preliminary Injunction is the proper remedy and such should be granted to Plaintiffs.

WHEREFORE, based on the above and all of Plaintiffs papers, it is respectfully requested that this Court grant Plaintiffs' request for a Preliminary Injunction.

Dated: February 10, 2007
Clifton Park, New York


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Carole Anne Slatkin
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Mr. Ronald Jackson
Town Supervisor
Town of Essex
Essex, New York 12936

January 9, 2007

Dear Supervisor Jackson:

As you know, my family has owned the former Marshall Cross farm on the Cross Road south of the Village of Essex for about 35 years. Each year during those decades we have had many occasions to admire and be grateful for the excellent work of the Town road crew. By ditching, removing debris, resurfacing, and especially plowing the road, and performing the myriad other tasks necessary to maintaining it, the members of the crew have kept it safe not only for our family, but for emergency vehicles, school buses, farm equipment, and private vehicles whose drivers count on using the road at all seasons.

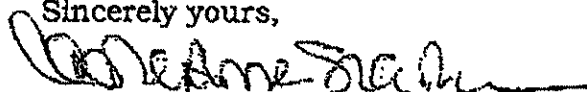
Recently, the owner of the property contiguous to ours on the west has built up each side of his land that abuts the Cross Road with steep earthen dikes, and created a gravel road at the top of each dike. The dikes and gravel roads run downhill and then along each side of the Cross Road as it flattens out from west to east. After the earth freezes and precipitation runs down the sides of the dikes, it is likely to freeze on the road surface and create a hazard for vehicles needing to use the road.

As an older woman living alone in the only house on the Cross Road, I am extremely anxious about possible emergencies in which an ambulance or fire engine from Whallonsburgh, the emergency-vehicle station closest to my house, would not be able to safely negotiate the road to get to me, and would have to spend many precious extra minutes going the several extra miles necessary to approach my house from the other end of the Cross Road.

While I understand that the dikes and gravel roads have been constructed on private property, I am troubled that the current configuration of the land abutting the Cross Road may endanger me or others who need to use the road in less-than-ideal conditions.

In the almost 60 years that I have lived in the Essex area, I have always maintained good relations with my neighbors. I cannot imagine that the neighbor in question would accept being put in a similar position of danger and isolation in case of emergency, and it is my hope that this potentially treacherous situation can be rectified such that those who need to travel on the Cross Road can do so without harm.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'Carole Anne Slatkin', with a long horizontal flourish extending to the right.

Carole Anne Slatkin