

**COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT**

HAMPDEN, SS

**HOUSING COURT DEPARTMENT
WESTERN DIVISION**

DOCKET NO. 06-CV-00392

**FIRE DEPARTMENT, TOWN OF
HOLLAND,**

Plaintiff

v.

JAMES LaMOUNTAIN,

Defendant

**FINDINGS, RULINGS, AND ORDER
FOR ENTRY OF PERMANENT
INJUNCTION**

Following evidentiary hearing and a view by the court, the following findings of fact and rulings of law shall enter in the above-captioned matter:

1. **Introduction:** This matter is before the court on an application by the Fire Department for the Town of Holland (“Holland;” “the Town”), for an order prohibiting the defendant James LaMountain (“LaMountain”) from burning wood and other debris at the property known as the Mashapaug Road lot (“the subject property;” “the property”). The parties have agreed that the outcome of this case turns on a determination as to whether LaMountain is engaged in agricultural activity at the subject property. LaMountain maintains that he is engaged in agricultural activity at the subject property, and is therefore exempt from regulation with respect to burning. Holland submits that LaMountain’s burning is subject to reasonable regulation, even assuming he is engaged in agricultural activity.

2. **Findings of Fact:** The subject property is a 79 acre parcel of land located across Mashapaug Road from the Hamilton Reservoir, in Holland. The property is owned by Northeast Concepts, Inc. (“Northeast Concepts”), which acquired title by deed dated February 16, 2006. There are two collapsed structures on the property, and existing residential structures on adjoining parcels.
3. Huguenot Farms, Inc. (“Huguenot”), a Massachusetts corporation organized for the purpose of engaging in farming, owns the majority of shares in Northeast Concepts. LaMountain is the sole director and officer of Huguenot. Michael LaMountain, the son and business partner of James LaMountain, owns 10,000 shares of Northeast Concepts, and shares are also owned by an individual named Chad Brigham.
4. Huguenot conducts farming activity on a parcel of land located in Oxford, Massachusetts, owned by Michael Leduc (“Leduc”). For a number of years, LaMountain and Leduc have operated the Huguenot farm in Oxford in partnership with one another, although the partnership is not documented, nor does it file a partnership tax return. The Oxford property is used for raising cattle, growing grass, and selling sod and loam. Huguenot currently purchases most of the grass used to feed the cows which graze on the Oxford farm.
5. LaMountain, as the sole director and officer of Huguenot, and Northeast Concepts are attempting to develop the subject property for residential and agricultural use. They have identified six potential residential lots, representing between 5 and 10% of the total property, to be located on a ridge which rises above Mashapaug Road and overlooks the Hamilton Reservoir. The potential lots are located in a residence zone. Chad Brigham is responsible for the residential development. LaMountain wishes to develop the remaining portion of the property

into pasture land, for raising cows and growing grass to feed them and the cows on the Oxford farm. This portion of the property is located in an agricultural-residence zone.

6. In order to develop the subject property into pasture land, Northeast Concepts and Huguenot Farms wish to clear trees and brush. In August, 2006, they obtained a forest cutting plan certificate from the Department of Conservation and Recreation. Prior to obtaining the certificate, individuals acting on behalf of the two corporations began clearing trees and burning brush, without a permit from the Fire Department. Holland then initiated this case, alleging that the defendant was conducting burns late at night, that adjoining property owners were complaining of smoke, and that LaMountain had instructed his associates to block access to the property by public safety personnel.

7. On July 14, 2006, the defendant agreed not to conduct burns at the subject property until a permit was issued by the Holland Fire Department. LaMountain and Huguenot Farms applied for a permit which was allowed, and authorized "agricultural burning" through October 31, 2006. LaMountain or individuals acting on his behalf conducted open burns at the property after October 31, 2006. By order entered on November 28, 2006, the court prohibited the defendant from conducting any open burns at the property in the absence of authorization by permit or the court. Holland thereafter issued another permit allowing open burning for a limited period between the hours of 10:00 a.m. and 4:00 p.m.

8. LaMountain has attempted to obtain a agricultural preservation grant for the property, but has failed to date to complete the application process. LaMountain has targeted 30 acres of the property for agricultural development, and has partially cleared 14 acres, having cut down trees, cleared brush, and removed rocks. He or others acting on his behalf have rebuilt small areas of

stone walls, cleared out drainage ditches, maintained an access road to the upper portion of the property, constructed a very minimal structure which they characterize as a pig pen, and planted ½ acre of grass. No animals or crops are presently being raised on the property, although LaMountain intends to raise cows there when the pastures are restored.

9. On February 19, 2007, LaMountain's business partner at the Oxford farm, Michael Leduc, paid Huguenot Farms \$400 for "forest products" acquired at the property. On May 18, 2006, Huguenot Farms sold forest sod and four laurels from the property to Redtail Associates, Inc., which paid by a check in the amount of \$2,700, signed by Mr. Leduc. On two occasions in October, 2006, Northeast Concepts sold logs harvested from the property to Cersosimo Lumber Co. Inc., which paid, respectively, \$3,100 and \$1,142.77.¹

10. ***Statutory and Regulatory Framework:*** G.L. c. 111, §142L provides in pertinent part as follows:

Notwithstanding the provisions of sections one hundred and forty-two A to one hundred and forty-two E, inclusive, the burning of tree prunings, diseased plant materials, and brush from land clearing operations, which are the direct result of the normal commercial pursuit of agriculture, as defined in section one A of chapter one hundred and twenty-eight, shall be allowed subject to the permission of the local fire chief which need not be in writing. Said permission shall be based solely upon whether or not appropriate meteorological conditions exist to ensure safe burning.²

¹ It appears from the record, Exhibit 5, that Northeast may also have sold timber to Scotland Hardwoods.

² G.L. c.128, §1A defines "agriculture" to include the following:

[F]arming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry

11. 310 C.M.R. 7.07(3) provides in pertinent part as follows with respect to open burning:

Except during periods of adverse meteorological conditions...310

CMR 7.07(1) shall not apply to open burning conducted for...

c) open burning of brush and trees resulting from agricultural land clearing operations...

(e) the disposal of brush, cane, driftwood, and forestry debris excluding grass, hay, leaves, and stumps from January 15 to May 1 of each year. All such open burning shall be conducted:

1. on land proximate to the place of generation,

2. at a location greater than 75 feet from any dwelling, and

3. between ten o'clock A.M. and four o'clock P.M.

No such open burning shall apply to commercial or institutional land clearing for non-agricultural purposes...

(g) open burning as described in 310 CMR 7.07(3)(a) through 310 CMR 7.07(3)(f) must be conducted:

1. during periods of good atmospheric ventilation,

2. without causing a nuisance,

3. with smoke minimizing starters if starters or starting aids are used, and

4. under the provisions of a properly executed permit issued under the provisions of M.G.L. c. 48, s. 13

12. G.L. c. 48, §13 provides that “[n]o person shall set, maintain or increase a fire in the open air at any time except by permission, covering a period not exceeding two days from the date thereof, granted by the ...chief of the fire department...”

13. ***Rulings of Law:*** For purposes of this case, the above-referenced statutes and regulations signify that the defendant is allowed to conduct open burning only if engaged in agricultural land clearing, and then only during periods of good atmospheric conditions, without causing a

or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

nuisance, with smoke minimizing starters if starters or starting aids are used, and only for two days immediately following issuance of a permit by the Chief of the Fire Department.

14. The defendant intends to use portions of the property for agriculture, and portions for residential development. The defendant has not taken any steps to date with respect to the potential residential development, other than having the land surveyed. (Exhibit 2). Were there evidence of actual activity at the property directed towards residential development, the court would be required to evaluate it in relation to the proposed burning, to determine whether the proposed burning was "incidental" to agricultural activity and exempt thereby. See *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994). At this stage, however, the only activity which is being conducted at the property is agricultural in nature: selling sod; cutting and selling timber; and beginning the process of restoring pastures. I therefore conclude that open burning on the property is permitted, within the constraints set forth in 310 CMR 7.07(3). The Town is free, however, to petition the court for an appropriate order at such time, if at all, as the defendant or those acting on his behalf engage in commercial real estate development and/or other non-agricultural activity at the property.

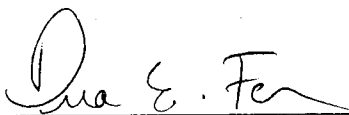
15. LaMountain has argued that the Town is not permitted to restrict the hours during which he may engage in agricultural burning. I disagree. 310 CMR 7.07(3)(e) mandates the hours during which seasonal brush burning must take place. The regulation does not, however, limit the Town's authority to condition issuance of a permit for agricultural burning on such terms as the Fire Department determines to be necessary to protect against fire hazards.

16. In addition, G.L. c. 48, §13 requires permission of the Chief of the Fire Department in order to conduct agricultural burning, and G.L. c. 111, §142L provides that the Chief's

permission shall be based solely upon whether or not appropriate meteorological conditions exist to ensure safe burning. Implicit in these requirements is the right of the Chief to withhold permission, or place conditions upon his permission, if deemed necessary in light of meteorological conditions to protect the public safety. Agricultural burning is permitted as a limited exception to the general prohibition against open burning. It is for the Fire Chief, in the exercise of his unique expertise, to determine whether and under what conditions that exception might safely be exercised. This ruling does not in any way abrogate that authority, and the determination of the Fire Chief whether, and on what conditions, to issue a two-day permit for agricultural burning under G.L. c. 48, §13, shall be binding upon the defendant and those acting on his behalf.

17. **RULING AND ORDER:** Based upon the foregoing, a permanent injunction shall issue, prohibiting the defendant from conducting open burns at the property except pursuant to, and upon such conditions as required by, agricultural burning permits issued for not more than two day intervals by the Chief of the Fire Department for the Town of Holland.

So entered this 5th day of June, 2007.



Dina E. Fein
Associate Justice

cc: Kevin R. Byrne, Sr.
Chief Housing Specialist