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COMMONWEALTH OF MASSACHUSETTS

The Trial Court

HAMPDEN, ss.

Superior Court

Civil Action No: 09-935

Town of Holland Fire Dept

Plaintiffs

Vs. James P LaMountain, ~~Chad Brigham~~ and
Northeast Concepts Inc. Defendants

HAMPDEN COUNTY
SUPERIOR COURT
FILED

MAR 29 2010

Brian P. Lee
CLERK-MAGISTRATE

**MOTION*

REQUEST FOR EMERGENCY RESTRAINING ORDER

Now come the Defendant's who asks this Honorable Court to ORDER the Town of Holland and the Holland Fire Chief to stop prohibiting farm hands of the Defendants from having reasonable cook fires on the Defendants Farm.

FACTS

1. On 26 March 2010, Two Farmhands of the Huguenot Farm at Mashapaug in Holland, Francis Reilly and Ed Smith, built a reasonable fire on gravelly land free from vegetation for the primary purpose of cooking. Both farmhands were over 18 and it was after 4 PM.
2. There was a pressurized water source at the fire which was supervised at all times.
3. The Holland Fire Department and State Police came onto the farm and inspected the cook fire.
4. The Fireman and the State Police officer both said the fire was reasonable and appropriate
5. Shortly thereafter the same fire department officer spoke to the fire chief by radio and then returned and ordered the cook fire to be extinguished as per order of Holland Fire Chief. The farm hands were told that no fires were allowed on the farm.
6. The farmhands extinguished the fire without having an opportunity to cook.
7. The town will not suffer harm by allowing these reasonable cook fires. The Defendant's farmhands will be harmed by not being allowed to cook meals. To prohibit Farmhands from having cook fires causes hardship to them by denying them a hot meal after a hard days work. Farmhands sometimes live on the land

3/30/10
-inmate for hearing
3/30/10
notified to Mark
for hearing
cc

4/21/10 Deane
4/22/10

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-0935

HAMPDEN COUNTY
SUPERIOR COURT
FILED

APR 22 2010

TOWN OF HOLLAND FIRE DEPARTMENT

vs.


CLERK-MAGISTRATE

JAMES LAMOUNTAIN & another¹

**MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFF'S
REQUEST FOR A PERMANENT INJUNCTION**

INTRODUCTION

The Town of Holland Fire Department ("Town") filed this action seeking a permanent injunction² enjoining the defendants, Northeast Concepts, Inc. ("Northeast") and James LaMountain ("LaMountain") (collectively, "the defendants"), from conducting open-air burning on property owned by Northeast and located on Mashapaug Road in Holland, Massachusetts. The defendants have counterclaimed seeking a declaration that they are entitled to conduct open-air burning.

The Town contends that the burning conducted by Northeast and LaMountain is in violation of G. L. c. 48, § 13; G. L. c. 111, § 142L; and 310 Code Mass. Regs. § 7.07. The defendants maintain, inter alia, that they are engaged in agricultural activity on the property and, therefore, are exempt from the regulation regarding burning. A jury-waived trial was conducted, during which numerous witnesses testified and 40 exhibits were admitted into evidence.

¹ Northeast Concepts, Inc.

² A judge of this Court (Josephson, J.) has previously issued a preliminary injunction enjoining the defendants from conducting open-air burning.

BACKGROUND

Based on the credible evidence and the reasonable inferences drawn therefrom, the following findings of fact are made. Northeast was formed in 2005. At the time of its formation, its corporate purposes were residential and business construction. Northeast purchased approximately 80 acres of undeveloped land located on Mashapaug Road in Holland. Close to the time of the purchase, Northeast disclosed its plan to develop a residential complex on the site for people over the age of 55. Those hopes were dashed when the plans were met with opposition from the town.

A portion of the property is located in a residential zone, while another portion is located in an agricultural/residential zone. Northeast eventually developed three lots for sale for residential purposes. In 2008, it sold two of the lots and the third remains available for sale. In 2007, Northeast reported gross revenues of approximately three hundred ninety-eight thousand dollars (\$398,000); in 2008, it reported gross revenues of one hundred five thousand, two hundred twenty dollars (\$105,220); in 2009, it reported gross revenues of twenty-nine thousand three hundred fifty dollars (\$29,350).

During the pendency of the trial, Northeast amended its Articles of Organization to state that the corporation intended to engage in "agricultural real estate development." It also amended its 2008 federal tax return to indicate that it was engaged in "Cattle Feed Lots 112112." Northeast contends that it wishes to restore the remaining land to farm production. It intends to raise cattle, swine and chickens, and to grow crops, principally corn and beans for forage. Northeast has undertaken a clearing of the land in order to create pasture. Part of that work involves burning cleared bushes and trees.

In the spring and summer of 2009, the Town received at least three reports of open-air burning on the property. On June 8, 2009, as a result of a citizen complaint, the Town's fire department responded to the property and found a large pile of burning brush. Mr. James LaMountain, a principal of Northeast, was on scene and, when pressed for an explanation, stated that the "fire chief said it was OK." Mr. LaMountain indicated that he intended to burn "a load of brush a day."

On June 27, 2009, as a result of another complaint, the fire department again returned and found some warm coals in a fire pit. No representative of Northeast or any one else was present when the fire department arrived.

On August 31, 2009, the fire department was again called to the scene. Two brush fires were burning upon arrival. Large tree stumps and tree trunks provided additional fuel for the fires. On this occasion, LaMountain's son Michael ("Michael") was present, and indicated that he was planning a pig roast on the premises in the near future. It took over an hour for the fire department to control the fires.

The fire chief had not issued permits for any of the subject fires. I find that LaMountain did not set any of these fires, but agents or employees of Northeast did. A dispute has arisen as to whether or not Northeast is exempt from the statutory and regulatory constraints prohibiting open-air burning. To that end, and for the purposes of a decision on the present request for injunctive relief, I must determine whether or not Northeast was or is presently engaged in agricultural activity at the site.

Although modest in scope, there is no question that Northeast has engaged in some agricultural activity on the property. A small pen has been erected which houses two pigs, and

approximately 50-150 chickens are kept on site at any particular time. The livestock has not been sold commercially, but rather consumed by the LaMountains or bartered in exchange for labor with part-time workers. Northeast has also harvested and sold a small amount of lumber and firewood from the property to private parties.

Northeast has obtained a "farm plate" from the Registry of Motor Vehicles and obtained a building permit in order to construct a barn. It had obtained approval for a Forest Cutting Plan from the Department of Conservation and Recreation, but that approval was later revoked and Northeast is now subjected to a cease and desist order.

DISCUSSION

As a general rule, open-air burning is not permitted in the Commonwealth. G. L. c. 48, § 13. However, this general rule is subject to exceptions, two of which Northeast and LaMountain seek to avail themselves. First, the defendants contend that the fires in question were used for cooking purposes and they cite to G. L. c. 48, § 13. That statute provides, in pertinent part, 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 thereof, granted by the forest warden or chief of the fire department in cities or towns . . . *provided further, that persons eighteen years of age or older may, without a permit, set, maintain or increase a reasonable fire for the purpose of cooking, upon sandy or gravelly land, free from living or dead vegetation or upon sandy or rocky beaches bordering on tidewater, if the fire is enclosed within rocks, metal or other nonflammable material*" (emphasis added). This argument is easily disposed of as I do not credit the testimony that the subject fires were "cooking fires."

The defendants' second contention is based upon an exemption from the air pollution control regulations promulgated by the Department of Environmental Protection ("the agency"). Pursuant to G. L. c. 111, § 142A, the agency has broad authority to promulgate regulations to "prevent pollution or contamination of the atmosphere."³ Its delegated authority, however, is not without limitation. The Legislature has limited the scope of the agency's authority with respect to, among other things, the burning of Christmas trees, bonfires, and agricultural burning. See G. L. c. 111, §§ 142G, 142I, and 142L. At issue here is the statute governing agricultural burning, G. L. c. 111, § 142L, which states:

"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 the appropriate meteorological conditions exist to ensure safe burning" (emphasis added).

Under G. L. c. 128, § 1A, "agriculture" is defined to "include farming and 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,

³ The agency has exercised its authority under the enabling statute and has promulgated regulations in 310 Code Mass. Regs. § 7.00 et. seq

swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals and any forestry 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.”

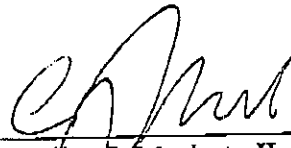
According to the above statutory language, the Legislature has expressly authorized agricultural burning, effectively exempting activities falling within the purview of G. L. c. 111, § 142L, from any statutory or regulatory prohibitions on open-air burning.

In the instant case, the evidence showed that the defendants were clearing the land of brush and trees in order to return the land to farm production. They harvested and commercially sold a small amount of lumber to private parties. Additionally, the evidence showed that the defendants kept and raised two pigs and approximately 50-150 chickens for food purposes. For those reasons, I find that the defendants were engaged in agriculture within the broad meaning of G. L. c. 128, § 1A. Furthermore, I find that the defendants are entitled to an exemption from the agency’s air pollution control regulations for activities falling within the purview of G. L. c. 111, § 142L, subject to the permission of the local fire chief, whose decision shall be based solely on whether or not appropriate meteorological conditions exist to ensure safe burning

ORDER

Based on the foregoing, it is hereby **ORDERED** that the plaintiff’s request for a permanent injunction is **DENIED**. It is further **ORDERED** that Northeast is permitted to conduct open air burning in accordance with G. L. c. 111, § 142L, which requires advance

permission from the local fire chief, which shall be based solely upon whether or not appropriate meteorological conditions exist to ensure safe burning.



Cornelius J. Morjarty II
Justice of the Superior Court

Dated: April 22, 2010