

COMMONWEALTH OF MASSACHUSETTS

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June 26, 2012

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RE: No. 2011-P-1166
Lower Ct. No.: HDCV2009-00935

TOWN OF HOLLAND FIRE DEPARTMENT
vs.
JAMES P. LAMOUNTAIN & another

NOTICE OF DECISION

Please take note that on June 26, 2012, the court issued the following decision in the above-referenced case:

Decision: Rule 1:28 (Wolchojian, Smith, Agnes, JJ.). Judgment affirmed. *Notice.

A copy of the court's opinion in the case will be available on <http://www.massreports.com> after 11:00 a.m. today. If the opinion is identified above as a Full or Rescript opinion, go to the Slip Opinions section of the website, and then choose Appeals Court, Opinions. If the opinion is identified as a Rule 1:28 decision, go to the Unpublished Decisions link, and by specifying the docket number, using the format 09-P-1234. The clerk's office will not mail a copy of the decision to you. Only incarcerated self-represented litigants will receive a paper copy by mail. Any questions regarding retrieval of decisions should be directed to the Office of the Reporter of Decisions at 617-557-1030.

ALL FURTHER FILINGS IN THIS APPEAL. All further filings in this appeal are required to be filed electronically by e-mailing the document in PDF to emotions@appct.state.ma.us

Very truly yours,
Joseph Stanton, Clerk

To: Tani E. Sapirstein, Esquire, James P. Lamountain, Clifford Heaton, Esquire

Term 

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

FIRE DEPARTMENT OF HOLLAND vs. JAMES P. LAMOUNTAIN & another. [FN1]

◆11-P-1166◆

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant Northeast Concepts, Inc., owns a seventy-five acre parcel of land in the town of Holland; the individual defendant, James P. Lamountain, is a principal of that entity (collectively, Northeast). On September 25, 2009, the plaintiff Fire Department of the town of Holland (department) filed a complaint seeking a permanent injunction to enjoin Northeast from engaging in open-air burning on the property. Following a bench trial, a judge of the Superior Court entered judgment in favor of Northeast. The department appeals.

Background. Northeast purchased the Holland property with the intention of developing it into a residential complex for persons over the age of fifty-five. When that plan fell through, it eventually sold two lots for residential construction in 2008. Northeast retained the remaining parcel, which it intends to restore to farm production by raising cattle, swine, and chickens, and by growing forage crops. As documentation of that change of corporate intention, Northeast amended both its articles of organization and 2008 Federal tax return during the pendency of the trial. To create pasturage for the cattle, Northeast is clearing the land, which involves burning cleared brush and trees. The fires have elicited reports and complaints to the town and the department. During the spring and summer of 2009, the department was called to the property several times following reports of open-air brush fires. On one of those occasions, it took the department over an hour to control the fire. The fire chief had not issued permits for any of the subject fires.

Based on concerns for public safety, the department filed the present action to enjoin further open air burning on the property. Although open-air burning is generally prohibited in the Commonwealth pursuant to G. L. c. 48, § 13, one exception applies if the burning is for agricultural purposes within the meaning of G. L. c. 111, § 142L. To qualify under § 142L, the burning must be "the direct result of the normal commercial pursuit of agriculture, as defined in [G. L. c. 128, § 1A [FN2]], [and] 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." *Ibid.*, inserted by St. 1992, c. 340.

Based on the evidence presented, the judge found 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 [Department of Environmental Protection] air pollution control regulations for activities falling within the purview of [§ 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." [FN3]

The judge accordingly entered an order permitting Northeast to conduct open-air burning on the property, pursuant to the requirements of § 142L.

Discussion. On appeal, the department argues that even if Northeast were engaged in agriculture, it nevertheless was not entitled to an exemption because the material burned was not a "direct result of the normal commercial pursuit of agriculture." G. L. c. 111, § 142L. The department, however, offers no threshold for what, exactly, constitutes the "normal commercial pursuit of agriculture," other than its bald assertion that Northeast's activities somehow miss the mark.

The judge found that Northeast was engaged in agriculture, as defined by G. L. c. 128, § 1A, for a number of reasons, as quoted *supra*. Two of those cited were the clearing of the land to restore farm production, and the harvesting and commercial sale of lumber to private parties. On the basis of those findings, the judge ordered that the defendants may conduct open-air burning in accordance with the provisions of § 142L, including the requirement of obtaining permission from the local fire chief. The findings are supported by the record, and are

not clearly erroneous. [FN4] There was no error. [FN5], [FN6]

Judgment affirmed.

By the Court (Wolohojian, Smith & Agnes, JJ.),

Entered: June 26, 2012.

[FN1]. Northeast Concepts, Inc.

[FN2]. General Laws c. 128, § 1A, as appearing in St. 1995, c. 38, § 142, defines agriculture as including "farming 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 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."

[FN3]. General Laws c. 111, § 142A, inserted by St. 1954, c. 672, § 3, generally allows the Department of Environmental Protection to promulgate regulations that prohibit open-air burning to "prevent pollution or contamination of the atmosphere."

[FN4]. Lamountain and other employees of Northeast testified at length about the expanding agricultural efforts on the property, which required that the trees and brush be cleared. Lamountain's son and a farm hand testified about the sale of cord wood harvested from trees on the property.

[FN5]. Because we conclude that the defendants are entitled to an exception under § 142L, we need not address whether the fires were for the purpose of cooking. See G. L. c. 48, § 13.

[FN6]. We decline the request of defendant James P. Lamountain for appellate fees and double costs.

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