Town of Bartlett
Zoning Board of Adjustment
Public Hearing - March 27, 2015

Members present: Chairman Richard Plusch; Peter Pelletier; Julia King; Helen Crowell; Norman Head.
Members absent: None.

Also present were: Applicant Paul Pagliarulo; Atty. Chris Hilson, Esq.; Scott Grant; Gene Black; Jon Hebert; Lynn Wilczek; Lynn Jones; Gene Chandler; Bert George; Mark and Jessica Spaulding; abutters Rose Dennis, Tom Dennis, Jeff Dennis, Rowen Prescott, Monica Bretschneider and Patricia Riley; and several other people who did not sign the attendance sheet.

Public Hearing - File 2014-03 (rehearing):

Applicant:	Paul Pagliarulo, dba Northern NH Nursery
Location:	1226 US Route 302, Bartlett, NH
Bartlett Tax Map:	Tax Map 5VILLG, Lot MAI-70
Purpose:	The applicant requested a rehearing regarding a decision made by the ZBA on January 13, 2015 when the board heard an Appeal of Administrative Decision request involving decisions made by the Board of Selectmen pertaining to a change-of-use permit, development in the flood plain, and a building permit associated with agricultural activities being proposed by the applicant on the property identified above.

Zoning Ordinance Section: Article XVII, Section F

Chairman Richard Plusch called the meeting to order at 7:30 pm. He opened the hearing by announcing the case number, name of applicant, purpose of the application, and how the meeting had been publically noticed.

1. Public Hearing: Paul Pagliarulo, dba Northern NH Nursery: The Chairman asked Mr. Pagliarulo to present his case. Mr. Pagliarulo said he would first like the record to reflect that he had not been afforded the opportunity to have his attorney present tonight. He advised how the meeting had originally been scheduled for March 23, 2015, but he had requested that date be changed as his attorney was unavailable to attend. The meeting was therefore re-scheduled for March 27, 2015. Mr. Pagliarulo stated that by the time he was advised of the new date, there was not enough time to arrange for his lawyer to be present. Norman Head noted Mr. Pagliarulo had not been denied the opportunity to have his attorney present, but rather the opportunity was there but his attorney did not take advantage of it. Mr. Pagliarulo said he had accommodated the board when there were scheduling issues involving the original meeting, and felt the board should have accommodated him in this instance. He did acknowledge that the prior scheduling conflicts were on both sides.

Mr. Pagliarulo provided the board with printed material for their review. He was asked by the Chairman whether it contained any new information which hadn't been considered at the original hearing. Mr. Pagliarulo said it was basically the same as before, but that it cleaned-up some misinformation and offered a more-accurate description of his appeal. When asked to identify which information was new, Mr. Pagliarulo declined to do so and suggested the board members compare what he had presented previously and what was being presented tonight, and make that determination for themselves. Mr. Pagliarulo then went through the material he had provided item by item, and discussed it with the board.

Mr. Pagliarulo said he was again appealing the selectmen's decision that he needed to apply for a building permit, a change-of-use permit, and a permit for activity in the floodplain. Under RSA 21:34-a, he said none of these permits were required since no development was taking place; no change-of-use had occurred; and temporary structures were permitted for the cultivation, conservation and tillage of the soil. Mr. Pagliarulo said the property had been known as the Cook Farm for many years and pre-dates zoning, and he was merely continuing a use which had been in existence for decades. To disprove the town's contention that the Cook

Farm was unused agricultural property, Mr. Pagliarulo provided copies of correspondence between the selectmen's office and the Cooks, which he said proved the town knew that agricultural activities had occurred on the property. One letter dated October 12, 2001, made reference to the Cook's apple stand. After reading the letter, the Chairman noted it was sent to the Cooks in regards to a non-compliant sign, and was not anything to do with agricultural activities. Mr. Pagliarulo said he was aware of that, but that it did mention an apple stand and he was just providing it as an overall example to show that the selectmen were aware that agricultural activities occurred on the property. He further noted that the Cooks had never acquired permits for their activities, and wondered why they had not been issued a cease-and-desist order. The Chairman asked Mr. Pagliarulo "hadn't he moved stuff around to construct a driveway?" Mr. Pagliarulo said he did, and explained that the back of the property was relatively wet. He said under RSA 24:31-a, construction was permitted to facilitate the transportation of crops from his growing fields in the rear of the property. Mr. Pagliarulo stated that he strictly follows best management practices, and that the state conducts inspections to make sure no harm is being done to the soil or the property. He stated not even one inch of topography was changed during the process, and cited a letter from town engineer Burr Phillips which documented observations Mr. Phillips made during a site visit he made to the property. The Chairman pointed-out that Mr. Phillips had stated in his letter that he could not determine how much excavation had taken place, since pre-earthwork measurements were not known.

The Chairman noted that one of the problems was that nobody has enough information regarding Mr. Pagliarulo's property, since a detailed survey indicating the shoreline, buffer area, soil types, etc. had never been provided. Nor was information provided as to whether wetlands were on the property, which should be taken into consideration. Mr. Pagliarulo said when he gets to the point where he puts in commercial greenhouses and changes the topography, then that would be a greatly expanded use and he agreed he would need to submit a development activity in the floodplain permit. However, at the moment he's not doing that; he was simply farming. The Chairman noted the law doesn't define the degree of change-of-use which would require a permit as being either minor or great; it just says "change of use." Mr. Pagliarulo said the real litmus test, as upheld by case law, was whether the change was detrimental to abutting properties or impeded traffic flow. He said in his case, what he was doing will be no different than how things were before, when the Cooks owned the property. He acknowledged having a commercial nursery license, but said his farming activities were considered strictly residential by the state.

Mr. Pagliarulo explained in detail how the state looks more-favorably on agriculture and farming uses in a floodplain rather than housing development, and that it was his inherent right as a farm owner to conduct agricultural activities on his property, and how he did not need to make application for any permits. Julie King interrupted him by saying that nobody was arguing about his right to farm; the argument was about the correct way to go about it and the need to comply with the permitting process. She quoted RSA 674:32-c which stated agricultural uses have to comply with local government ordinances, unless a waiver had been requested through the ZBA. She noted Mr. Pagliarulo had not requested any such waivers. Mr. Pagliarulo disagreed with her statement, saying he had asked "the authority at hand," i.e. the selectmen's office, for a waiver which was denied. He reiterated again that he did not need any permits as he was not developing in the floodplain, and offered Ms. King the opportunity to visit his property any time she wanted. When Ms. King declined his offer saying it was too wet in the back, Mr. Pagliarulo responded that it wasn't wet at all, that he would not have purchased the property had it been wet.

Mr. Pagliarulo then advised the board of a letter he had sent to the selectmen offering to scale back his operations by removing the storage trailer, equipment, stock piled loam, and potted trees, and grow only apples and berries which would be sold, along with pies, at the farm stand. Mr. Pagliarulo said that would bring the property back to the same use as previously carried-out by the Cooks. The board discussed Mr. Pagliarulo's motives for doing this, but eventually decided the offer was not part of the appeal that was currently before the board. Julia King broached the subject of the proposed farm stand, and reminded Mr. Pagliarulo that at least 35% of any product sold at the stand needs to come directly from the property. Mr. Pagliarulo corrected Ms. King by saying it could come from any property owned by the farm stand owner.

The Chairman asked Mr. Pagliarulo if he had any further comments or information that he wanted the board to consider. Mr. Pagliarulo said he didn't, and thanked the board for their time.

Atty. Chris Hilson, representing the board of selectmen, spoke next. He provided copies of a letter summarizing the statutory framework for zoning relief in the context of the agricultural activities being proposed by Mr. Pagliarulo. It said the statutes invoked by Mr. Pagliarulo in his appeal did not provide the relief that he was seeking. Atty. Hilson acknowledged Mr. Pagliarulo was correct in saying that RSA 21:34 does have an effect in this case. Atty. Hilson described what that particular statute meant by saying it was a statute of construction, that is, it documented definitions in terms of what each different statute means when they say "agriculture," "agricultural activities," etc. He said it was not a permissive statute in that it gave anyone any rights under anything, but rather it merely defined different terms. He said one of the definitions defined a "farm stand," which Mr. Pagliarulo correctly pointed-out could sell products that came from elsewhere, so long as the source belonged to the same owner. However, it was just a definition of what a farm stand is; it doesn't mean you can have a farm stand, and it doesn't govern the expansion or subtraction of one. Atty. Hilson said the statutes that the board needed to focus on were RSA 674:32-a, b, and c. He described 674:32-a as altering the permissive nature of traditional zoning ordinances which typically lists uses which are permitted within a particular zoning district. It provides that instead of a use being prohibited if not expressly permitted, an agricultural use shall be permitted if the zoning ordinance does not stipulate whether agricultural uses are permitted in a particular zone. However, the provision does not mean that permits are still not needed.

Atty. Hilson then described RSA 674:32-b(II). He said if the applicant is suggesting that he is merely reinstating the farm stand, even though at the last meeting members of the public questioned whether the stand was ever in regular use, that this RSA clearly states that any new establishment, re-establishment after disuse, or significant expansion of a farm stand may be made subject to applicable local land use board approval. If the use was expanded to include a commercial nursery operation which included the tilling and large-scale movement and processing of topsoil with heavy machinery, it would certainly be subject to these permit processes. Finally, Atty. Hilson said that 674:32-c (II) couldn't make any better argument when it states that nothing shall exempt new, re-established, or expanded agricultural operations from generally-applicable building and site requirements. Atty. Hilson said the applicant could get a waiver from those site requirements if their literal application would effectively prohibit an agricultural use, but the selectmen are not saying the applicant cannot farm this particular property. He is working in the floodplain, and since there is no evidence to suggest that he is not in the floodplain, an application for activity in the floodplain is a generally-applicable permit. Atty. Hilson said the applicant needs to get an engineer to call-out the elevations. As far as the applicant's claim that that there is no difference in topography, Atty. Hilson said the September 22, 2014 letter from Burr Phillips stated what the applicant is doing definitely has an effect on the topography. Whether that activity is good, bad, or indifferent to the floodplain is unknown, which is why there is a need for the elevations to be determined by an engineer, which is all the selectmen are looking for.

Atty Hilson said he had heard two different things from Mr. Pagliarulo tonight where he said it was/ was not wet on his property. Nevertheless under 674:32-c, there is no limit on the authority of the DES to regulate the wetlands, and he is not exempt from those regulations, either. He asked the board to be mindful of the scope of why we were here, which is because the selectboard insisted on a permit from the applicant which was submitted, but without the necessary engineer's report. He felt if the applicant was now trying to shift gears by scaling-back his operations to simply growing and selling berries at the farm stand, at the very least he should go back to the selectmen and resubmit his application. He said that may or may not need an engineer's report. Julia King noted that the Pagliarulo property is classified as Zone A and A/E, which is a sensitive area in the floodway. Atty. Hilson said he needed to clarify Mr. Pagliarulo's testimony whereby he said that the town thinks he is going to develop in the floodplain. The town is not saying that he was going to put buildings in the floodplain, but he is developing in terms of the definition in the flood ordinance. Atty. Hilson agreed it was a sensitive area of the floodplains, which is why the selectboard had an obligation to ask for more information

to determine what consequences Mr. Pagliarulo's activities will have in that area. Atty. Hilson asked the board if they had any questions for him, and thanked them for their time.

The Chairman asked if there were any comments from the board. Norman Head asked whether all these issues could be resolved if Mr. Pagliarulo could prove that his activities were not taking place in the floodplain. He noted the applicant maintains his activities are not a change of use and therefore he doesn't have to prove that, but Mr. Head felt the applicant needed to provide evidence as to whether or not he is in the floodplain to support his claim that he's not developing in it. The Chairman responded by saying he didn't think the applicant was saying he's not in the floodplain, except for where he checked the "not in the floodplain" box on his building permit application. He noted that even though his activities involves agricultural, the state is very concerned with what happens in the floodplain and floodway. Mr. Pagliarulo responded to the Chairman's remark by saying the Dept. of Agriculture preferred to see the floodplain used for agricultural and farming, citing the Hussey property in Conway as an example of a floodplain farm. He said it wasn't a question of whether his property is or isn't in the floodplain as he was not developing in it, he was farming.

The Chairman then opened the meeting for public comment. Gene Black asked Mr. Pagliarulo if he was proposing to spread human manure like they do on the Hussey farm. Mr. Pagliarulo assured Mr. Black that he was not, and said that he didn't have a septage license. Rowen Prescott asked if Mr. Pagliarulo had obtained a DOT driveway permit for the driveway he installed. Mr. Pagliarulo said it was off the original driveway which had existed since 1978 or '79. Monica Bretschneider said she lived downstream from the property and asked if Mr. Pagliarulo was cutting down any trees in the floodplain area that the selectmen were aware of. She was worried that any tree clearing would cause problems for her septic system in terms of flood levels and runoff from this winter. The question was turned over to selectman Gene Chandler, but Mr. Pagliarulo offered to answer. He said that was something he was allowed to do, and it had been done for many year. He said it was beneficial not to have trees as their root system prevented water from percolating through the soil. He said the stockpile of soil on his property is mainly mucky topsoil, which was the result of the Cooks raising pigs. He said he scraped it to make the soil more permeable, which was beneficial to the floodplain. He added that everything had been done per mandates in the Dept. of Agriculture's Best Management Practices handbook and advised that the DEP and Dept. of Agriculture knew all about his activities. This prompted Atty. Hilson to ask whether Mr. Pagliarulo had informed the DES of his activities. Mr. Pagliarulo said yes, that he called them to ask if he needed permits, even a minimal impact permit, and they said he did not. When asked by Atty. Hilson who he had spoken to at the DES, Mr. Pagliarulo said he could not remember but advised that you can go on-line and use their tutorial by answering questions of what you are going to do on a property. He said a minimal impact notification did not require any DES inspection of the project. He acknowledged should he ever put in irrigation or install a pond that he would need to notify the DES, but he was not planning on doing that at this stage. When asked by Atty. Hilson whether he had given them a minimal impact notification, Mr. Pagliarulo said it was not required, as he was farming and doing the same stuff that had been done for thirty-five years. Julia King enquired if the tutorial had asked whether the project was located in the floodplain. Mr. Pagliarulo repeated that he was farming, and it was allowed in the floodplain. He described the term "floodplain" as a "buzzword" being used by counsel, and said he was absolutely in full compliance with the Shoreland Protection Act.

Scott Grant noted the applicant stated he had contacted the DES, and asked whether the selectmen's office had contacted them as well. Atty. Hilson said any contact would have been through him, and that he had not been in touch with them. Norman Head also noted Mr. Pagliarulo's statement that he had been in touch with the DES, and asked whether he was referring to a wetlands non-site-specific permit expedited, and whether he had paid the state a $200 fee. Mr. Pagliarulo said it was not required as he was not building or developing anything. He said the legislative intent of those rules and regulations was to prevent building or prevent development or prevent impeding on the shoreline. Mr. Head, who was checking the DES website on his cell phone, advised the non-specific expedited application said nothing about development or buildings. Mr. Pagliarulo suggested Mr. Head was getting off track, and that it wasn't applicable. Mr. Head asked Mr. Pagliarulo if it wasn't applicable, then why had he brought it up? Mr. Pagliarulo said he didn't bring it up, and

added that what was applicable was what was before us, which was does the town have the right to insist he apply for permits under the "police action" (his description of the cease and desist orders) that they gave him. He described those actions as "the town saying that they have the policing power to stop you from doing anything on your property that they deem necessary." The Chairman reminded Mr. Pagliarulo that there was a process in place, even though he may not agree with that process. Mr. Pagliarulo said he absolutely agreed with the process if he was in fact developing in the floodplain or changing the use, but he wasn't. The Chairman said he may not be building, but he was developing by moving dirt and installing a driveway, which were all classified as development, i.e., something that was going on, under the regulations. Mr. Pagliarulo disagreed, saying he was not developing, he was farming which was beneficial to the floodplain and wetlands. The Chairman asked him what if his activities of moving the soil did impact his neighbor's land values? Mr. Pagliarulo deflected the question by saying his neighbor had old cars and campers and junk on their land which would also be detrimental to the resale value of his property. The Chairman pressed-on with his line of questioning by asking Mr. Pagliarulo what if the disturbance he caused to the land caused it to flood differently. Mr. Pagliarulo objected to the Chairman's use of the term "disturbance," saying it was farming. The Chairman then changed the term to "development," which Mr. Pagliarulo also objected to. When the Chairman said "development" was a "change," Mr. Pagliarulo said the Chairman was taking the light most-favorable to town counsel, which was his prerogative and which he had the power to do. Mr. Pagliarulo repeated again that it wasn't development, it was simply farming on a very low scale.

Helen Crowell asked Mr. Pagliarulo if her understanding was correct that the first time he was before the board he said the activities planned for the property were to buy seedlings, raise them, and sell them. Mr. Pagliarulo said yes, that he would be selling them off-site in ten years. Ms. Crowell said now Mr. Pagliarulo was talking about growing blueberries, picking them, baking them in pies, and selling them at a table outside. Mr. Pagliarulo agreed again, and said that was always going to be the case, there was always going to be blueberries, along with ornamentals. Ms. Crowell asked Mr. Pagliarulo if he would now not be doing the other things, i.e., growing plants for sale? When Mr. Pagliarulo said that was correct, she wondered if the board was now considering the same thing. Mr. Pagliarulo said sure they were, that there was no distinction under the regulations as to what he was allowed to grow. Ms. Crowell assured him she was not saying he wasn't allowed to grow them. Julia King noted it didn't really matter, as the board was not concerned what was for sale. The board's concern was the floodplain, the building permit, etc. Mr. Pagliarulo disagreed. He said the town was saying that because he was changing what he was planting, that it was a change-of-use. He described the town's thinking as ludicrous, saying that case law backs the position that farming is farming, regardless of what is grown. When it was suggested that the change-of-use request was due to the scale of his proposed activities, Mr. Pagliarulo said so long as it wasn't detrimental to the neighborhood or traffic flow and if it was a wholesale grow operation in the field, the law was clear that he could do that. He said it was the exact same retail operation that had always been in existence; he wasn't going to put a building in and sell three thousand pies.

Julia King said she felt Mr. Pagliarulo was coming from the point of view that if he applied to the selectmen for the permits they requested, that they would be denied. She said she was trying to figure-out why Mr. Pagliarulo would have that point of view, and asked why didn't he just apply for them and move forward. She said that she felt something was getting in the way of him complying. Mr. Pagliarulo answered by saying it was his inherent right, and asked why should a townsperson have to ask for permission for something that they have the right to do. He said he bought the property because it had a farm stand, without which it would be useless to him. Norman Head said he had a few questions and noted Mr. Pagliarulo kept mentioning case law. He asked whether he had recited any of those specific cases to the ZBA, the selectmen, or town counsel? Mr. Pagliarulo answered he only provided copies of the RSAs which related to the case laws. Mr. Head noted that RSAs weren't case law, so the answer is "no." Mr. Head then asked if Mr. Pagliarulo was excavating on the property. He answered, "absolutely not." Mr. Pagliarulo was then asked if he had stripped topsoil. He replied that what he did was called "soil conservation." Mr. Head asked for a yes or no answer, which Mr. Pagliarulo did not provide, but repeated it was "soil conservation" under RSA 21:34-a. Mr. Head asked Mr. Pagliarulo if he didn't consider that "excavation." Mr. Pagliarulo again replied "absolutely not." Mr. Head continued with

the same line of questions by asking Mr. Pagliarulo if he had removed or dredged any soil. He replied, "no, there was no dredging done." He was asked again if he had removed any soil, and replied that everything that was removed was piled on the site. He said the soil that was removed was muck which came from the area where the interior road was put in. Mr. Pagliarulo said his typical mode of operation would be to screen the soil and mix it with compost and other hummus material using the heavy equipment, and use it to fill about two thousand pots he has on-site,. These would then be put in the grow field. Mr. Pagliarulo said that would be what he would typically do, but the cease-and-desist order in-place prevents him from doing that with the pile of soil that is currently on the property .

At this point, the Chairman closed the public hearing and the board deliberated on Mr. Pagliarulo's appeal. The board discussed whether a building permit was required for the storage trailer, with Julia King feeling it was since any building was tied to assessment of property taxes, and other members felt it probably wasn't, since Mr. Pagliarulo had offered to remove it and a waiver process was available to him if it remained. Peter Pelletier suggested the board deal with the issue at hand, which is the appeal, and make a decision and give the applicant the opportunity to move forward in the appropriate manner. He asked the Chairman if he was ready to entertain a motion. The Chairman said he was, and that it could be discussed after it was seconded. Mr. Pelletier said seeing as Mr. Pagliarulo has not provided any new information specific to our decision of January 13, 2015, he moved to deny this appeal. Norman Head seconded. The board then reviewed the pertinent RSAs again, along with the findings of the January 13 meeting as documented in the Notice of Decision. The board felt those findings were all still relevant. In reconsidering those conditions, the board reaffirmed their findings that there was a significant change in use from unused farm land to a commercial nursery, and the movement of soil to create a road using heavy equipment in an area of special flood hazard constituted enough significant development to require a permit for activity in the floodplain. Peter Pelletier also made mention of comments made by Atty. Hilson at the January meeting, as documented in the minutes, when he said if the property was in the A/AE zone, placing any structure, such as a trailer, on the property required a permit. The Chairman noted the applicant's reluctance to provide information to the selectmen, and felt that the selectmen in their role as overseers of the town and their responsibility to protect the citizens and floodplain, had the right to require the information requested from Mr. Pagliarulo.

Norman Head felt the board had considered all the information in enough depth to take a vote. The Chairman said a motion had been made and seconded to deny the application, and he called for a vote. Vote taken: All in favor. The motion passed unanimously. The board of selectmen will be advised of the ZBA's decision.

2. Review and Approval of Minutes: The minutes of the January 13, 2015 meeting were reviewed. Motion to approve, as written, made by Norman Head; seconded by Helen Crowell. Vote: All in favor. The minutes of the February 28, 2015 meeting were reviewed. Motion to approve, as written, made by Julia King; seconded by Norman Head. Vote: 4-0-1 with Peter Pelletier abstaining since he was not present at the meeting.

With no further business, a motion to adjourn was made by Julia King; seconded by Peter Pelletier. Vote: All in favor. Meeting was adjourned at 9:00 pm.

Respectfully submitted,
Barbara Bush
Recording Secretary