

**January 29, 2024 Letter to Alna re Comments on Draft Mining Ordinance,  
attaching May 22, 2023 and August 1, 2023 Comments**

**GEORGIA BOLDUC**

Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101

**PH** 207.791.1249  
**FX** 207.791.1350  
gbolduc@pierceatwood.com  
www.pierceatwood.com

*Admitted in:* ME

January 29, 2024

**VIA ELECTRONIC MAIL**

Town of Alna Planning Board  
Chair Johnson and Vice Chair Papagiannis  
1574 Alna Road  
Alna, Maine 04535

Re: Comments on Draft Mining Ordinance

Dear Chair Johnson and Vice Chair Papagiannis:

In advance of the January 30, 2024, Planning Board meeting, I submit additional comments on behalf of Crooker Construction, LLC ("Crooker"), regarding the January 21, 2024, version of the draft mining ordinance. Crooker previously submitted comments on May 22, 2023, and August 1, 2023, which we incorporate herein by reference.

Crooker – one of Maine's oldest and most experienced earthwork contractors – operates a gravel quarry in the Town of Alna, pursuant to the February 17, 2003, Subdivision and Site Plan Review Ordinance Permit ("2003 permit") and a Maine DEP permit. Its Alna facility supplies aggregate to Alna and the Midcoast region that is needed for roadways, utilities, septic systems, house lots, and essential services. The 2003 permit, by reference to Topsham's Blasting Ordinance, also requires Crooker to obtain an annual blasting permit, the most recent of which was approved by the Planning Board on April 4, 2023. On January 16, Crooker submitted its renewal application for a 2024 annual blasting permit.

As we have previously noted, Crooker supports the Town's efforts to ensure that mining and quarrying operations are safe and pose no risk to the residents of Alna but is concerned that the most recent version of the draft Mining Ordinance ("draft ordinance") would unlawfully prohibit Crooker's ongoing and permitted operations in Alna.

We believe that Crooker's operations qualify as a nonconforming use under the draft ordinance and therefore do not require additional permitting, except for Crooker's blasting operations, but submit comments on all provisions of the draft ordinance for completeness.

First, Section 3(B) of the draft mining ordinance prohibits blasting after January 1, 2029, and Section 3(E) unlawfully prevents a preexisting blasting operation from qualifying as a legally nonconforming use under the ordinance. Crooker's quarrying operation in Alna primarily uses blasting; consequently, the draft ordinance in its current form, may force Crooker to shut down its Alna facility in violation of both the state and federal Takings Clause. U.S. Const. amend. V; Me. Const. art. I § 21. As we have noted in our previous comments, Maine's highest court has recognized the importance of providing nonconforming

use provisions in local ordinances to avoid compelling nonconforming uses to cease operations under the Takings Clause. *See Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548, 550 (Me. 1966) (noting a provision “for the continuance of the nonconforming use . . . is ordinarily included in zoning and police power ordinances because of hardship and [the] doubtful constitutionality of compelling . . . cessation of nonconforming uses”); *see* also Department of Economic and Community Development, Office of Community Development, Code Enforcement Officer Training/Certification Program 2017 Legal Issues pg. 58 (“Provisions dealing with nonconforming lots, structures and uses must be included in a zoning ordinance in order to avoid constitutional problems.”).

Furthermore, a sunset provision does not absolve a municipality from a Takings claim. *See Inhabitants of Town of Boothbay v. National Advertising Co.*, 347 A.2d 419, 424-25 (Me. 1975) (evaluating whether sunset provision in ordinance constituted a takings claim). Accordingly, if the Town’s intent is to prohibit blasting operations like Crooker’s, the ordinance must include a provision that allows for Crooker to continue its permitted operations, which includes blasting.

Likewise, by prohibiting rock crushing, the draft ordinance runs afoul of the Takings Clause. Section 3 of the mining ordinance bans rock crushing, yet it is unclear whether the nonconforming use provision applies to legally nonconforming rock crushing operations, because in the definition for bedrock quarrying the ordinance specifies rock crushing as both a quarrying activity and not a quarrying activity. *See* Draft Ordinance pg. 20 (“Bedrock Quarrying: The extraction, excavation, removal, handling, or processing of consolidated rock (bedrock) or other hard nonmetallic material that requires cutting, blasting, or similar methods of forced extraction, and any structures, facilities, equipment, and processes associated with such activities, including . . . rock crushing and sorting. This definition does not include . . . rock crushing . . .”). Assuming the Planning Board intends to exempt rock crushing as a quarrying activity, this violates both the state and federal Takings Clause because it bans rock crushing operations without allowing for current legal rock crushing operations to continue to operate once the draft ordinance goes into effect. *See Inhabitants of Town of Windham v. Sprague*, 219 A.2d at 550.

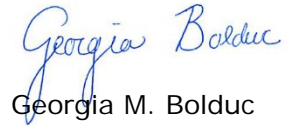
Additionally, the maximum extraction and frequency of blasting provisions, which limit blasting operations to 30,000 cubic yards and 14 days of blasting, are very limiting to Crooker’s operations and may have the effect of compelling Crooker to cease its operations. Just last year the Town of Alna permitted Crooker to blast 100,00 cubic yards in 19 days.

Finally, although Crooker believes its quarrying operation qualifies as a nonconforming use, Crooker would like to comment on the mining ordinance’s treatment of quarrying operations. The setback, reclamation, and groundwater requirements for quarrying are extremely limiting. The setback requirements under the mining ordinance are 10 to 20 times larger than the state setback requirements; the active mining zone – the area of total non-vegetated cover – is required to be more than 3 times smaller under the zoning ordinance than under state law; and the groundwater protection requirement - which prohibits extraction within 5 feet of the seasonal high groundwater table - is too conservative, Crooker is currently permitted to extract to within 2 feet of the seasonal high groundwater table.

Town of Alna  
January 29, 2024  
Page 3

Thank you for your consideration.

Sincerely,



Georgia M. Bolduc

Enclosures

cc: Benjamin Plante, Drummond Woodsum, Alna Town Counsel  
Thomas Sturgeon, President & CEO, Crooker Construction, LLC  
Ian Messier, Chief Engineer, Crooker Construction, LLC

## **May 22, 2023 Comments**

**GEORGIA BOLDUC**

Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101

**PH** 207.791.1249  
**FX** 207.791.1350  
gbolduc@pierceatwood.com  
www.pierceatwood.com

*Admitted in:* ME

May 22, 2023

**VIA ELECTRONIC MAIL**

Town of Alna Planning Board  
Chair Amaral and Vice Chair Johnson  
1574 Alna Road  
Alna, Maine 04535  
[Amaral707@proton.me](mailto:Amaral707@proton.me)

Re: Draft Mining Ordinance

Chair Amaral, Vice Chair Johnson, and Members of the Alna Planning Board:

In advance of the May 23, 2023 workshop on the draft Mining Ordinance, I submit the following comments on behalf of Crooker Construction, LLC ("Crooker"), which operates a gravel mine in the Town of Alna pursuant to the February 17, 2003, Subdivision and Site Plan Review Ordinance Permit ("2003 permit").

As you are aware, Crooker is one of Maine's oldest and most experienced earthwork contractors, having operated in the Midcoast region since 1935 and currently employing 170 people. Crooker provides superior materials and construction services to a wide range of businesses, including earthwork and landscape companies, homeowners, and municipalities just like Alna. Crooker's Alna rock mining operation allows Crooker to supply much needed aggregate to the Midcoast region that is needed for roadways, utilities, septic systems, house lots, and essential services.

Crooker's local gravel mining operation that straddles the Alna/Whitefield border is permitted by the 2003 permit as well as by the Maine DEP. Under the 2003 permit, Crooker is subject to the Topsham Blasting Ordinance, which includes comprehensive performance standards that regulate hours of blasting and set water quality and ground vibration and airblast overpressure limits. The 2003 permit, by reference to Topsham's Blasting Ordinance, also requires Crooker to obtain an annual blasting permit, the most recent of which was approved by the Planning Board on April 4, 2023.

We understand the Town's desire to more specifically regulate mining activities, and fully support the Town's efforts to ensure that such essential operations are safe and pose no risk to the residents of Alna. However, Crooker has reviewed the draft Mining Ordinance and is concerned that, if adopted, the ordinance could be interpreted to prohibit Crooker's ongoing and permitted operations in Alna.

As written, the draft Mining Ordinance appears to prohibit certain mining and quarrying activities yet lacks a preexisting nonconforming use provision in violation of constitutional principles. In particular, Article 8(c) of the Mining Ordinance reads:

Article 8. Rock Crushing, Asphalt Batch Plants and Quarrying

C. Quarries: Quarrying or the mining of rock or other consolidated material using explosives or mechanical means is prohibited.

Assuming the draft Mining Ordinance intends to prohibit quarrying through mechanical means or explosives, without a grandfathering or preexisting nonconforming use allowance, the draft Mining Ordinance may force Crooker to shut down its facility, in violation of both the federal and state Takings Clause. U.S. Const. amend. V; Me. Const. art. I, § 21; *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973). Since 1966 the Maine Supreme Court has acknowledged the importance of including nonconforming use provisions in local ordinances to avoid “doubtful constitutionality” under the Takings Clause. *See Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548, 550 (Me. 1966) (noting a provision “for the continuance of the nonconforming use ... is ordinarily included in zoning and police power ordinances because of hardship and [the] doubtful constitutionality of compelling immediate cessation of nonconforming uses”); *see also Stewart v. Inhabitants of Town of Durham*, 451 A.2d 308, 311-312 (Me. 1982) (noting “some form of a grandfather clause is probably required” to save a mobile home ordinance “from a constitutional challenge under the takings clause”); *see also Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015) (“a grandfather clause, which allows the limited continuance of nonconformities, is included in . . . ordinances in order to avoid takings challenges.”). Accordingly, if the Town’s intent is to prohibit operations like Crooker’s, the ordinance must include provisions that allow for it to continue its permitted operations.

Furthermore, while Section 8(c) of the draft Mining Ordinance clearly prohibits quarrying or the mining of rock through mechanical means or explosives, other sections of the draft Mining Ordinance are inconsistent with this prohibition. For example, the notes in Article 5 suggest regulation based on the type of mining activity, including “quarrying rock,” which is differentiated from “gravel extraction” and “mineral mining.” Further inconsistent with the prohibition is the Article 16(M) definition of mining activities which include quarrying (“any excavation or removal, handling or storage of on-site extracted sand, gravel, borrow, rock, clay, minerals or topsoil including . . . quarrying”). Likewise, it is hard to imagine how quarrying could occur without mechanical means, as the draft Mining Ordinance appears to recognize in its Article 6 standards for blasting hours (Section D) and noise (Section E).

It is also unclear under the ordinance how quarrying is differentiated from “gravel extraction” or “mineral mining.” Typically, a “quarry” refers to a type of mine in which rock (as opposed to topsoil, clay, sand, or gravel) is mined. If it is the Town’s intent to allow only the extraction by hand of certain materials, it should be made clear. However, Crooker suggests that the Town’s intent appears to be regulation of different classes of “mining activities” that include quarrying.

In addition to the fundamental issue of what the Mining Ordinance will regulate and what it will prohibit, we note that the Article 6 noise standards should be revised to include standards for operational noise that are different from blasting noise, as blasting noise

Town of Alna Planning Board  
Chair Amaral and Vice Chair Johnson  
May 22, 2023  
Page 3

levels are higher but shorter in duration. We also note that the groundwater protection performance standards are significantly more restrictive than state standards.

Thank you for your consideration of our comments. Please let me know if you have any questions or need additional information, and we look forward to working with you on the draft Mining Ordinance at the May 23 workshop.

Sincerely,



Georgia Bolduc

cc: Benjamin J. Plante, Drummond Woodsum, Alna Town Counsel  
Thomas Sturgeon, President & CEO, Crooker Construction LLC  
Ian Messier, Chief Engineer, Crooker Construction LLC



## **August 1, 2023 Comments**

August 1, 2023

**VIA ELECTRONIC MAIL**

[Amaral707@proton.me](mailto:Amaral707@proton.me)

Town of Alna Planning Board  
Chair Amaral and Vice Chair Johnson  
1574 Alna Road  
Alna, Maine 04535

Re: July 25, 2023 Version of Draft Mining Ordinance

Chair Amaral, Vice Chair Johnson, and Members of the Alna Planning Board:

In advance of the August 1, 2023, Planning Board meeting, I submit additional comments on behalf of Crooker Construction, LLC ("Crooker"), regarding the July 25, 2023, version of the draft mining ordinance. Crooker operates a gravel mine in the Town of Alna pursuant to the February 17, 2003, Subdivision and Site Plan Review Ordinance Permit ("2003 permit") and a Maine DEP permit. The 2003 permit, by reference to Topsham's Blasting Ordinance, also requires Crooker to obtain an annual blasting permit, the most recent of which was approved by the Planning Board on April 4, 2023.

We fully support the Town's efforts to ensure that mining operations are safe and pose no risk to the residents of Alna. However, Crooker has reviewed the most recent version of the draft Mining Ordinance and is concerned that, if adopted as written, the ordinance would prohibit Crooker's ongoing and permitted operations in Alna. Crooker previously submitted comments addressing this concern on May 22, 2023. See Attachment 1.

As currently written, under Section 8, the draft Mining Ordinance prohibits mineral mining, rock crushing, asphalt batch plants, and quarrying activities except for when done on a specific site for the purpose of constructing a structure. By prohibiting quarrying without a grandfathering or preexisting nonconforming use allowance or some sort of exception for Crooker, however, the draft Mining Ordinance may force Crooker to shut down its facility, in violation of both the federal and state Takings Clause.<sup>1</sup> Thus, the ordinance must include a

---

<sup>1</sup> U.S. Const. amend. V; Me. Const. art. I, § 21; *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973) (taking includes an interest in the property, or in its use and enjoyment, being seriously impaired); *See Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548, 550 (Me. 1966) (noting a provision "for the continuance of the nonconforming use ... is ordinarily included in zoning and police power ordinances because of hardship and [the] doubtful constitutionality of compelling immediate cessation of nonconforming uses"); *see also Stewart v. Inhabitants of Town of Durham*, 451 A.2d 308, 311-312 (Me. 1982) (noting "some form of a grandfather clause is probably required" to save a mobile home ordinance "from a constitutional challenge under the takings clause"); *see also Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015) ("a grandfather clause, which allows the limited continuance of nonconformities, is included in . . . ordinances in order to avoid takings challenges.").

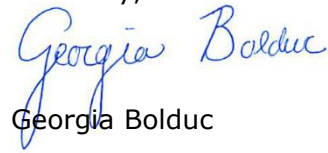
Town of Alna Planning Board  
Chair Amaral and Vice Chair Johnson  
August 1, 2023  
Page 2

nonconforming use provision, exemption, or waiver provision that allows for Crooker to continue its permitted operations, including clarification of its annual blasting approval and any other standards that will govern Crooker's operations.

Finally, we'd once again like to note that the Article 6 noise standards should be revised to include standards for operational noise that are different from blasting noise, because blasting noise levels are higher but shorter in duration and that the groundwater protection performance standards are significantly more restrictive than state standards.

Thank you for your consideration of our comments. Please let me know if you have any questions or need additional information.

Sincerely,



Georgia Bolduc

Enclosure

cc: Benjamin J. Plante, Drummond Woodsum, Alna Town Counsel  
Thomas Sturgeon, President & CEO, Crooker Construction LLC  
Ian Messier, Chief Engineer, Crooker Construction LLC

## ATTACHMENT 1

**GEORGIA BOLDUC**

Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101

**PH** 207.791.1249  
**FX** 207.791.1350  
gbolduc@pierceatwood.com  
www.pierceatwood.com

*Admitted in:* ME

May 22, 2023

**VIA ELECTRONIC MAIL**

Town of Alna Planning Board  
Chair Amaral and Vice Chair Johnson  
1574 Alna Road  
Alna, Maine 04535  
[Amaral707@proton.me](mailto:Amaral707@proton.me)

Re: Draft Mining Ordinance

Chair Amaral, Vice Chair Johnson, and Members of the Alna Planning Board:

In advance of the May 23, 2023 workshop on the draft Mining Ordinance, I submit the following comments on behalf of Crooker Construction, LLC ("Crooker"), which operates a gravel mine in the Town of Alna pursuant to the February 17, 2003, Subdivision and Site Plan Review Ordinance Permit ("2003 permit").

As you are aware, Crooker is one of Maine's oldest and most experienced earthwork contractors, having operated in the Midcoast region since 1935 and currently employing 170 people. Crooker provides superior materials and construction services to a wide range of businesses, including earthwork and landscape companies, homeowners, and municipalities just like Alna. Crooker's Alna rock mining operation allows Crooker to supply much needed aggregate to the Midcoast region that is needed for roadways, utilities, septic systems, house lots, and essential services.

Crooker's local gravel mining operation that straddles the Alna/Whitefield border is permitted by the 2003 permit as well as by the Maine DEP. Under the 2003 permit, Crooker is subject to the Topsham Blasting Ordinance, which includes comprehensive performance standards that regulate hours of blasting and set water quality and ground vibration and airblast overpressure limits. The 2003 permit, by reference to Topsham's Blasting Ordinance, also requires Crooker to obtain an annual blasting permit, the most recent of which was approved by the Planning Board on April 4, 2023.

We understand the Town's desire to more specifically regulate mining activities, and fully support the Town's efforts to ensure that such essential operations are safe and pose no risk to the residents of Alna. However, Crooker has reviewed the draft Mining Ordinance and is concerned that, if adopted, the ordinance could be interpreted to prohibit Crooker's ongoing and permitted operations in Alna.

As written, the draft Mining Ordinance appears to prohibit certain mining and quarrying activities yet lacks a preexisting nonconforming use provision in violation of constitutional principles. In particular, Article 8(c) of the Mining Ordinance reads:

Article 8. Rock Crushing, Asphalt Batch Plants and Quarrying

C. Quarries: Quarrying or the mining of rock or other consolidated material using explosives or mechanical means is prohibited.

Assuming the draft Mining Ordinance intends to prohibit quarrying through mechanical means or explosives, without a grandfathering or preexisting nonconforming use allowance, the draft Mining Ordinance may force Crooker to shut down its facility, in violation of both the federal and state Takings Clause. U.S. Const. amend. V; Me. Const. art. I, § 21; *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973). Since 1966 the Maine Supreme Court has acknowledged the importance of including nonconforming use provisions in local ordinances to avoid “doubtful constitutionality” under the Takings Clause. *See Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548, 550 (Me. 1966) (noting a provision “for the continuance of the nonconforming use ... is ordinarily included in zoning and police power ordinances because of hardship and [the] doubtful constitutionality of compelling immediate cessation of nonconforming uses”); *see also Stewart v. Inhabitants of Town of Durham*, 451 A.2d 308, 311-312 (Me. 1982) (noting “some form of a grandfather clause is probably required” to save a mobile home ordinance “from a constitutional challenge under the takings clause”); *see also Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015) (“a grandfather clause, which allows the limited continuance of nonconformities, is included in . . . ordinances in order to avoid takings challenges.”). Accordingly, if the Town’s intent is to prohibit operations like Crooker’s, the ordinance must include provisions that allow for it to continue its permitted operations.

Furthermore, while Section 8(c) of the draft Mining Ordinance clearly prohibits quarrying or the mining of rock through mechanical means or explosives, other sections of the draft Mining Ordinance are inconsistent with this prohibition. For example, the notes in Article 5 suggest regulation based on the type of mining activity, including “quarrying rock,” which is differentiated from “gravel extraction” and “mineral mining.” Further inconsistent with the prohibition is the Article 16(M) definition of mining activities which include quarrying (“any excavation or removal, handling or storage of on-site extracted sand, gravel, borrow, rock, clay, minerals or topsoil including . . . quarrying”). Likewise, it is hard to imagine how quarrying could occur without mechanical means, as the draft Mining Ordinance appears to recognize in its Article 6 standards for blasting hours (Section D) and noise (Section E).

It is also unclear under the ordinance how quarrying is differentiated from “gravel extraction” or “mineral mining.” Typically, a “quarry” refers to a type of mine in which rock (as opposed to topsoil, clay, sand, or gravel) is mined. If it is the Town’s intent to allow only the extraction by hand of certain materials, it should be made clear. However, Crooker suggests that the Town’s intent appears to be regulation of different classes of “mining activities” that include quarrying.

In addition to the fundamental issue of what the Mining Ordinance will regulate and what it will prohibit, we note that the Article 6 noise standards should be revised to include standards for operational noise that are different from blasting noise, as blasting noise

Town of Alna Planning Board  
Chair Amaral and Vice Chair Johnson  
May 22, 2023  
Page 3

levels are higher but shorter in duration. We also note that the groundwater protection performance standards are significantly more restrictive than state standards.

Thank you for your consideration of our comments. Please let me know if you have any questions or need additional information, and we look forward to working with you on the draft Mining Ordinance at the May 23 workshop.

Sincerely,



Georgia Bolduc

cc: Benjamin J. Plante, Drummond Woodsum, Alna Town Counsel  
Thomas Sturgeon, President & CEO, Crooker Construction LLC  
Ian Messier, Chief Engineer, Crooker Construction LLC