Email from Jeff Spinney 2/2/24

Had an extensive discussion with Steve today regarding the planning board and the planned exec session for planning board advertized as:

"Executive Session pursuant to Title 1 M.R.S.A. §405 (6) for legal consultation regarding amendment
and development of ordinances, including legal rights and duties of the board."

this is of course all subject to

## §401. Declaration of public policy; rules of construction

"The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly."

The very few executive session cases listed in statute, as noted are note intended to be used without specific purpose. It is unlikely that this could put the town at a disadvantage, since this is nothing but public policy making in action and this (and all such discussions) should be conducted in public. Since there is no pending or contemplated litigation on this land use matter, it is doubtful that this could do any damage. Seeing the interaction between the board and counsel, allows the public to understand and see the judicious and efficient use of counsel and essentially, what the public is paying for.

Based upon the various meetings, and the discussion of board members and the resulting work product, it is quite clear that the proposed ordinance is targeting certain operations in town, which is fundamentally wrong and the public has some serious concerns. This proposed ordinance, also improperly burdens and limits small operators, and many of the measures and standards are way out of line.

Steve asked me to put this all in writing, so below I have tried to systematically go through them here for the record: i reviewed both the summary document and the actual proposed ordinance itself from the website, with most of my focus on the smaller gravel (mining by definition) operations.

see me if any questions,
-j

https://www.maine.gov/dep/land/mining/Mining_Pamphlet.pdf (c1970)
DEP requires a NOITC (notice of intent to comply) for quarry over 1 ac, gravel over 5ac:

- in short: for small pits under 5ac, no notice is filed with DEP

https://alna.maine.gov/vertical/sites/%7BBDB98820-241D-4E93-ADE8-FCEDF75584C6%7D/uploads/SubdivisionSitePlanOrdinance(1).pdf
Town of Alna: 1/2 acres gravel and mining, 2 acre loam and topsoil (date of adoption...i don't have off top of my head but it was post 1970's)

-in short: in practice, it has always been considered that under 2 acres of unreclaimed disturbed area was permit exempt. this was more restrictive than the DEP 5 acre NOITC requirement and is generally what you will find in existence as smaller, permit exempt pits today.

Current, known/active pits that i can list just off top of my head and a vague approx size: Currently used for smaller scale (As compared to crooker), commercial gravel/sand/stone operations. Not large enough for commercial permitting as permitted by DEP or town of Alna. But larger than the proposed town regulations would allow.

sutters pit - 2+ acres main pit, smaller side pits
ron wrights -- 1.5+ acres
jeff verneys - 1.5+ acres
spinney - approx 3/4 acre sand & 1.5 acre gravel pits
Steve Piworski - 3/4 acre
Wallace - 1 acre (?)

- The current proposal, is laughable at 24 yards of material max for class A pit. A single triaxle dump truck is 12 yards. That's a limit of two truck loads per year. Clearly this was written by people who either have no knowledge of material transportation or have a desire to close all gravel pits in town.

* from the proposed ordinance summary document: *

"Standards: The ordinance establishes regulations addressing a number of issues including protection of groundwater, dust, noise, truck traffic, protection of wildlife habitat, exterior lighting, hours of operation, setbacks and screening, liability insurance, performance guarantees, spill containment, and reclamation. The standards vary depending on the size and type of operation, and limit the amount of extraction.

Nonconforming Uses: A legally existing, nonconforming mining or quarrying operation may continue to operate if it meets specific requirements. Expansions of nonconforming uses must comply with the standards of this ordinance. "

This establishes a set of standards and subjective tests that for existing, small pits, as noted above that are completely unreasonable. These pits do not have most of the things listed in the standards as being applicable, and will not. The overburdening of these small owner/operators to show that they have been 'substantively' operating is not acceptable and is clearly focused to put an end to these operations. These operations are where nearly 100% of the septic sand comes from for septic systems installed in the last 5 years in Alna. These operations are also where the majority of the bank run gravel and such comes for roads for things like the access roads at Sea Lyon farm, the roads and parking areas at WW&F, and many other resident projects.

*looking specifically at the proposed ordinance*

-section c(5) - " 5. Mining operations with a disturbed area of less than ½ acre and where less than 24 cubic yards of mining materials are extracted per year for the exclusive, non-commercial use of the property owner on the same property."
-as stated, 1/2 acre is far too small. Almost all of the pits in use today, exceed this as noted above.
-24 yards, is 2 truck loads and way too small
-non-commercial use, this makes all of the pits listed not exempt from permitting, as they are all used for commercial activity.
-the requirement for 'use on same property' should be stricken, for example, i have multiple gravel pits at Golden Ridge Rd and will on occasion haul gravel to my other properties in Alna such as Albees or Hassan Rd. No proposed ordinance has the realistic authority to stop this from occurring with a landowner, any attempt to enforce this would result in a legal battle because it infringes on fundamental ownership and probably constitutional rights.

-this seems to run in conflict with the definition of DISTURBED AREA at the end. Disturbed area by definition here is literally all land owned by applicant. As is seemingly used in the clases, it seems to be trying to be both actual operative pit face (working) area and total area at the same time. The two sections need reconciliation and a realistic resizing of class a and class b accordingly.

(see also further comments on definition at end)

- Section 3 (D). - "D. Nonconforming Bedrock Quarrying, Mining Operations. A legally existing, nonconforming bedrock quarrying or mining operation may continue to operate but only in strict compliance with the following requirements:

1. Actual and Substantial Use. A bedrock quarrying or mining operation is a legally existing, nonconforming use if (i) the operation existed lawfully prior to the enactment of this Ordinance; (ii) the preexisting operation was actual and substantial, as demonstrated by substantial investment in the operation or substantial financial loss if the operation is discontinued; and (iii) the nonconforming operation reflects the original nature and purpose of the preexisting

operation, is not different in quality or character as well as in degree of the preexisting operation, and is not different in kind in its effect on the neighborhood where it is located.

2. Expansion of Nonconforming Use. The expansion of a legally existing, nonconforming bedrock quarrying or mining operation is prohibited unless the operation, together with any proposed expansion of the operation, complies with the requirements of this Ordinance. No such expanded operation may commence until an application pursuant to this Ordinance has been submitted to and reviewed and approved by the Board.

3. Resumption Prohibited. If a nonconforming bedrock quarry or mining operation is abandoned or discontinued for any reason for a period of 24 or more consecutive months, any resumed operation must comply with the requirements of this Ordinance in all respects. A nonconforming bedrock quarrying or mining operation may not be changed to another nonconforming operation"

-part 1 (i) - the smaller pits of focus here, listed above, are well known and are indeed lawful in that they were not required to have permits prior to this proposal. It is unclear as to what purpose this section serves, other than it was added due to the lack of knowledge of all the small pits when this was being drafted with ONLY crookers pit in mind.

-part 1(ii) - is purely subjective in nature, and will be abused or misunderstood by board members. I can say that every truck load of gravel is worth $600-1000 and therefore that is 'substantial' in my opinion. Or, i could say that the property cost 800k to acquire the right to use and dig the gravel, that is substantial. In contrast, a board member might say that a half dozen truck loads of septic sand, in comparison to the thousands of loads of crushed aggregate from crooker's is not substantial. There is no effective benefit derived from this item, it will only lead to arguments and lawsuits.

-part 1(iii) - again, this is subjective in nature relying on the 'quality' and it is 'not different in kind or character in its effect on the neighborhood'. What this is essentially laying the groundwork for, is denial or some sort of bias based upon the neighborhood growing up around the existing permitted use (among a variety of other points of possible abuse). That isn't right. This is the Sheepscot problem, all the people who have moved in from away, complain incessantly about 'big dump trucks' traveling through Sheepscot. Again, this is nothing but a subjective, problem area for land use permitting and should be adjusted/removed.

-part 2 -- this attempts to tie any expansion at all, with complete conformance. This may not be realistic. Let me give an example: My sand pit, is very close to my northern property line. The reason being, the line (the same exact one drawn beside my boat ramp) was established and put there when dividing the property long AFTER the pit was in use.

Should i wish to expand my sand pit, i should be able to do so but to the South in a conforming manner. The principal of 'expansion not increasing the non-conformance (similar to tha in SZO)

should be employed. It is not reasonable, to expect that the existing non-conformance, magically disappears.

-part 3: - resumption period of 24 months. This is too short for an occasional use thing. Pits in the class we are talking about here are typically seasonal, due to access, etc. And, there may be a skip in seasons or two for one reason or another. It would be more reasonable, and less likely to be challenged, to establish either no resumption limit on the smallest class pits, or make it be a large amount of time, say 10 years.

Section 4:

" Class A: 1) Mining operations with a disturbed area of less than ½ acre and where 24 or more but fewer than 300 cubic yards of mining materials are extracted per year for the exclusive, non-commercial use of the property owner or 2) Mining operations with a disturbed area of more than ½ acre and fewer than 24 cubic yards of mining materials are extracted per year for the exclusive, noncommercial use of the property owner "

note: for these comments, I'm only going to tackle class a, but some of these things/ideas likely transcend the classes.

-the 'disturbed acreage' - for class A - seems to focus on 1/2 acre. I would assume this to be (based on use/context) to be the pit 'face' (working area from which the material is coming)...not the entire pit size/total area. However, when you step up to the next class (class b), this assumption then gets thrown off because you go from 1/2 ac to up to 50ac. It seems you may have a fundamental issue in this measurement that should be addressed.....1/2ac is too small, as you can see by the approx pit sizes i listed, but might be realistic for pit face. But, 50ac is larger than any pit face i can think of in Maine. It seems there is a lot of room for improvement or granularity here and the section needs to be reworked

-24 yds - 300 yds of volume removed -- is just ridiculously small. Thats 2 - 25 truck loads a year. If i recall, the road at Sea Lyon took around 50+ truck loads alone. That is one relatively small project. Another, my 4 bay garage took approx 50 loads.

-finally, the statement ' extracted for the exclusive, noncommercial use of the property owner.' -- completely attempts to wipe out all the small pits in town. This is a non-starter, and needs to be changed. It has always been considered a foundational right of landowners in the town of Alna to extract and sell/trade gravel, under the cap of town and DEP limits.

section 7 (a) - 500' setback from property line. I can tell you with a fair amount of confidence and acuracy that all of the small pits listed, do not have a 500' setback from the abutting property line.

section 7(b)1 - the 3:1 slope during operation without a fence. None of these pits have fences and all have faces in excess of this. When digging gravel from a bank, you will always have an exposed face and it would be highly unusual to have it be less than that angle. This restriction is typical for reclamation language or where the face may be easily accessible to the public. It is unrealistic to expect this fencing and/or lack of slope to occur. It might be reasonable to have such a restriction if within so many feet of a public way, for example where a person cold wander and get hurt or killed. Most of these pits are far out of sight, so much so this planning board didn't even seem to know about them.

section 7(c) - it is unrealistic to expect private landowners of small pits to carry this insurance. i do note there is an awkward line at the end of this, saying that 'this standard' applies to class b, or quarrying so perhaps this was a last minute addition to exempt gravel pits? but, in part 2 of the standard, it speaks of mining materials being transported offsite...and mining, unfortunately, appears to include gravel pits by definition. so, this section's applicability therefore is a little unclear. Regardless, small pit operators would not be able to comply with this. This should be addressed/clarified.

section 7(d) - similarly, this section seems to have a class b or quarrying line thrown on the end, but it also refers to mining....which includes gravel.
It is unrealistic to expect that small pit operators are going to place any limits on their hours. It is completely unenforceable in cases where it may be the actual owner of the property driving the truck as the town cannot effectively limit the operations of a homeowner accessing his property.

section 7(g) - the town does not have the authority to enforce this (accumulation of dirt, etc) on anything but a town road. and a pit operator only has authority over their owned/controlled vehicles. Once they leave the pit out of the permittee's control, they are autonomous citizens on a public road. Trucks securing loads are a DOT issue, not a town issue. Police and DOT have the authority here, not the town. This was explained to the planning board numerous times.

section 7(h) - this section is rife with subjective items that will cause legal issues.
- "The average and peak number of vehicle trips per day must not result in safety hazards or an unreasonable adverse impact on the character of the Town." - if i as a taxpaying landowner want to drive my car, my truck, my truck with a trailer, or even a dumptruck up and down the road 50 times a day to and from my home, there is nothing the town can do about it if i am not breaking any laws. "Character of the town" is not a quantitative item, and should not be used in land use ordinances, i actually believe there have been some notable court cases citing this exact type of subjective measure for abuse.

-the town of Alna planning board, has no authority to limit the number of vehicle trips on state roads. This was discussed and explained at length, and yet this overreach of authority seems to have still gotten into the final draft.

-section 7(I) - any shelter that does not exceed the minimum building permit size, would not need a permit. this appears to create a conflcit between ordinances. Wording should be adjusted, it is unreasonable to require a building permit for small storage sheds which do not require a permit otherwise.

-section j(4) - this is completely unrealistic thinking this will occur. The DEP has spill laws, it is foolish for the town to try and enforce this lacking the capability and enforcement mechanism.

section O - disturbed area, appears to encompass the entire pit property. need to reconcile this with use and definition as noted.

section t - this should not apply to class a, it is not realistic to expect. As an example, to get to my sand pit you must travel down a wooded road. to get to sutters pit you actually drive across an often washed out stream area. Such acces would likely would not meet the frankly subjective requirements here. Would be reasonable to expect this of a bigger operation such as crooker with a large access road.

Emergency vehicles require a larger width road area, specific construction for road base for safe transit, certain grades, broad turn arounds, etc....all of which have specific requirements that are not always going to occur on the smaller class of pits used by and accessed by construction vehicles. Lifting this as a class A requirement would be a minimum.

section 9 - the potential for abuse by over exuberant or uninformed board members exists here in conditions. the conditions cited are vague, and likely excessive for a class a operation. limiting routes, demanding compensation for roads, demanding groundwater testing, etc..... many of these things, are applicable to larger operations, and class a (smaller operators) should be exempted. Note: there is no way for a town to impose a fine for the negligent or abusive conduct of a non-employee on a town way, and the town has no authority on a state way. This entire section should be revamped to make clear what is and is not within the town's scope of authority and is not subjective aor arbitrary in nature, this was discussed and explained at numerous meetings. The planning board does not get to have a 'catch all' in land use enforcement.

section 10 - not applicable to small operators. they should be exempted from this.

section 15 -- we have an appeals board, it is therefore not reasonable to force small operators to go to the time and expense of superior court when the issue, likely caused by some of this

subjective interpretation, could be resolved by the local appeals board. By forcing this to go straight to superior court, you are raising the costs/bar for small operators who are more than likely citizens and taxpayers.

definitions:

DISTURBED AREA: The total land area owned or controlled by a person or persons acting in concert that is devoted to a mining operation, metallic mineral mining, or bedrock quarrying, regardless of the number of extraction sources or sites used, including: (i) all land areas that are stripped, graded, grubbed, filled, bulldozed, or excavated at any time during the site preparation (including existing or new access and egress roads); (ii) all land from which mining material, metallic minerals, or consolidated rock (bedrock or the like) is removed in connection with, respectively, a mining operation, metallic mining, or bedrock quarrying, including but not limited to: all reclaimed and unreclaimed land; land that has or will have the overburden removed; land on which stumps, spoil, or other solid waste has or will be deposited; and storage areas or other land that will or has been used in connection with a mining operation, metallic mining, or bedrock quarrying; (iii) land on which mining material, metallic minerals, or consolidated rock (bedrock or the like) is temporarily or permanently stored or deposited; (iv) land on which processing, beneficiating, or treatment facilities (including groundwater and surface water management treatment systems) are located; (v) land on which water reservoirs used in a mining operation, metallic mining, or bedrock quarrying are located; and (vi) land used for mineral exploration activities, including by hand sampling, test boring, or other methods of determining the nature or extent of mineral resources.

-according to this definition, this is the TOTAL AREA INCLUDING ROADS, ALL RECLAIMED AND UNRECLAIMED LAND, ALL LAND THAT HAS OR WILL HAVE OVERBURDEN REMOVED, LAND ON WHICH WASTE MAY BE DEPOSITED
... literally, this is all land of the applicant.

looking at my land for example: the road leading into/out of the pits is probably half a mile long, lets say 12' wide at least. that's 31,680 sq ft just in the road from my gate to the pit. This is well over the 1/2 acre class A barrier, and you haven't even gotten to the gravel pit to start calculating the actual area.

Sutters is similar situation, if not even longer. So is Wright's.

Generally, the intent of the 'Disturbed area' is to be the working face/working area or area yet to be reclaimed. Obviously, if you reclaim an older section...that shouldn't be counting against you

and this is how the DEP calculations for this generally work. Otherwise, what is the point of reclamation if not to restore the land. This definition needs to be reworked seriously. I understand the desire to incorporate pre-stripped areas into the calculation as well as unreclaimed areas, but this definition is simply too broad and encompassing to be used effectively. On larger parcels of land (50ac+), it is realistic that there could be individual, yet separate areas that should not be aggregated. Sutters is this way, so is my Golden Ridge property. In these cases, there is the notion of a 'site' which encompasses the land in question for permit, but not necessarily the entire parcel. Therefore, a large parcel, may have multiple sites.