

October 7, 2025

To: Alna Select Board Members

From: Ed Pentaleri

Re: Observations and Recommendations on the Draft Mining Ordinance

My overall impression is that this draft is quite good, but would still benefit from additional detailed review to clarify and address certain important points, eliminate typos and inconsistencies, and to ensure that what's being presented is consistent with the spirit in which the moratorium was first adopted. Note that this document only includes the most significant observations, concerns, and recommendations. Additional suggestions, including minor typographical errors and inconsistencies are noted in the annotated PDF.

- Article I, Section 2: There is an important word (“regulating”) missing from the first sentence. See annotated PDF.
- Article I, Section 3: I think the threshold for applicability in this ordinance should be 1/2 acre, as in the Subdivision and Site Plan Review Ordinance (SSPRO), rather than increasing the threshold that appears there from 1/2 acre to 2 acres because (a) voters approved the 1/2-acre threshold when they approved the initial SSPRO and subsequent updates, and (b) voters probably did not ask to have the mining moratorium in order to relax regulation of mining operations in Alna as compared with the *status quo* that’s existed in Alna since the SSPRO was adopted. Although there are certainly some people who would prefer to see the threshold increased to 2 acres, the best indicator we have of the overall sentiments of the town on this point is the town-wide votes that initially established and later preserved the 1/2-acre threshold through subsequent SSPRO updates amendments.
- Article III, Section 1: It's not clear on first reading that the threshold criteria described under Article III, Section 1 follow from the findings in Article I, Section 2, even though a more direct connection is ordinarily evident in documents like this one, and they should be clearly consistent with one another. Even though I think the findings described in Article I, Section 2 should reflect a 1/2-acre threshold, the threshold criteria described in this section for applicability to mining should be consistent with whatever threshold ends up being mentioned in the findings. Instead, we’ve gone from a 1/2-acre threshold in the SSPRO to a 5-acre threshold here – a difference of 10x. *Note that after reading through the entire document, I believe the intent was that the draft ordinance (a) **would not** impose municipal requirements on mining operations of 2 acres or less; (b) **would** regulate mining operations between 2 acres and 5 acres, and (c) **would prohibit** new or*

expanded mining operations greater than 5 acres. THIS IS NOT CONSISTENTLY WHAT IS REFLECTED IN THE CURRENT DRAFT.

- Article III, Section 1: I haven't thoroughly mapped out the applicability, but believe there are important gaps in Article III, Section 1 that may inadvertently leave some things unregulated. (In particular, see the comments for Article VII, Section 2, which relate to mining operations between 2 and 5 acres). A thorough review to chart all relevant domains would be worthwhile to avoid unintended omissions and potentially conflicting overlaps. (Note that Article VII, Section 1 specifically applies to excavation for clay, topsoil, and silt, and does not apply to sand and gravel extraction.)
- Article IV, Section 2(B): I think it's completely reasonable to write this ordinance in a way that doesn't impose *new* requirements on legally pre-existing operations. For reasons I've elaborated in the PDF annotations, there are two points about Article IV, Section 2B that should be addressed.
 - (A) It should make clear that such operations aren't left unregulated at the municipal level, but *are still required to comply with the conditions of any permits they received prior to the adoption of this ordinance, AND to comply with all other town ordinances and relevant statutes that were applicable prior to the adoption of this ordinance.*
 - (B) It's important to establish clear standards for what constitutes an "existing" operation.

Also, in the interest of fair, uniform, and enforceable application of the ordinance, this is where "actual and substantial use" and "non-resumption" criteria need to be specified and invoked. Giving clear guidance in the ordinance both to applicants and to the Planning Board will help to ensure that the ordinance is applied uniformly, both across the community and over time as the composition of the Planning Board changes.

- Article VI(4): Is Article III, Section 1(4) consistent with Article IV (4)? I think that the former says that this ordinance is applicable to mining operations greater than 5 acres, while the latter says that mining operations greater than 5 acres are prohibited. *Note that after reading through the entire document, I believe the intent was that the draft ordinance (a) **would not** impose municipal requirements on mining operations of 2 acres or less; (b) **would** regulate mining operations between 2 acres and 5 acres, and (c) **would prohibit** new or expanded mining operations greater than 5 acres. THIS IS NOT CONSISTENTLY WHAT IS REFLECTED IN THE CURRENT DRAFT.*
- Article VI, Section 1(A)(3) -- Production of a permit: Although a permit should carry a lot of weight in establishing that an operation LEGALLY existed prior to the effective date of the ordinance, it should also be necessary to show that the operation has remained in "actual and substantial use" since the permit was issued. Just as a building permit is

not valid for an indefinite time into the future (an extension or a new permit must typically be obtained if the project is not completed within two years), so too should it be necessary to show that there have been no lapses in a pre-existing operation's *actual* and *substantial* use since the permit was issued. One should not be able to claim a pre-existing operation for a site that has not been used for 5, 10, 50, or more years, or a site that was last excavated by neolithic persons or prior owners who occupied the property generations ago. To allow such operations to be resumed despite such interruptions would mean that essentially anyone would be able to “resume” small-scale mining that’s exempt from this ordinance. To have any practical enforceability, there really should be some requirement that pre-existing operations have been actual (supported by significant evidence such as business or tax records), substantial (e.g., not just a child building sandcastles), and continuous (typically supported by evidence that there have been no lapses in operations greater than two years).

- Article VI, Section 1(A)(3) -- Other evidence: Two important points here -- (A) It's important to be clear that any such "other evidence" must support the LEGAL, actual, substantial, and continuous existence of the operation prior to the adoption of the mining ordinance. That is, if it can be shown that the operation is either not subject to any other ordinance or law that would otherwise require a permit, OR that it first started prior to the adoption of any other such ordinance or law, AND that it has continuously maintained actual and substantial use since then, other evidence such as business or tax records should be allowed to establish that the operation should be able to continue operations. By doing less, this ordinance might, for example, inadvertently exempt a pre-existing operation from separate requirements that it should have had to obtain a permit pursuant to the SSPRO or other state or federal laws. (B) Also, I think it's important to specify the types of "other evidence" that could be used to establish that an operation legally existed prior to the adoption of this ordinance. To do otherwise would invite inconsistent review by future Planning Boards and challenges by applicants. Such records might, for example, include business or tax records such as contracts, purchase orders, or tax returns.
- Article VI, Section 2: I recommend that Article VI, Section 2 should be retitled as "New Operations and Expansion *or Resumption* of Existing Operations," and should include a "non-resumption" clause to require that operations that stop for some specific amount of time (e.g., 2 years) must obtain a new permit under this ordinance prior to resuming operations.

Also, in the top paragraph of Article VI, Section 2, it should be made clear that an application for expansion of an existing operation triggers a requirement for the ENTIRE

operation (original, plus proposed expansion) to be reviewed for overall compliance with the ordinance; not just the expansion. It's easy to think of reasons that this is the case. Example: an operator of a pre-existing 1.99-acre operation proposes a 5-acre expansion adjacent to the existing operation, creating a combined operation covering 6.99 acres. The expansion would be allowed if the scope of the review were limited to the expansion, whereas the expansion would be limited to no more than 3 acres if the entire operation were to be considered. There are probably better examples, but the point is that it would be clearest, best, and easiest just to explicitly add a few words to explicitly state the intent that an expansion requires review of the entire operation (original, plus expansion) for overall compliance with the ordinance.

- Article VII: There may be a typo in the second word ("blasting") of Article VII. It doesn't make sense to have this statement about blasting requirements in this ordinance when blasting is thoroughly covered in the blasting ordinance. It *would* make sense to include this sentence if the word "blasting" were to be replaced with the phrase "mining and bedrock quarrying."
- Article VII, Section 1: Because this section of this ordinance proposes regulating sand mining differently than silt mining, it would be very good to add the words "sand" and "silt" to the list of definitions. Otherwise people mining sand might claim that they are really mining silt, and therefore subject to more relaxed requirements.
- Article VII, Section 2: Article IV(4) states that mining operations greater than 5 acres are *prohibited*, while this section describes in detail performance standards that are applicable to mining operations greater than 5 acres. If left as-is, there would be both a significant inconsistency within the document, AND an inadvertent gap in the standards for gravel pits that are between 2 and 5 acres. After reading the entire document, I think that the intent for the mining standards described in Article VII, Section 2 to be applicable to mining operations *between 2 and 5 acres* rather than for mining operations greater than 5 acres. Making this change would certainly be an appropriate and easy fix, both to eliminate an inconsistency and to avoid a gap in the applicable standards.

Article XII:

- There is an inconsistency between (a) the *phrase* "Mineral Mining Area," which appears in the Definitions section, (b) the actual definition that's presented for that phrase, and (c) Article IV (1), "Prohibited Activities." The definition of the phrase "Mineral Mining Area" specifically refers to METALLIC mineral mining. Because metallic mineral mining is prohibited by this ordinance, we don't need a definition for a "metallic mineral mining area." Given the scope of the draft ordinance, we only need a definition for "metallic mineral mining," which is provided as the immediately preceding definition. While the

solution might be simply to delete the definition for the phrase “Mineral Mining Area,” it MIGHT be useful to have a definition for the more generic phrase "Mining Area," if this phrase has been used elsewhere in the ordinance in reference to non-metallic mining operations. Something to consider.

- Because this ordinance proposes to regulate the mining of sand differently than the mining of silt (Compare Article VII, Section 1 to Article VII, Section 2), it's important that these terms be defined in the ordinance. Otherwise, there is a risk that someone mining sand might claim to be mining silt, or *vice versa*.