

**Proposed “Mill at Occoquan” Development
Frequently Asked Questions (FAQs)
Town of Occoquan
November 2019**

Introduction

During the past month a variety of questions have been raised with the Town regarding the proposed Mill at Occoquan development. Some of these questions are addressed in the staff report for the project, which is available on the Town web site (www.occoquanva.gov). Other questions, however, go beyond the scope of the staff report. In an effort to provide as much information as is practical, the Town has compiled a list of the most common of these questions and attempted to answer them as comprehensively, but as concisely, as possible. Although there is some overlap with items in the staff report, where such overlap exists it is hoped the answers here provide additional useful information.

Questions

1. Where would the proposed Mill at Occoquan development be located?

The proposed development would be located on approximately 0.95 acres of land on property with the addresses of 401–411 Mill Street. This property extends along the south bank of the Occoquan River and the north side of Mill Street from roughly the intersection of Mill Street and Ellicott Street, west to the Mill House Museum.

2. What is the zoning of the property where the proposed Mill at Occoquan development would be located?

The property is zoned B-1, meaning it is zoned for commercial uses.

3. Does the developer of the proposed Mill at Occoquan need the permission of the Town in order to build on this property?

Almost every development in Town requires some type of approval from the Town. Many such approvals, however, are ministerial, meaning that if the relevant requirements are met the Town has no discretion in granting or denying approval. A common example is the requirement for a site plan. Provided an applicant’s site plan meets the requirements detailed in Town Code §155.042, the Town Council must approve the site plan.

Beyond ministerial approvals and the approval of the Town’s Architectural Review Board (ARB) (see next FAQ on the ARB), the developer can build on this property without any other approvals from the Town provided he builds solely commercial structures (i.e. non-residential) and complies with other zoning requirements (e.g. height limitations, setback requirements, etc.).

See also FAQ #5 below, regarding the needed approvals for the proposed development.

4. What role does the Town's Architectural Review Board (ARB) play in reviewing the proposed Mill at Occoquan development?

The property for the proposed Mill at Occoquan development is within what is known as the Town's "Old and Historic Occoquan District." No structure in that district can be reconstructed, altered, or restored without a Certificate of Appropriateness from the Town's Architectural Review Board (ARB). Structures in the district listed in the Town Code as *Historic Occoquan Landmarks* also cannot be demolished without a Certificate of Appropriateness from the ARB (under state law demolition is a separate category from alteration). Additionally, no new structures can be built in the district without a Certificate of Appropriateness from the ARB. When evaluating requests the ARB cannot consider interior arrangement, relative size of a building or structure, detailed design, or features not subject to any public view. What the ARB is legally allowed to consider under state law is detailed in Town Code §157.179. Decisions of the ARB to deny a Certificate of Appropriateness can be appealed through the Zoning Administrator to the Town Council. Town Council denial of appeals can be appealed to the state court system.

5. Is the developer of the proposed Mill at Occoquan proposing things that require permission from the Town beyond ministerial or ARB approvals?

Yes, the developer of the proposed Mill at Occoquan is requesting *special exceptions* and the issuance of *special use permits* to (a) allow him to exceed the height limitations in the Town Code, (b) to be set back from the property boundaries less than required by the Town Code, and (c) to include residential structures on the site. It is anticipated that at the time of site plan submission the developer will also submit a required special exception request to build in a floodplain.

6. What are Special Exceptions and Special Use Permits? Are they the same as Variances?

Special Exceptions are uses or activities that are only permitted in a specified zoning district with the specific approval of the Town Council. *Special Use Permits* are the permits issued to allow special exception uses. *Special Exceptions* differ from *variances*, which are requests for an exception from the applicable zoning ordinances because of unnecessary hardship that may constitute a taking of private property by the government. The developer of the proposed Mill at Occoquan project is requesting *special exceptions* and the issuance of *special use permits*, not *variances*.

7. Can the Town deny special exception requests?

Yes, the Town may deny special exception requests. The grounds for doing so, however, must be related to the nature of the special exception request and must take into account any measures proposed to mitigate the adverse affects of the exceptions requested.

8. The proposed Mill at Occoquan is in the B-1 zoning district, which is set aside for business uses and only allows mixed use (i.e., business and residential uses) with a

special use permit. Why are there in the B-1 zoning district exclusively residential developments like Gaslight Landing and the houses being constructed in front of Rockledge Mansion?

Under zoning law, any use existing at the time of a change to the zoning ordinance can continue as a “nonconforming use,” and any development begun under a previous zoning ordinance can be completed and occupied as a “vested right.” Gaslight Landing was planned and built under a previous version of the zoning ordinance, and the unfinished houses in front of Rockledge Mansion acquired vested rights under the previous zoning ordinance.

In 2017 the Town Council, responding to growing concern that the Town’s business district would eventually disappear as a result of developers pursuing what are typically more lucrative residential developments, revised the Town ordinances to restrict the B-1 district solely to business uses, except with a Special Use Permit. Town Code §157.120 thus reads that “[t]he B-1 District is also encouraged to incorporate mixed-use designs, characterized by business uses along the street or water front with high-density residential above, as new developments and redevelopment occurs.” Town Code § 157.121 (B)(4) contains the requirement that general residential uses are permitted only with a Special Use Permit and subject to the requirement that “residential uses may not occupy the floor of the building that is adjacent to the primary street and/or sidewalk.”

9. The Town height restriction in the B-1 zoning district is 35 feet. Why are some buildings in that zoning district, including those on the proposed Mill at Occoquan site, already higher than 35 feet?

There are multiple reasons why some buildings in the B-1 zoning district are higher than the current 35 foot limitation. In some cases the structures were built before the current 35 foot limit was adopted. These are known as nonconforming structures. While the owner of such structures does not have to bring them into compliance, any new development on the site must conform to the current limitations set forth in the Town Code.

Another reason existing structures may exceed 35 feet in height is because the height calculation for zoning purposes is complex and can result in some portions of a structure exceeding 35 feet. Town Code §157.008 defines building height (see ***BUILDING, HEIGHT OF***) as:

“[t]he vertical distance measured from the average elevation ten feet out from the finished grade adjoining the building on all exterior walls to the highest point of the roof for a flat roof or to the mean elevation between the main eaves and highest ridge or point of other types of roof. The term ***ACTUAL HEIGHT OF BUILDING*** as used in this chapter shall not be deemed to include any part of a building wall erected above a flat roof for the purpose of creating a false mansard or parapet to screen rooftop mechanical equipment or housings from public view.”

It is also possible that some structures were granted special use exceptions in the past.

10. The developer of the proposed Mill at Occoquan is requesting that the setback for his structure be identical to the existing structures, yet these structures do not conform to the Town's setback requirements. Why do they not conform?

Town Code §157.123(A) says that “[b]uildings shall be located five feet or more from any street right-of-way that is 50 feet or more in width, or 35 feet or more from the centerline of any street right-of-way less than 50 feet in width. This shall be known as the setback line.” The existing buildings that do not meet this requirement were constructed prior to the requirement taking effect and are considered nonconforming uses that must be remedied in any new construction (unless the Town grants a Special Use Permit).

11. The developer will also be requesting a special exception and special use permit to build in the floodplain. Are there already structures in the floodplain and does this have implications for the approval or denial of the Mill at Occoquan exception request?

Yes, there are already structures that have been built in the floodplain, some of which are nonconforming uses and some of which may have received special exceptions in the past. The Town Code requirements regarding special exceptions for building in the floodplain are outlined beginning in Town Code §157.10. Provided the developer meets the relevant requirements, the Town has to grant the special exception request for building in the floodplain. A developer's request for that special exception is typically submitted at the site plan stage.

12. What is the process for reviewing special exception requests?

After an applicant submits a special exception request it is reviewed by staff, who conduct an analysis and provide recommendations to the Planning Commission and Town Council. The Planning Commission then reviews the special exception request. This review includes a public hearing required by law, where the public is given an opportunity to comment. The Planning Commission then makes a recommendation to the Town Council (although the Planning Commission can continue the hearing or defer their decision in order to obtain additional information). Once the Town Council has received the Planning Commission recommendation, it too holds a public hearing required by law, where the public is again given an opportunity to comment. The Town Council then deliberates and votes on whether to approve or deny the special exception request.

Besides these formal steps, the applicant can have multiple informal meetings with Town staff and citizens, as well as communications with Town Council members and Planning Commission members outside of called meetings. Under the Virginia Freedom of Information Act (FOIA), any written communications the Town receives from applicants and citizens are subject to public review and comment, and any meetings of three or more (or a quorum, even if less than three) of a public body must be open to the public, unless a closed meeting is properly convened in accordance with FOIA.

13. If a special exception request is denied can the applicant appeal?

If a special exception request is denied, the applicant can file suit with the state courts to have the denial overturned. At least one applicant has successfully challenged the Town's denial of a special exception request in the past.

14. What is the format of public hearings?

Although the order can vary, typically public hearings involved (a) a presentation by the applicant, (b) a presentation of staff analysis and recommendations, (c) a period of public comment during which members of the public may take up to three (3) minutes to offer their observations and request that the Planning Commissioners/Town Council members ask specific questions of the applicant, and (d) a period during which the Planning Commissioners/Town Council members ask questions of staff and the applicant. There is typically no direct questioning of the applicant by members of the public.

15. The traffic study for the proposed Mill at Occoquan shows that the project will generate less traffic than if the developer builds an exclusively commercial structure that conforms to the Town's existing ordinances and thus does not require Town approval of special exceptions. Can the project be rejected solely on the basis of traffic concerns?

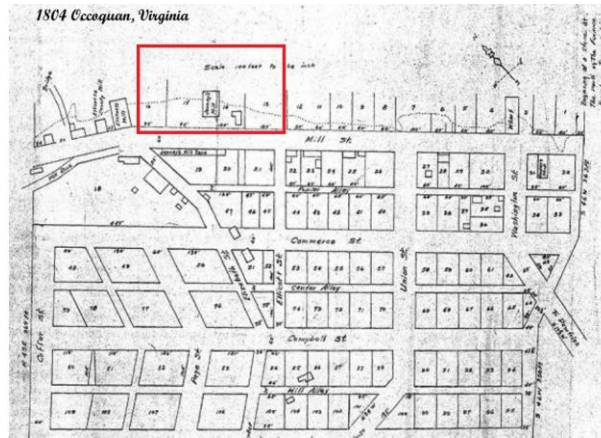
No. Adequate public infrastructure requirements are prohibited in Virginia. Consequently, the project cannot be denied solely on the basis of traffic concerns.

16. Are there other permissions required for this project beyond those already discussed?

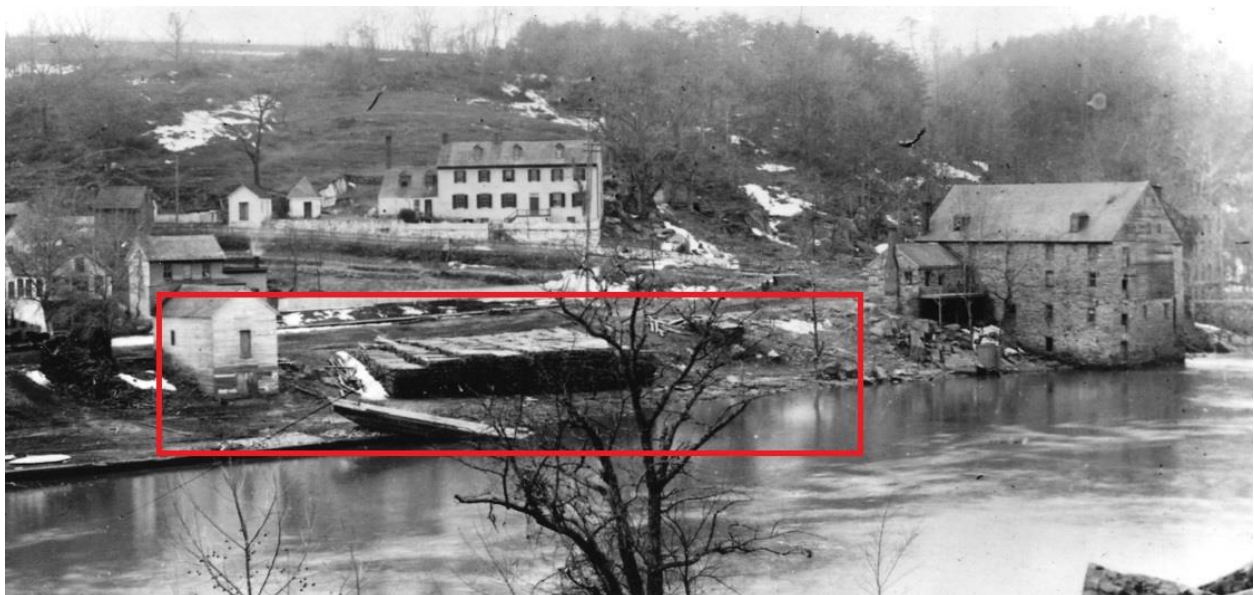
Beyond various ministerial approvals, ARB approval, and the Town special exception approvals already discussed, the proposed Mill at Occoquan project will likely require other approvals that are beyond the authority and jurisdiction of the Town. For example, given that the applicant is proposing a public boardwalk that will involve construction in the river, the developer will need to obtain a permit from the U.S. Army Corps of Engineers.

17. What is the history of the site for the proposed project?

During the second half of the 18th century the westernmost portion of the site contained the forge (not the furnace, which was farther west) associated with the Ballendine iron works. According to the 1804 plat, by the time the Town was chartered the only structures on the site were Elisha Janney's gristmill at what is today 407 Mill Street and what is believed to be the Janney house to its east. The Town's main mill complex stretched westward from where the Mill House Museum is today. Below is an image of the 1804 plat with the proposed development area shown in the red box.



The Janney gristmill was destroyed in 1809 and the house just before the American Civil War. Below is detail from a photograph from the December (Winter) 2014 edition of the Occoquan Historical Society's *Mill Racer*. Former Mill House Museum Curator, Dolores Elder, dates the photograph circa 1895. It shows most of the property being used as a lumberyard (property under consideration for development in red box).



While the western end of the property has been largely vacant for most of the Town's history, the eastern end of the property during the 20th and 21st centuries has contained various stores, warehouses, and apartment buildings. 401 Mill Street is and has been largely vacant. 403 Mill Street was once the site of the Ledman building, with a store on the first floor and apartments upstairs. After the major fire of 1916 it was succeeded by the Lyric Theatre, which was built in the 1920s and continued in operation into the 1950s. What remains of the theatre is at 403 Mill Street and has contained a succession of stores since the theatre closed.

The brick structure at 405 Mill Street was also built after the fire of 1916. Originally serving as a general store it has also been occupied by a succession of commercial businesses. Adjacent to it, the structure at 407 Mill Street contained what was originally the Janney Apartments, which was

destroyed in the 1950s and was ultimately replaced with the structure that exists today. A photo below believed to date from the 1920s shows the rear of the Janney Apartments, the rear of the general store building, and the rear of the Lyric Theatre.



18. Is the current site or its structures protected?

To a limited extent. Since the property is located in the Town's historic district, it is subject to limited oversight by the Town's Architectural Review Board (see earlier FAQ on ARB). Additionally, two structures on the site, 403 and 405 Mill Street, are listed on the Virginia Landmarks Register and the National Register of Historic Places as contributing structures to the Occoquan Historic District. The historic district as a whole was listed on the Virginia Landmarks Register (VLR) in August of 1983 and on the National Park Service's National Register of Historic Places (NRHP) in September 1983.

19. What does listing on the NRHP and VLR mean?

It means that a property has, upon application, been deemed worthy of historic preservation in accordance with processes administered by the National Park Service (NPS) and the Virginia Department of Historic Resources (VDHR). The benefits of each such listing are similar and are outlined in the following two paragraphs.

Listing on the National Register, beyond honorific recognition, (a) requires that the Advisory Council on Historic Preservation (an independent agency of the U.S. Government) be given the opportunity to comment on any Federal, Federally-licensed, or Federally-assisted projects affecting the property (this is commonly referred to as a Section 106 study in reference to the relevant section of the National Historic Preservation Act of 1966), (b) makes the property eligible for certain tax benefits associated with conservation or rehabilitation of listed historic structures, (c) requires consideration of historic values in decisions related to the granting of permits for coal mining, and (d) enables qualification for federal grants for historic preservation when funds are available.

Listing on the Virginia Landmarks Register, beyond honorific recognition, (a) allows owners to donate historic preservation easements for tax benefits, (b) enables owners to qualify for state and federal historic rehabilitation tax credits, (c) allows owners to receive technical assistance from department staff, and (d) allows owners to purchase plaques to mark the property.

The plaques often seen on structures listed on the National Register of Historic Places are neither provided nor approved by the National Park Service. Property owners are free to purchase and design plaques advertising their designation from local trophy or plaque vendors as they see fit.

Listing on either register does not require the approval of the property owner, nor does it offer any protection of the property or restrict a non-Federal property owner from demolition or alteration of the property. Structures listed as “contributing” to a historic district designation can become “non-contributing” if alterations to the structures occur.

20. An earlier FAQ described the review authority of the ARB and noted that structures on the list of *Historic Occoquan Landmarks* cannot be demolished without ARB approval. Are any of the structures on the property of the proposed Mill at Occoquan on the list of *Historic Occoquan Landmarks*?

No, none of the structures on the property of the proposed Mill at Occoquan are on the list of *Historic Occoquan Landmarks*.

Prior to 2007 the Town Code only required that ARB approval be obtained for demolition of structures that pre-dated 1900. In 2007 the Town participated in Virginia 2007, a year-long, state-wide commemoration of the 400th anniversary of the founding of Jamestown. As part of the commemoration, and building on the Town’s charter bicentennial celebration of 2004-05, the Town held more than a dozen history-themed events designed to highlight the Town’s heritage. Spurred by the commemoration long-time Town resident, historic preservation advocate, and then-chair of the ARB, the late Walter Bailey, advocated for extending demolition protections to more recent structures in Town, noting that the fire of 1916 had destroyed many of the pre-1900 buildings and that the register plaques on most buildings pertained mostly to isolated walls rather than major structures.

With the approval of the Town Council, Mr. Bailey led the ARB and the Planning Commission in a six-month effort to identify and evaluate post-1900 structures in Town worthy of demolition protection. Beginning with the list of contributing structures in the 1983 application that had established the Occoquan historic district, the ARB ultimately recommended that 41 structures be specifically protected from demolition. Property owners objected to the inclusion of one property on Ellicott Street and another on Union Street. As a result of these objections, the Planning Commission removed each of these properties from their list and ultimately recommended to the Town Council that 39 structures be specifically protected from demolition. After the required notice to property owners and public hearings, the result of these efforts was the adoption by the Town Council in December of 2007 of the list of *Historic Occoquan Landmarks* now contained in Town Code §157.177. In adopting this code section, the Town Council approved the entire list recommended by the Planning Commission.

Though in 1983 both 403 Mill Street and 405 Mill Street were listed as contributing structures on the nomination form that established the Old and Historic District in the National Register of Historic Places, in 2007 the ARB and Planning Commission determined that the properties had been so altered as to no longer be considered representative either of their original structures or of a particular style of architecture in Occoquan. As a result, they were not included on the lists presented to the Town Council for protection from demolition.

21. Since none of the structures on the property proposed for the Mill at Occoquan development are on the list of *Historic Occoquan Landmarks*, can they be demolished without any approval from the ARB?

Technically, yes. However, since the ARB must approve any new construction, it is typically against a property owner's self-interest to demolish a structure in the historic district before receiving ARB approval of a proposed new structure. In the absence of such approval, the property owner risks incurring the costs of demolition without any guarantee of replacement with a suitable income-producing structure.

22. An earlier FAQ references a Section 106 study that it is beyond the Town's authority to require. Are there other factors that will require the developer to do such a study?

Almost certainly yes. Typically the Army Corps of Engineers will not issue a permit without a Section 106 study being done (such a review was necessary for the Town's boardwalk and kayak ramp projects). Since the developer of the proposed Mill at Occoquan is proposing a boardwalk, he will need a permit from the Army Corps of Engineers that will almost certainly trigger the requirement that the developer perform a Section 106 study.

23. What does a Section 106 study entail?

While there are multiple steps and consultation with multiple parties (including the public) involved in a Section 106 study, two significant components involve identification of historic properties that might be affected and the development and evaluation of alternatives that can avoid, minimize, or mitigate adverse impacts on historic resources. The Virginia Department of Historic Resources (DHR) is the primary state agency involved in Section 106 studies in Virginia.

24. Can a Section 106 study stop a development project?

No. The law recognizes that private property owners have significant rights to use their property profitably. The Virginia Department of Historic Resources (DHR) notes, in fact, that the Section 106 study process cannot stop a project. In some cases historic buildings, structures, and sites may not be preserved without unreasonable investments. In other cases, there may be no reasonable alternatives to demolition. In such cases, the department may recommend excavation of an archaeological site, or written and photographic documentation of a building prior to its destruction. Although the Section 106 process encourages the rehabilitation of historic structures, DHR acknowledges that, in some cases, accurate restoration may not be possible, economically feasible, or even desirable.

25. Most of the questions regarding the historic significance of the site have focused on existing structures. What if during the construction process the developer uncovers human remains or subsurface structures?

State law governs the exhumation and relocation of human remains found during construction. If subsurface structures are located, the results of the Section 106 study will likely require their excavation and written and photographic documentation before they are destroyed. Again, the law recognizes that private property owners have significant rights and Section 106 does not allow a prohibition on construction based on the discovery of archeological remains.

26. The Town of Occoquan is a bird sanctuary. What does this mean?

The primary implication of the Town's status as a bird sanctuary is that birds cannot be hunted within Town limits. It does not impose any requirements regarding habitat or migratory routes.

27. There is an osprey nest on the site of the proposed Mill at Occoquan development. Can it be removed?

Yes. The U.S. Fish and Wildlife Service, who governs such matters, does not require a permit to remove a nest if the nest is inactive. Nests are considered inactive if there are no eggs or young in the nest and are also deemed inactive from September through February when osprey are at their wintering grounds in Central and South America.

28. Are there requirements to prevent soil erosion into the Occoquan River during construction?

Yes. As with the construction of Gaslight Landing and other waterfront properties in Town, a variety of regulations govern control of soil erosion during construction and will require submission and implementation of a sediment and erosion control plan.