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September 5, 2001

D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Re: BZA Case No. 16696
Responses to Applicant's Post Hearing Submission
of August 22, 2001

Dear Members of the Board:

I am the zoning and land use consultant to the resident owners of the houses at 1317 and 1319 33rd Street, N.W., who were accorded status as a party in opposition to the Application. These properties immediately abut the subject property to the west. The following statements respond to the Applicant's post hearing submission dated August 22, 2001.

1. **Additional Variances Required.** We believe that the proposed use is not allowed in R-3 districts, and that the Application needs to include a use variance as well as an area variance. Moreover, a variance to extend a nonconforming aspect of a nonconforming structure is also required.

Use Variance. The intent of the Zoning Regulation in Subsection 2500.5 of the "Miscellaneous Zoning Requirements" is to limit the use of a second story used for sleeping or living quarters of domestic employees of the family occupying the main building to the R-1-A and R-1-B districts. This stated intent is especially clear in the text of the Zoning Regulations in effect prior to the 1984 codification in DCMR format, as found in §7601.3, as follows:

> *7601.3 An accessory building in **any** district shall not exceed one story or 15 feet in height **except** in an R-1-A and R-1-B District an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building. . . . Any such two-story accessory building shall also be set back from all side lot lines for a distance equal to the minimum width of a required side yard in the district in which located.*
> (Emphasis added.)

BZA
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Exhibit No. 79

Board of Zoning Adjustment
District of Columbia
CASE NO.16696
EXHIBIT NO.79

It is significant that this provision is within the freestanding Miscellaneous Provisions rather than in the R-1 use provisions of the Zoning Regulations. The explicit wording of the text ("except in an R-1-A or R-1-B district") makes clear that this use was not intended to carry over to the R-2 or R-3 zones. Applicant relies on the carryover provisions of the R-3 zone regarding Accessory Uses and Buildings in §321, which allows "Any accessory use or accessory building permitted in R-1 districts under §§ 202 and 203 of this title." However, the accessory uses authorized under § 202 do not include the applicable second story addition to a garage. Section 203 regulates Home Occupations, again without any reference to the applicable use in this case. ***It appears that the intent of the Zoning Regulations is to restrict this use to the R-1-A and R-1-B zone districts, and that a use variance and the more stringent standards for approval apply in this case.***

Additional Area Variance. The requirement that the allowed second story addition comply with the side yard requirements makes the existing garage a nonconforming structure, as confirmed today in the attached copy of an e-mail from Toye Bello, Chief of the Zoning Review Branch, Department of Consumer and Regulatory Affairs.[1] Nonconforming structures are subject to special restrictions, as provided in the Zoning Regulations in Chapter 20, "Nonconforming Uses and Structures." Section 2001 provides rules for "Nonconforming Structures Devoted to Conforming Uses." Subsection 2001.3 further provides (in pertinent part):

> *Enlargements or* ***additions*** *may be made to the structure; Provided, that the following requirements shall be met:*
>
> (c) *The addition or enlargement itself shall not increase* ***or extend*** *any existing, nonconforming aspect of the structure, and shall not create any new nonconformity of structure and addition combined.* (Emphasis added.)

The proposed second story addition in this Application would constitute a vertical extension of the nonconforming occupancy of the required side yard pursuant to Subsection 2500.3, cited above. The obvious and well-founded land use rationale for

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[1] *The two-story accessory building shall also be set back from all side lot lines for a distance equal to the minimum width of a required side yard in the district in which located.* (§ 2500.6)

this provision is to prevent an exacerbation of adverse effects on neighboring properties and residents, who may already be adversely affected by the nonconforming structure. Thus, an additional variance is required.

3. No Practical Difficulty or Hardship. Subsection 3104, authorizing the Board to grant variances, states some examples of practical difficulties: "exceptional narrowness, shallowness or shape of a specific piece of property . . . or . . . exceptional topographical conditions or other [exceptional conditions]." The subject lot is **wider than the typical lot** and minimum required width of lot in an R-3 district and larger in square footage than the typical lot or the required minimum lot size in R-3. It is not shallow, but **relatively deep**, being 150 feet in length in its north-south dimension. It is **approximately level** and is **rectangular** in shape. Applicant has emphasized the existing, **relatively low lot occupancy** of the property, in effect, indicating **ample room for expansion of the house**. Applicant has also emphasized in his statement dated June 25, 2001, that the lot is "different" from the typical R-3 property and is an "anomaly."

Being different, however, is not at all the same as being limited by an exceptional condition or limitation inherent in the property, as required by the variance test in the Zoning Regulations. Indeed, the large size and absence of typical constraints as summarized above, show that the property owner has substantial flexibility under the R-3 provisions to construct an addition to the main dwelling, if additional habitable space is desired.

The subject lot is larger than the typical R-3 lot, is wider and deeper than the typical R-3 lot, is rectangular and quite level. These differences from the typical Georgetown lot are only differences, not unique constraints or practical difficulties as required for approval of a variance. The large size of the property actually allows more options for expansion than the typical, smaller R-3 lot. The Applicant has not met its burden of proof in this regard.

The following two sections indicate that the property is not so constrained as alleged in Applicant's post hearing statement.

4. Matter-of-Right Options. The Applicant has several matter-of-right options available for adding living space for domestic employees without requesting a variance, including:

- Create living space for the domestic employee within the existing house. Applicant's consulting architect indicates that the floor area of the house is approximately 2,300 square feet above grade. The floor plans submitted show the basement as having approximately the same area as the above-grade floors, say 1,100 square feet, for a total of approximately 3,400 square feet. This is a medium size house with many rooms: 4 bedrooms, 4 baths, living room, dining room, family room/breakfast area, kitchen, 2 offices, storage area and utility room. It is axiomatic that many families in smaller houses have made space for a live-in domestic, or have simply relied on a housekeeper who does not live on the premises.

- Construct an addition to the house. The consulting architect has identified some constraints that an architect hired to design an addition would need to contend with. Many additions encounter various constraints that force clients to make compromises, spend beyond the budget, sacrifice a nice tree, etc., in order to achieve more indoor living area. The consulting architect cites the potential loss of Victorian windows if an addition is built. It is, of course, common practice for additions to historic buildings to utilize historic materials and features in the addition itself. The comment that an addition would "damage" the architectural integrity of the house are belied by the many outstanding additions that have been approved and constructed in Washington's many historic districts. The fact that a previous proposed addition was not approved does not rule out approval of an addition, but may only reflect the specifics of the prior design concept.

5. **Rear Yard Features.** The following are short comments on aspects of the "Landscape Plan" and comments by consultants submitted by Applicant that allege unique and exceptional constraints on construction under matter-of-right provisions and others about some of the features.

- The statement by the archeologist of the Office of Planning makes clear that the cistern has no historic status in the public sense. It is old, historically interesting, and it would be nice if the Applicants can retain it. But it is not historic in any public policy or regulatory sense. The Applicants can fill it in, cover it, demolish it, leave it unchanged, or restore it without public review. The structure is apparently not a "slave tunnel," as previously alleged by Applicant.

- The English boxwoods are located far from the principal building, in contrast with Applicant's Pre-Hearing Statement saying they are "directly behind" the main house. The boxwoods are reportedly "old," but have no "historic" status, nor does the "historic" English garden have a designated status. They are relatively close to the garage and are more likely to be damaged by the proposed second story addition than by an addition or adaptation of the house.

- Nearly all of the landscaping consists of smaller plants at the side yards of the property and would be largely unaffected by an addition to either the house or the garage. As I stated in testimony, the great majority of the rear yard is a level lawn plus a level brick patio.

- The indicated locations of the cherry tree and the cistern do not appear to preclude an addition, even if either or both are deemed essential to preserve.

4. Adverse Effects on Neighbors. See the attached photos, which illustrate the potential for adverse effects on the privacy, views, light and air of neighbors, including my clients at 1317 and 131`9 33rd Street. Note that there are no design controls over the construction. Windows can be located to face into neighbors' yards; noise from music and visitors to the new dwelling unit are real possibilities. Applicant's statement that neighbors are attempting to secure a "visual easement" over the subject property is erroneous. They are simply seeking equal treatment in the enforcement of the zoning regulations. It is noteworthy that, in adopting rules to allow accessory apartments, the Zoning Commission specifically prohibited the conversion of garages for this purpose.[2] Thus, even in the R-1 zones, with large lot size and width requirements, the presence of a new dwelling in the center of a city block was considered a potentially intrusive use that should not be allowed.

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[2] "The new apartment may be created only through internal conversion of the house, without any additional lot occupancy or gross floor area; **garage space may not be converted**." (11 DCMR 202.9(d), emphasis added.) The Board may wish to consider referring the applicable parts of § 2500 (Accessory Uses and Buildings, in Chapter 25, Miscellaneous Provisions) to the Zoning Commission and the Office of Planning for a policy review as to the present day importance of this use and the obvious potential adverse effects on neighbors.

5. Advisory Neighborhood Commission 2E and Office of Planning Reports. Both of these official agencies of the District of Columbia recommended denial of the application. Applicant conveniently selects partial statements from their positions while ignoring their recommendations.

6. Opposition. Despite Applicant's resubmission of signatures on a petition, opposition to the application is widespread in the neighborhood. Immediate neighbors of the subject property – those who will be most directly affected – are virtually all in opposition. The Citizens Association of Georgetown as well as several members of the D.C. Council also opposed the Application.

7. Due Process. Applicant objects that he was not served with a copy of my testimony prior to the hearing. Several comments: There is no requirement for such service, as the Board determined at the public hearing. Party status is not determined until the public hearing, so that testimony in opposition prior to determinations of party status are simply testimony not subject to the obligations of party status. Further, my clients, and other immediate neighbors who were denied party status, filed detailed submissions of their issues along with request for party status in opposition in the Spring, long before the hearing. Finally, my initial submission indicating that I would be representing clients outlined the issues that would be addressed. All submissions were served on ANC 2E and the Applicant at the time of submission to the Board.

In conclusion, my clients and I believe that the Application has not met the required burden of proof for approval of variances and that the Application should be denied.

Sincerely,

Nathan W. Gross, AICP

CC: Craig and Ann Goodman, Applicants
ANC 2E
Dr. Mary R. Carter
Mrs. Mary G. Sella



toye.bello@dc.gov on 09/05/2001 12:48:16 PM

Please respond to toye.bello@dc.gov

To: Nathan Gross/Spec/DC/ArnoldAndPorter@APORTER
cc:

Subject: RE: BZA # 16696

Mr. Gross, the accessory one-story garage as it exists is conforming if it is set back 12ft from the centerline of the alley. I do not have the survey in front of me as I write. I, however, concede that an extra variance from the requirements of section 2500.6 is required since a non-existent nonconformity of side yard is introduced by the proposal of a second story addition

-----Original Message-----
From: Nathan_Gross@aporter.com [mailto:Nathan_Gross@aporter.com]
Sent: Wednesday, September 05, 2001 10:04 AM
To: Toye.Bello@dc.gov
Subject: BZA # 16696

Re the Goodman's garage and the rear yard requirement, I stand corrected by your
memo. However, is the existing garage a conforming or nonconforming structure?
Please respond by 1 p.m. if possible; my responses to Applicant's post hearing
submission is due by COB today. Thanks.

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View of the Applicant's Garage from the Alley looking to the northwest

The very large size of the existing garage is evident. The proposed variance to allow a vertical addition to be 21 feet high will adversely affect the three small townhouses at 1317, 1319 and 1321 33rd Street, N.W. seen in the background. The Landscape Plan submitted by the Applicant shows that the footprint of the garage is in the same size range as the footprint of these townhouses. The requested variance would allow creation of a large dwelling unit in the center of this block, with potential adverse effects by way of noise, privacy and views for these and other neighbors.



View of Applicant's Garage Roof (in Foreground) From the Rear Deck of Dr. Carter's Home at 1317 33rd Street, N.W.

Clearly, the excess height of an addition if authorized by the requested variance would adversely affect the views, privacy, light and air available to Dr. Carter as well as to the Sella's, residing next door at 1319 33rd Street.