GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16696 of Craig and Ann Goodman, pursuant to 11 DCMR § 3103.2 for a variance from the limitations of subsection 2500.4 to allow a second story addition to an accessory garage for maids quarters and a mother-in-law suite in the R-3 District at premises 3254 O Street, N.W. (Square 1230, Lot 809).

HEARING DATES: May 1, 2001; July 17, 2001

DECISION DATE: October 2, 2001

DECISION AND ORDER

Craig and Ann Goodman, the owners of Lot 809 in Square 1230, with a street address of 3254 O Street, N.W., filed an application with the Board of Zoning Adjustment on January 25, 2001, requesting variance relief pursuant to 11 DCMR § 3103.2 from the requirements of 11 DCMR § 2500.4 relating to accessory buildings. The applicants propose to build a second story addition to an accessory private garage in an R-3 Zone District and to use the addition for maid's quarters or the living quarters of a family member, as well as for an artist studio and storage. The application was accompanied by a memorandum from the Department of Consumer and Regulatory Affairs, Zoning Review Branch, certifying the requested zoning relief. After a public hearing, the Board denied the application on the grounds that the applicants had not met their burden of proof with respect to the relief required for the proposed use and addition.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda dated February 7, 2001, the Office of Zoning provided notice of the filing of the application to the District of Columbia Office of Planning; Advisory Neighborhood Commission (ANC) 2E, the ANC for the area within which the property that is the subject of the application is located; the ANC Commissioner for the affected Single-Member District; and the Ward 2 Councilmember.

The Board scheduled a public hearing on the application for May 1, 2001. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on March 8, 2001, mailed the applicants, the owners of all property within 200 feet of the subject property, and ANC 2E notice of hearing. Notice of hearing was published in the *D.C. Register* on March 9, 2001, at 48 DCR 2161.

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At the applicants' request, the Board continued the hearing to July 17, 2001, to afford the applicants the opportunity to discuss modifications to the proposed addition with their neighbors and the ANC. The Board announced the new hearing date at the May 1 public hearing, and also published a new notice of hearing in the *D.C. Register* on June 1, 2001, at 48 DCR 4897. The applicants' affidavit of posting indicates that on June 24, 2001, a zoning poster was placed on the O Street frontage of the property, in plain view of the public.

Requests for Party Status. The Board granted Mary R. Carter and Mary D. Sella party status pursuant to 11 DCMR § 3106.3, finding that their interests would be more significantly, distinctively, or uniquely affected by the proposed zoning relief than those of other persons in the general public, since they own the properties abutting the rear of the subject lot. The Board denied party status to the owners of three other abutting properties (Madison Powers, Bea Van Roijen, and Thomas Vogt and Robert Laycock), since their dwellings are situated farther away from the proposed addition and they would not likely be more significantly, distinctively, or uniquely affected by the proposed zoning relief than other persons in the general public. All six neighbors are represented by Arnold & Porter.

Alan C. Mitchell presented a request for party status from a number of property owners and tenants residing on N Street and 33rd Street, across the rear alley from the subject property. The Board denied their request, finding that they had failed to show that their interests would be more significantly, distinctively, or uniquely affected by the proposed addition than those of other persons in the general public.

Applicants' Case. As a result of neighborhood opposition, the applicants modified their plans as originally filed. The new plans dated April 25, 2001 (Ex. 34), which are the subject of this Decision and Order, reduce the height of the proposed two-story addition to result in an overall building height of 20 feet and eliminate a proposed three-foot overhang. The applicants presented oral testimony and submitted a number of written documents, plans, and photographs in support of their application.

Zoning Administrator's Reports. In a memorandum dated January 18, 2000 (Ex. 1), the Zoning Review Branch states that the applicants require a variance from both the number of stories and height limitations in 11 DCMR § 2500.4 to allow a second story addition to an accessory building in the R-3 District. The memorandum indicates that the addition would be used for maid's quarters and a mother-in-law suite.

In a letter dated June 5, 2001, to the affected ANC (Ex. 44, attachment 2), the Zoning Administrator states that the applicants must obtain a variance from the 15-foot height restriction in § 2500.4. A follow-up letter from the Office of the Zoning Administrator to the applicants dated June 21, 2001 (Ex. 44, attachment 2), states that the applicants require variance relief from § 2500.4, which limits accessory private garages to no more than one story or 15 feet in height. The letter states that § 2500.5 permits, in the R-1-A and R-1-B Districts, the use of the second story of an accessory private garage for the living quarters of domestic employees of the family occupying the main building. It also states that if the Board grants relief for the erection of a two-story accessory building, then the use of the second story for domestic employee living quarters is a matter of right in the R-3 District, since the use is already allowed in the more

restrictive R-1 District and since § 321.1(a) allows as a matter of right in the R-3 District any accessory use or building permitted in the R-1 District. During the public hearing on the application, the Zoning Administrator confirmed his interpretation that when a use is first allowed in a more restrictive zone, it is automatically allowed in a less restrictive zone. Tr. at 206-11 (July 17, 2001).

Under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799; D.C. Code § 6-641.07(g)(4) (2001)), the Board has final administrative authority to interpret the Zoning Regulations. *See Murray v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990). For the reasons stated in this Decision and Order, the Board does not accept the Zoning Administrator's interpretation of §§ 2500.4 – 2500.6 that if the Board approves an area variance for the proposed second story of an accessory private garage in an R-3 District, then the proposed use as domestic employee living quarters is a matter of right. The Board, however, concurs with the Zoning Administrator's statement that if the applicants wish to use the addition for the living quarters of a family member, then a use variance would be required. Tr. at 211 (July 17, 2001).

A fourth letter from the Zoning Administrator to the applicants, dated August 16, 2001, indicates that the subject garage is not located within the required 20-foot rear yard, since the rear yard is measured outward from the rear line of the main building to the rear lot line. Ex. 75 (attachment 7).

Office of Planning (OP) Reports. The Board waived the seven-day advance filing deadline in 11 DCMR § 3114.2 to accept OP's report dated July 12, 2001, Exhibit 55. OP found the property to have unique and exceptional conditions, but concluded that the applicants would not encounter exceptional practical difficulties in complying with the Zoning Regulations, since the applicants could construct an addition to the main dwelling. OP noted that the practical difficulties of such construction are not exceptional in historic districts. OP recommended that the application be denied on the grounds that the proposed use could be detrimental to the community, as it could be interpreted as establishing a precedent for the conversion of accessory structures to residential uses. OP stated that such conversions would increase density and detrimentally affect the already adverse parking conditions in the area. Finally, OP cautioned that having a fully self-contained residence in an accessory building could be detrimental to the overall intent of the zone plan. Alternatively, OP recommended that the Board grant the applicants a variance for a period of five years, with the condition that the residential portion not be rented and that it be used only for maid's quarters or to provide housing for an elderly parent.

United States Commission of Fine Arts (CFA) Report. The applicants submitted a design review report dated September 18, 1998, from the CFA to the Mayor's Agent for the Historic Landmark and Historic District Protection Act of 1978, effective March 3, 1979 (D.C. Law 2-144, as amended; D.C. Code §§ 6-1101 to 6-1115 (2001)) , stating that CFA had no objection to the issuance of a building permit for the proposed addition of a second floor over the garage, with a triangular vent on the gable end, as shown in the applicants' drawings dated September 18, 1998. Ex. 11. The application reviewed by the CFA proposed the "alteration and repair" of the garage, to change the garage roof from a flat or shed roof to a gabled roof. The plans reviewed by the CFA show that a second floor would be added to the existing garage, to be used

for attic space. No living quarters are shown, and the garage would have remained a one-story structure. Therefore, the CFA report does not pertain to the addition proposed in this variance application. Ex. 28.

Old Georgetown Board (OGB) and Historic Preservation Review Board (HPRB). OP states that OGB and HPRB will not review the proposed addition until the Board of Zoning Adjustment has made its decision on the variance application. Ex. 55.

ANC Reports. In its report dated June 13, 2001, ANC 2E states that at a duly-noticed meeting with seven of eight commissioners present, the ANC adopted a resolution opposing the application. The ANC stated that there was a certain degree of uniqueness with respect to the low percentage of land use and beautiful upkeep of the property. However, the ANC objected to the application on the grounds that the applicants failed to show that compliance with the Zoning Regulations would be unnecessarily burdensome and that their practical difficulties are unique to the property. With respect to the third prong of the variance test, the ANC stated that the addition would significantly harm the sight lines and air circulation of the adjacent neighbors. The ANC stated further that the variance would threaten the zone plan by encouraging other residents to construct free-standing residential units on historic alleyways, which would be detrimental to Georgetown's historic and residential character. Ex. 42.

The Board waived the filing deadline established at the July 17, 2001, hearing to accept the ANC's September 8, 2001, post-hearing report, which was due by September 5, 2001. The applicants had an adequate opportunity to respond to the ANC's submission, as their response was due on September 18, 2001, and, in fact, it contains a vigorous response. In its report, the ANC clarifies that while its earlier report recognized "a certain degree of uniqueness" in the property, the ANC did not recommend that the Board find that this uniqueness imposes a hardship sufficient to warrant the granting of a variance. The ANC also stated that while it had not taken a position on whether the requested variance would be detrimental to the zone plan, the ANC believed that granting the variance would result in substantial detriment to the public. The ANC stated that approval would establish a dangerous precedent that would encourage other residents of Georgetown's historic alleyways to construct free-standing residential units; and that in high-density neighborhoods such as Georgetown, any request to increase scale and massing should be considered very carefully.

Persons in Support of the Application. The applicants submitted a petition, signed by some 61 nearby residents, stating that they do not object to a one-story addition to the garage as shown in the April 25, 2001, plans. Ex. 75 (attachment 2).

Parties and Persons in Opposition to the Application. At the hearing, the Board recognized Nate Gross as an expert in zoning and land use planning due to his extensive training and experience in the field. He stated that given the size, shape, and topography, as well as the relatively low lot occupancy of the subject property, the applicants would have ample room for an expansion of the main dwelling and that any difficulties associated with such construction would not be unusual or exceptional in a historic district.

Mary Carter stated that the addition, which would be about 15 feet from her rear deck, would seriously impact the beauty and comfort of her home. In written materials, she raised concerns about the intended purpose of the alley, public safety/fire issues, residential density, overcrowding, and Georgetown parking problems. Ex. 28. Tom Vogt, an adjacent property owner, questioned the validity of the petition submitted by the applicants. He stated that while the applicants might not rent out the addition, there was no guarantee that circumstances would not change in the future or that the applicants would not sell the property to someone who would use the addition as an apartment. He also stated that there are no occupied apartments in any of the garages along the alley. Alan Mitchell also questioned the supporting petition, and stated that the two-story garages along the alley are not inhabited. He argued that the impacts of congestion and parking extend beyond the immediate area to the wider neighborhood.

The Board received a number of letters as well as a petition in opposition to the requested variance from adjacent and nearby property owners. The comments received from Dr. Madison Powers were typical:

> A self-sustaining residential unit, if permitted by the BZA, raises significant public policy issues, including the intended purpose of the alley, public safety/fire issues, residential density and overcrowding parking issues in Georgetown. Moreover, if the Goodmans are granted a variance, it would establish a precedent that would permit all other homeowners who are similarly situated on this alley (and others like it in Georgetown) to construct and maintain accessory buildings. Such a change would be detrimental to the neighborhood inasmuch as it would increase population density to unacceptable levels, generate additional noise and congestion, and convert a quiet alley into a residential mews. In addition, such a change will likely increase the presence of open market rentals of facilities ostensibly designed as au pair or in-law suites. While I have no reason to question the Goodmans' statement that they do not have such intentions, subsequent owners and other neighbors who may follow in their footsteps may succumb to the considerable economic pressure to produce additional revenue in this manner.

Ex. 31.

In its letter dated July 12, 2001, the Citizens Association of Georgetown (CAG) strongly opposed the application on the grounds that it would allow the establishment of a second residence on a single lot in the R-3 District. CAG argued that the height and use variances required for the second story addition would impair the integrity of one-family housing in the R-3 District, which CAG asserted is critical to the maintenance of the zone plan. CAG stated that the existing density in Georgetown's residential communities already taxes the quality of life, adversely affecting municipal services and parking and traffic conditions, and that establishing a precedent for a second residential unit on R-3 lots would undermine the Comprehensive Plan's goal of strengthening residential and historic neighborhoods. CAG also noted that the adjacent neighbors had expressed concerns that the addition would adversely affect their light and air, visual sight lines, privacy, and property values. Ex. 54.

Ward 2 Councilmember Jack Evans and Councilmember-at-Large David A. Catania submitted letters dated July 2, 2001, and July 9, 2001, respectively, opposing the application based on concerns about increased residential density in Georgetown and associated problems. Exs. 50 and 56. Councilmember-at-Large Harold Brazil submitted a letter dated July 16, 2001, encouraging the Board to give full consideration to ANC 2E's and CAG's opposition. Ex. 61. Councilmember-at-Large Phil Mendelson, in a letter dated July 17, 2001, disagreed with OP's recommendation that the Board find the property unique, stating that there are many properties in the District of Columbia with an historic house, mature plantings, and subsurface rock conditions. In addition, he stated that the property is developable and usable as an R-3 residence, with room to spare in both lot area and lot occupancy. Councilmember Mendelson also pointed out that in the event the Board were to grant the application, the conditions recommended by OP to restrict rental use would be impracticable and unenforceable. Ex. 67.

Closing of the Record. The record closed at the conclusion of the hearing on July 17, 2001, with the exception of the following materials specifically requested by the Board: a landscape plan, showing the existing landscaping and the location of an underground granite wall; information on whether the boxwood bushes could be successfully replanted; the floor plan of the main dwelling; and information relating to the Commission of Fine Arts review of previous proposed additions. The applicants' submission was due on August 5, with the parties in opposition given until September 5 to respond, and the applicants until September 18 to reply.

The Board received certain materials from persons and parties in opposition, in response to the applicants' September 18, 2001, reply. Exs. 83, 84, 86, and 87. These materials, filed after the opponents' September 5, 2001, deadline, do not bear upon the substance of the application, and the Board has not considered them in making its determination.

The applicants also submitted additional materials after the record closed on September 18. With the exception of Exhibit 85, the Board has not considered these materials in its decision. Exhibit 85 is a handwritten note from the applicants dated September 25, 2001, stating their willingness to place a covenant upon the property that the garage would not be used for rental purposes. Since OP had proposed that the Board condition any order approving variance relief with a similar restriction, and since the parties had the opportunity to cross-examine OP staff and to respond to OP's recommendation with respect to this condition, the Board considered the applicants' submission in making its decision.

Decision Meeting. On October 2, 2001, the Board, voting 4–0–1, with one member abstaining, denied the application on the grounds that the applicants had not met their burden of proof for the required zoning relief.

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of this application is located mid-block at 3254 O Street, N.W. (Square 1230, Lot 809), on the south side of O Street. It is in an R-3 Zone District and in the Georgetown Historic District.

2. Square 1230 is bounded by O Street to the north, Potomac Street to the east, N Street to the south, and 33rd Street to the west.

3. The subject property abuts a public alley at the rear. The alley runs in an east-west direction between 33rd Street and Potomac Street, bisecting the square.

4. The existing use of the property is for a one-family detached dwelling and an accessory, private four-car garage. Both the dwelling and garage are approximately 150 years old. Ex. 55.

5. The property is essentially rectangular in shape and slopes slightly downward toward the rear. The applicants have purchased a small strip of land at the rear, four feet wide and 33.33 feet deep, along the western side lot line. Tr. at 204 (July 17, 2001); Ex. 5.

6. The lot area is 5,533 square feet, which is greater than the 4,000 square feet minimum prescribed in § 401.3 for a one-family detached dwelling in an R-3 District. Exs. 24, 44, and 55.

7. The property has a lot width of 36 feet at the front and 40 feet at the rear. Exs. 3, 7, and 69. Subsection 401.3 prescribes a minimum lot width of 40 feet.

8. The existing lot occupancy is less than the 2,213 square feet or 40 percent maximum permitted under § 403.2 for a one-family detached dwelling. Ex. 55. The applicants calculate their lot occupancy at 1,830 square feet or 33 percent. It is not clear whether the four-foot side yard on the west side of the garage is included in the lot occupancy calculations; however, even with the side yard included, the applicants' dwelling and garage fall within the permitted lot occupancy. *See* 11 DCMR §§ 199.1 (definitions of "percentage of lot occupancy" and "building area").

9. The rear yard is approximately 3,391 square feet in area. The depth of the rear yard is approximately 90 feet, which is much greater than the 20-foot minimum prescribed in § 404.1. *See* Ex. 75 (attachment 1).

10. The dwelling has a seven-foot side yard on the east side and a five-foot side yard on the west side. Exs. 7, 75 (attachment 1, page 4). Subsections 405.1 and 405.9 require a minimum eight-foot side yard on each side of the dwelling.

11. The dwelling has approximately 2,300 square feet of above-grade interior space. Ex. 75 (attachment 1). The drawings show that the dwelling has three bedrooms, each with a full

bathroom, on the second floor; and a living room, dining room, family room, kitchen and breakfast area, and half-bath on the first floor. Ex. 75 (attachment 5). According to the applicants, these three bedrooms can comfortably accommodate four people. Ex. 24.

12. Below grade, there is a guest bedroom, full bathroom, home office, drafting and storage area, utility area, and lawn equipment storage area. Ex. 75 (attachment 5). The applicants use the guestroom more than 40 percent of the time. Tr. at 184-85 (July 17, 2001).

13. There is a boxwood garden, mature double cherry tree, and two other mature trees in the rear yard. Ex. 44. The boxwood bushes are located close to the garage. The applicants submitted a letter from TruGreen ChemLawn stating that the boxwoods are approximately 100 to 150 years old, with entwined roots, making it unlikely that they would survive transplanting. Ex. 75 (attachment 4).

14. There is a mid-19th-century brick cistern, located near the east property line and about 17 feet south of the southeast corner of the dwelling. According to the OP Historic Preservation Office, while there is nothing in the Historic Preservation Act that would legally protect such a structure, there is a certain value in protecting any 19th-century structure that need not be demolished. The Historic Preservation Office also indicates that "Georgetown had, and undoubtedly still has, hundreds of subterranean structures built as water sources and for water storage in the eighteenth and nineteenth centuries." Ex. 75 (attachment 3).

15. In the rear yard, there is a subsurface granite wall of unknown length and direction. Exs. 44, 75 (attachment 1).

16. There is no access to the rear of the property for the large earthmoving and construction machinery that the applicants assert would be needed to expand the main dwelling. Ex. 44.

The Existing Garage

17. The existing garage is located approximately 67 feet from the rear of the dwelling. It does not occupy the required minimum 20-foot rear yard, which is measured outward from the rear line of the dwelling to the rear lot line. *See* § 199.1 (definition of "yard, rear"); Tr. at 293 (July 17, 2001); Ex. 75 (attachments 1 and 7).

18. The existing garage occupies approximately 22 percent of the rear yard. Ex. 75, (attachment 1).

19. The existing garage is one story in height.

20. The existing garage is 8 feet high. Ex. 5.

21. The existing garage is 36 feet, 4 inches wide, and 21 feet deep. Exs. 8, 34.

22. Originally, no side yards were provided for the garage. However, as a result of the applicants' purchase of a strip of land along the west side of the rear yard, at the rear, the garage now has a four-foot side yard on the west side. Exs. 2, 3.

23. The garage opens to the public alley at the rear. Ex. 3. The applicants' plans (Ex. 8) show the alley as 22 feet wide, as does a house location drawing. Ex. 3. Other drawings submitted by the applicants show the alley as 19.5 feet wide (Exs. 34, 43, 44, 71, 75 (attachment 5)) and as 20 feet wide (Ex. 9). At the hearing, Mr. Goodman described the alley as between 20 and 27 feet wide. Tr. at 188 (July 17, 2001). In a post-hearing submission, the applicants state that the alley is 27 feet wide at their property line. Ex. 82 (Sept. 18, 2001, letter, page 9, note 16). The Sanborn map submitted by OP shows the alley as 20 feet wide. Ex. 55 (attachment 1).

24. The applicants submitted a location drawing survey showing that the existing garage is set back approximately 3.5 feet (Ex. 69 (indicating the setback is 'plus or minus' 3.5 feet)), as well as a building permit plat showing that the garage is set back five feet from the rear lot line. Ex. 2. In a post-hearing submission, the applicants state that the garage is set back 7 feet from the alley. Ex. 82, page 11, note 19. The applicants also state that the garage is 17 feet from the center line of the alley. Ex. 82, page 1 (Sept. 17, 2001, letter).

25. In light of the conflicting evidence and in the absence of an accurate and reliable survey, the Board is unable to determine the depth of the setback from the center line of the alley to the existing garage.

26. The applicants state that they can currently accommodate five cars on their property. Ex. 24, 71. However, the Board finds that the spaces provided in the exterior parking area should not be counted. These spaces do not meet the size and access requirements for open parking spaces specified in §§ 2115 and 2117, since the parking spaces are at most 3.5 to 7 feet wide and located directly behind the garage door. *See* Ex. 44 (attachments 4, 5, 7); Ex. 5 (photographs of cars blocking garage door). The Board finds that the applicants can currently accommodate three cars plus storage inside the garage.

The Adjacent Properties and Surrounding Area

27. Square 1230 is located north of M Street and a block west of Wisconsin Avenue. The area surrounding the subject property consists predominantly of a mixture of apartments, one-family semi-detached dwellings, and row dwellings. Some of the one-family dwellings have been converted to rental units. Ex. 55.

28. The subject property contains the only detached dwelling in the square. Ex. 71. It appears to be the largest property in the square. Ex. 44. However, there are other detached dwellings in the adjacent squares. Tr. at 253 (July 17, 2001); Ex. 78 (stating that six dwellings on the adjacent block are "freestanding" structures).

29. The adjacent lot to the east contains a row dwelling fronting on O Street.

30. Along the alley, to the east of the subject garage, there is a one-story, 15-foot high accessory private garage. Next to that to the east is a 19-foot high garage, and beyond that, a three-story dwelling fronting on Potomac Street. Tr. at 186-87 (July 17, 2001).

31. To the west of the subject property, there is a semi-detached dwelling fronting on O Street. Its side lot line extends approximately four-fifths of the depth of the subject lot. The rear yards of three adjacent row dwellings that front on 33rd Street abut the applicants' side lot line at the rear. These dwellings would be located closest to the addition. *See* Ex. 69.

32. To the rear of the subject property and across the alley are five row dwellings that front on N Street. This row of five-story 1810 Federal dwellings is designated as the "Smith Row Historic Site." Ex. 55.

33. Also across the alley, where it intersects 33rd Street, is an apartment building owned and operated by Georgetown University as faculty and employee residences. *See* Ex. 52. At the public hearing, the applicants described the apartment house as "incredibly densely populated [with] an enormous amount of demands being placed on public property because of the high density of that apartment house and the high density of having renters." Tr. at 197 (July 17, 2001).

34. The OP report (Ex. 55) and submissions from the community indicate that there are difficult parking conditions in the neighborhood. *See, e.g.*, Ex. 54 (CAG letter). Two neighbors state that it is difficult to find on-street parking spaces, and that they sometimes have to drive around the neighborhood for 30 minutes before they can find a parking space. Ex. 32.

The Proposed Use of the Proposed Addition to the Accessory Private Garage

35. In their application, the Goodmans state that the second story addition would be used for maid's quarters and for storage. Exs. 1 and 4. The Zoning Review Branch memorandum dated January 18, 2000, that accompanies the application indicates that the addition would be used for maids quarter's and a mother-in-law suite. Ex. 7.

36. The applicants state that they would use the addition to provide living space for one or two persons. Ex. 24.

37. The applicants also wish to have space available to house an elderly parent, if necessary. The second story of the garage would provide housing for a parent or, alternatively, living quarters for a maid, who would be available full time to assist in providing care. Tr. at 212-13 (July 17, 2001); Ex. 24.

38. Mrs. Goodman would use any remaining space as an art studio for herself and her family. Ex. 24.

39. The applicants would also use the addition for file storage. Ex. 24.

40. The Board finds that the first story of the garage would continue to provide parking for three cars as well as a storage area. *See* Ex. 34.

The Proposed Addition to the Accessory Private Garage

41. The addition would not affect the existing percentage of lot occupancy, which would remain under the maximum permitted 40 percent.

42. The addition would add a second story to the garage, a 100 percent variance from the maximum one-story limitation in § 2500.4.

43. The height of the garage with the addition would be 20 feet, a 33 percent variance from the maximum height of 15 feet permitted under § 2500.4. Ex. 34.

44. The second story would consist of two bedrooms, one bathroom, a living room, kitchen and dining area, and a laundry and storage area. Ex. 34.

45. The second story would be accessed from the exterior, by steel stairs, constructed in the west side yard. Ex. 8.

46. The applicants have attempted to mitigate the impact of the addition on the neighborhood by changing their building plans to use a roof with a less severe pitch and arranging to plant trees along their western property line. Exs. 44, 55, and 71. Also, all of the windows in the addition would be opaque, and there would be no windows on the west side. Tr. at 184 (July 17, 2001).

Unique or Exceptional Conditions of the Property

47. The applicants argue that their property is unique or exceptional by virtue of its size, the historic character of the main dwelling, the boxwood garden and mature trees located in the rear yard, the presence of a subsurface wall, the presence of the cistern as an archaeological site, and the lack of access to the rear yard for large construction and earthmoving equipment.

48. OP states that the detached dwelling is unique because it is located within a community developed with one-family attached dwellings and apartments. Ex. 55.

49. OP states that the boxwood garden and other mature trees contribute to the historic character of the property. Ex. 55.

50. OP also recommends that the Board find that the subsurface wall would present an exceptional circumstance, as it would present problems with the expansion of the main dwelling and would have to be removed. Ex. 55.

51. The Board finds that the subject property is not unique or exceptional. There are other one-family detached dwellings in the surrounding squares. The historic character of the

property, its landscaping, and the presence of the cistern are not unique or exceptional in the Georgetown Historic District.

52. Many of the trees, shrubs, and plantings on the property are historic in the sense of being old, but they do not have legally-designated or protected "historic" status. Tr. at 220 (July 17, 2001).

53. The presence of an underground wall is not unique, and in any event, the applicants did not provide the Board with sufficient evidence of its size, location, or direction to establish that it would constitute an exceptional or extraordinary condition of the property or that it is a significant impediment to the construction of a typical addition.

Undue Hardship and Practical Difficulties

54. The applicants state that since they both work full-time, they are in need of a fulltime, live-in domestic employee to maintain their home and grounds. Ex. 44.

55. They state that they currently do not have available a habitable room in which a domestic employee could live on a full-time basis. Ex. 44.

56. The applicants also state that in the future, it is possible that a family member may have an emergency need for assisted living. Ex. 44.

57. They state it would be a hardship on their family if one or both of the potential residents of the second story of the garage lived in their dwelling. Ex. 24.

58. Many families, however, have made space for live-in domestic employees or family members in smaller dwellings, or rely upon a housekeeper or health care aide who does not live on the premises. There is nothing in the record that would show that only a live-in domestic can meet this family's needs.

59. The applicants state that as a result of the sloping topography of their lot, their view to the rear is of the alley and the N Street townhouses, which they describe as "a singular, mammoth, dark building with an unbroken roofline." Ex. 24. They argue that the addition would help to block their view, and would also block the views from the townhouses to their dwelling, helping to provide them with privacy. Ex. 24. The Board finds that while the N Street townhouses are not the same scale as the applicants' dwelling, the applicants' view is not as objectionable as described. The buildings have varying finishes and paint colors, and there is sufficient detailing that they do not appear singular or mammoth. Further, the applicants' dwelling is separated from the townhouses by the applicants' deep rear yard, the alley, and the rear yards and accessory private garages of the townhouses. Also, several large trees screen the applicants' view of the townhouses and the alley. *See, e.g.*, Ex. 44 (attachment 4, drawings showing extent of separation) and (attachment 8, photographs); Ex.5 (photographs). The separation and trees provide the applicants with a great degree of privacy.

60. The applicants state that they could double the size of their dwelling by extending the dwelling an additional 48 feet into the rear yard, but that they would confront undue hardship and practical difficulty in doing so because this would alter the beauty and historic character of the dwelling and landscaping and damage the cistern. Exs. 24, 44.

61. They also state that they would be unable to access the rear of the dwelling with construction equipment without destroying the boxwood garden, trees, and cistern. They also speculate that if the subsurface wall runs the length of the lot, any such construction might require blasting. Ex. 44.

62. The applicants submitted a report from Almy Architects, dated July 30, 2001, concluding that extending the main dwelling into the rear yard would cause significant damage to its historic fabric and architectural integrity, and that the construction would likely damage the garden and cistern, and invade the privacy and light of both of the neighbors who would be close to such an expansion. The report states that the family room and one bedroom would become dependent on the modern windows to the east for sunlight; that removal of the original windows at the rear would damage the historic fabric and integrity of the dwelling; and that an extension would deprive a second story bathroom of direct sunlight. Ex. 75 (attachment 1).

63. The applicants, however, did not present any proposed designs that would demonstrate this would in fact occur, and did not demonstrate that it would be impossible to develop an alternative design that would not have the feared impacts. Moreover, it is common practice for additions to historic buildings to integrate historic materials and historic features in an addition to avoid damaging the historic fabric and integrity of the building. Further, with an addition to the dwelling, the minimum required side yards on each side of the addition would protect the light and privacy of the adjacent dwellings.

64. In 1983, the Commission on Fine Arts (CFA) recommended disapproval of an application from a previous owner of the subject property for an alteration and addition to the existing dwelling, noting that it would be incompatible with the character of the dwelling. Ex. 75 (attachment 6). CFA, however, did not conclude that any alteration or addition would be incompatible. Moreover, in 1984, CFA recommended approval of an application for alterations and a porch infill renovation. Ex. 75 (attachment 6).

65. There is a substantial brick patio behind the dwelling, nearly the width of the dwelling, and extending 17 feet into the rear yard. It has one double cherry tree growing through it. Tr. at 254 (July 17, 2001). Construction of an addition to the main dwelling would probably require removal of the tree and relocation of the patio. Such measures are not unusual or unduly burdensome.

66. While the presence of the subsurface granite wall, mature landscaping, and cistern would make the construction of an addition to the dwelling a complex undertaking, OP notes that such complexities abound in historic neighborhoods such as Georgetown and do not rise to the level of "peculiar and exceptional practical difficulties." Ex. 55. In any event, a typical addition would not require extensive removal of the existing landscaping, and it may be possible to

preserve the cistern. An addition to the main dwelling would not likely damage the boxwood garden, since it is located near the garage.

67. With respect to construction access, there is access to the rear yard from the front of the property along the side yards, and to the rear of the property from the four-foot side yard. Tr. at 255 (July 17, 2001). Such access may require the applicants to remove existing landscaping, gates, and trellises, but such measures do not constitute an undue hardship or practical difficulty.

68. There is no evidence that large earthmoving or construction equipment would be required to construct an addition to a wood-frame dwelling, or to re-arrange the space inside the dwelling to provide living quarters for a maid or family member. Tr. at 255-56 (July 17, 2001).

69. Based on the above, the Board finds that any undue hardship and practical difficulties in this case derive from the applicants' personal desires and lifestyle choices, not from unique or exceptional conditions of the property.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. Craig and Ann Goodman are seeking variance relief to construct a 20-foot high, second story addition to an accessory private garage in an R-3 District for use as a maid's quarters and other human habitation. The public notice requirements of § 3113 for the public hearing on the application have been met.

The applicants maintain that they require only a five-foot height variance under 11 DCMR § 2500.4 for the proposed use and addition. However, the Board concludes that the use and addition require several variances, including a use variance; and that the applicants have not met their burden of proof with respect to the required variances.

In reviewing a variance application, the Board is required under D.C. Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. For the reasons stated in this Decision and Order, the Board agrees with the ANC that the applicants have not met their burden of proving that they would encounter practical difficulties in complying with the Zoning Regulations as a result of unique or exceptional conditions of the property.

The Board is also required under D.C. Code § 6-623.04 (2001) to give "great weight" to OP recommendations. The Board does not accept OP's recommendation that the Board find the property unique, but the Board does agree with OP that the applicants would not encounter practical difficulties in complying with the Zoning Regulations. Inasmuch as the Board has concluded that the applicants have not met their burden of proof for variance relief, it is not necessary to reach the merits of OP's alternative recommendation of a time-limited approval.

The ANC recommends that the Board conclude that variance relief would result in substantial detriment to the public, while OP recommends that the Board conclude that variance relief would result in substantial detriment to both the public *and* the zone plan. To a certain extent, the Board has addressed the impact of the proposed use and addition in connection with its determination the applicants require a use variance. However, since the Board has concluded that the applicants have not met their burden of proving that they would encounter undue hardship or practical difficulties in complying with the Zoning Regulations as a result of unique or exceptional conditions of the property, the Board has not found it necessary to reach the question of whether variance relief can be granted in this case without substantial detriment to the public or substantial impairment of the zone plan.

The Applicable Zoning Regulations and the Required Use and Area Variances

This case involves the interpretation of § 2500, which permits the use of the second story of an accessory private garage in an R-1-A or R-1-B District for the sleeping or living quarters of the domestic employees of the family occupying the main building. To determine whether this use is permitted in the R-3 District and, if so, the pertinent area restrictions, the Board reviewed numerous provisions of the Zoning Regulations:

Definitions. The Zoning Regulations define the term "accessory building" in § 199.1 as "a subordinate building located on the same lot as the main building, the use of which is incidental to the main building."

The term "accessory use" is defined in § 199.1 as "a use customarily incidental and subordinate to the principal use, and located on the same lot as the principal use."

The term "private garage" is defined in 11 DCMR § 199.1 as:

> a building or other structure, or part of a building or structure, not exceeding nine hundred square feet (900 ft.^{2}) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities.

Section 201, Matter-of-Right Uses in an R-1 District. Under § 201.1(a), a one-family detached dwelling is permitted as a matter-of-right use in the R-1 District. Under § 201.1(h), a "[p]rivate garage designed to house no more than two (2) motor vehicles and not exceeding four hundred fifty square feet (450 ft.^{2}) in area, subject to the special provisions of Chapter 23" is a matter-of-right use. In light of the provisions in § 204.1(a) that permit a private garage as an accessory building and that do not contain any area restriction (other than the 900-square-foot limitation in § 199.1), the Board concludes that § 201.1(h) pertains to use as a private garage as a principal use.

Section 202, Accessory Uses in an R-1 District. Section 202, which lists accessory uses in an R-1 District, does not list use as an accessory private garage. Subsection 202.11, "[o]ther accessory uses customarily incidental to the uses permitted in R-1 Districts under the provisions

of this section," does not include use as an accessory private garage, since it is limited to the uses incidental to the accessory uses listed in § 202.

Section 204, Accessory Buildings in an R-1 District. Under § 204.1(a), a private garage is permitted as an accessory building in an R-1 District, incidental to the uses permitted in Chapter 1, including use as a one-family detached dwelling, subject to the special provisions of Chapter 23. As § 204.1(a) does not specify an area restriction (unlike the 450-square foot limitation in § 201.1(h)), the 900-square-foot area restriction in the definition of "private garage" in § 199.1 applies.

Section 320, Matter-of-Right Uses in an R-3 District. Subsection 320.3, which lists the principal uses that are a matter-of-right in the R-3 District, incorporates by reference the uses permitted in the R-2 District under § 300.3 and adds row dwellings. Subsection 300.3 in turn incorporates the matter-of-right uses in an R-1 District listed in § 201.

Section 321, Accessory Uses and Buildings in an R-3 District. Subsection 321.1 states:

> The following accessory uses or accessory buildings incidental to the uses permitted in § 320.2 shall be permitted in R-3 Districts:
>
> (a) Any accessory use or accessory building permitted in R-1 Districts under §§ 202 and [204][1] of this title; and
>
> (b) Other accessory uses, building, or structures customarily incidental to the uses permitted in R-3 Districts under the provisions of this chapter.

A private garage is therefore permitted in the R-3 District as an accessory building incidental to a principal use, including use as a one-family detached, semi-detached, or row dwelling, permitted under § 320.2 and listed specifically in § 320.3. The applicants' garage is thus permitted in the R-3 District under § 321 as an accessory building incidental to the principal use, the one-family detached dwelling.

Applicable Chapter 23 Provisions Pertaining to Private Garages. First, where abutting an alley, a private garage that is an accessory building in a Residence District must be set back at least 12 feet from the center line of the alley upon which it opens. 11 DCMR § 2300.2(b). The applicants submitted conflicting evidence regarding the width of the alley and the depth of the setback. In the absence of an accurate and reliable survey, the Board is unable to determine whether the garage meets the 12-foot setback requirement. The applicants therefore failed to establish that the garage conforms with the Zoning Regulations in this regard.

Second, the applicants' lot does not meet minimum lot width requirements. However, under § 2300.7:

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[1] Subsection 321.1, as published in the 1995 Edition of Title 11 contains an erroneous cross-reference to § 203. Section 203, "Accessory Buildings (R-1)," was renumbered § 204 in the Zoning Commission's 1988 Notice of Final Rulemaking, which added a new § 203, "Home Occupations (R-1)," and renumbered §§ 203 – 220 as 204 – 221. *See* 35 DCR 6973, 6918 (1988).

> The lot upon which a private garage permitted in a Residence District is located shall be exempt from the requirements for minimum lot dimensions, but shall be subject to the limitation on percentage of lot occupancy for the district in which it is located.

Therefore, the applicants do not require zoning relief from the minimum lot width requirements to construct the addition.

Section 2500 Provisions Pertaining to Accessory Uses and Buildings. The Zoning Regulations in §§ 2500.3 – 2500.7 contain additional use and area restrictions for an accessory private garage in a Residence District. These regulations state:

2500.3 No more than thirty percent (30%) of the area of a required rear yard on any lot shall be occupied by an accessory building or buildings.

2500.4 An accessory building in any district shall not exceed one (1) story or fifteen feet (15 ft.) in height, except as provided in § 2500.5.

2500.5 In an R-1-A or 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.

2500.6 A two (2) story accessory building allowed under § 2500.5 shall not exceed twenty feet (20 ft.) in height, and shall not be located within the required rear yard. The two (2) 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 it is located.

Subsection 2500.3. The addition does not require zoning relief from § 2500.3, since the garage is not located within the required rear yard. *See* Finding No. 17.

Subsection 2500.4. The addition requires area variances from *both* the number of stories limitation and the building height limitation in § 2500.4, since it would be a two-story, 20-foot high addition. While the number of stories and height limitations serve similar purposes, the number of stories limitation plays a significant and distinct role in controlling population congestion and in maintaining the character of a zoned district by regulating the development density and appearance of permitted accessory buildings. The Board therefore rejects the applicants' assertion that they require only a five-foot height variance from the provisions of § 2500.4.

Subsection 2500.5. As discussed below, the proposed use requires a use variance from the provisions of § 2500.5 since the garage is not located in an R-1-A or R-1-B District.

Subsection 2500.6. Under § 2500.6, a two-story accessory building allowed under § 2500.5 must 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 it is located. Except for one-family detached and semi-detached dwellings, a side yard is not required in an R-3 District. However, under § 405.6, if a side yard is provided, it must be at least eight feet wide.[2] The garage has no side yard on the east side, and a four-foot side yard on the west side. The proposed construction would extend the four-foot side yard nonconformity vertically. Since the Zoning Regulations require a minimum eight-foot side yard on the west side, if the Board grants the applicants a use variance from the provisions of § 2500.5, then the applicants also require a side yard variance from the provisions of § 2500.6.

Conclusion

The Board concludes that the applicants require area variances from § 2500.4 (both the number of stories and maximum height limitations) and § 2500.6 (minimum side yard requirement). In addition, if the existing garage does not conform to the 12-foot alley center line setback requirement, the applicants would require area variance relief from § 2300.2(b) and § 2001.3(b)-(c) (additions to nonconforming structures).[3] The applicants also require a use variance from § 2500.5, to use the addition for domestic employee living quarters or other human habitation.

The Required Use Variance

A variance that would "drastically alter" the nature or character of a zone district, whether a use variance in its purest form or a "use-area" variance, is classified as a use variance. To qualify for such a variance, an applicant must meet the heavier "undue hardship" burden of proof. *See Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 233 (D.C. 1973). As explained below, the Board concludes that the character of the R-3 District would be drastically altered by the increase in development density and population density that would occur if the second story of an accessory private garage could be used as a second dwelling unit on a single lot as a matter of right. Such use therefore requires a use variance. The Board bases its conclusion on the organization and wording of the regulations, as well as a comparison of the R-1 and R-3 zone plan provisions.

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[2] Subsection 405.6 states:

> Except as provided in §§ 405.1 and 405.2 [pertaining to one-family detached and semi-detached dwellings respectively], a side yard shall not be required in an R-3, R-4, R-5-B, R-5-C, R-5-D, or R-5-E District. However, if the yard is provided, it shall be at least three inches (3 in.) wide per foot of height of building, but not less than eight feet (8 ft.) wide.

[3] A variance from § 2001.3(b)-(c), relating to additions to nonconforming structures, would be needed since the addition would not conform to the use and area requirements of §§ 2500.4 –2500.6, would extend the existing side yard and alley center line setback nonconformities vertically, and would create new nonconformities of structure and addition combined with respect to number of stories and height. *See, e.g., Draude v. District of Columbia Board of Zoning Adjustment*, 582 A.2d 949, 954-55, 963 (D.C. 1990).

First, § 2500.5 relating to the use of the second story of an accessory private garage for sleeping or living quarters of domestic employees of the family occupying the main building is found in Chapter 25 of the Zoning Regulations, miscellaneous zoning regulations, not in Chapters 2 and 3, the Residence District use regulations. The R-3 District use provisions in Chapter 3, which incorporate by reference the R-1 District use provisions in Chapter 2, do not include the R-1-A and R-1-B domestic employee living quarter provision of § 2500.5. *See* §§ 201, 202, 204, 321.1.

Second, § 2500.5, which states that "In an R-1-A or 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," is an express exception to the zoning restriction in § 2500.4 that "An accessory building in any district shall not exceed one (1) story or fifteen feet (15 ft.) in height, *except as provided in § 2500.5*." (Emphasis added). That § 2500.5 is an express exception can easily be seen from the original wording of the regulations. Subsections 2500.4 through 2500.6 were originally published in the 1958 Zoning Regulations as § 7502.3, subsequently renumbered § 7601.3, as follows:

> 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 not exceed 20 feet in height and shall not be located within the required rear yard. 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). In 1984, the D.C. Office of Documents and Administrative Issuances recodified the Zoning Regulations, dividing the text of § 7601.3 into three subsections and numbering them §§ 2500.5 – 2500.6. No substantive changes were made. *See* "Table of Sources" in 11 DCMR (1984).

As recognized in Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 47.11 at 165 (5th ed. 1992), "Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied." Further, a basic rule in interpreting regulations is that each provision should be construed so as to give effect to all of a regulation's provisions, not rendering any provision meaningless. *See School Street Associates Limited Partnership v. District of Columbia*, 764 A.2d 798, 807 (2001). If the applicants' argument that domestic employee living quarters are a matter-of-right use in districts other than R-1-A and R-1-B were correct, then there would have been no need for § 2500.4 to include the phrase, "except as provided in § 2500.5" or for § 2500.5 to include the phrase "in an R-1-A or R-1-B District." The applicants' interpretation, which renders both provisions superfluous, fails.

Third, established planning and zoning policies support restricting the use of an accessory private garage for domestic employee living quarters to the R-1-A and R-1-B Districts. As stated in § 200.1, the R-1 District is designed to protect areas developed with one-family detached

dwellings. A "one-family detached dwelling" is defined in § 199.1 as "a one-family dwelling, completely separated from all other buildings and having two (2) side yards." In contrast, § 330.1 states:

> The R-3 District is designed essentially for row dwellings, but there shall be included in an R-3 District areas within which row dwellings are mingled with one-family detached dwellings, one-family semi-detached dwellings, and groups of three (3) or more row dwellings.

A "row dwelling" is defined in § 199.1 as a one-family dwelling having no side yards.

The following summary chart shows the minimum lot area and minimum lot width requirements of § 401.3, the maximum percentage of lot occupancy limitations of § 403.2, the minimum rear yard requirements of § 404.1, and the minimum side yard requirements of §§ 405.6 and 405.9 for one-family dwellings in the R-1-A, R-1-B, and R-3 Districts. Except for one-family detached and semi-detached dwellings, a side yard is not required in the R-3 District. However, under § 405.6, if a side yard is provided, it must be a minimum of eight feet wide. Since the R-3 District is "designed essentially for row dwellings," § 320.1, and since the applicants compare their lot to an "R-1-B size lot," the R-1-B and R-3 Row Dwelling columns are highlighted.

COMPARISON OF R-1 AND R-3 AREA RESTRICTIONS FOR MAIN DWELLINGS

	R-1-A One-Family Detached Dwelling	**R-1-B** One-Family Detached Dwelling	**R-3** Row Dwelling	**R-3** One-Family Semi-Detached Dwelling	**R-3** One-Family Detached Dwelling
Minimum Lot Area	7,500 sq. ft.	5,000 sq. ft.	2,000 sq. ft.	3,000 sq. ft.	4,000 sq. ft.
Minimum Lot Width	75 ft.	50 ft.	20 ft.	30 ft.	40 ft.
Maximum Percentage of Lot Occupancy	40%	40%	60%	40%	40%
Minimum Rear Yard	25 ft.	25 ft.	20 ft.	20 ft.	20 ft.
Minimum Side Yards	8 ft. each side	8 ft. each side	none	8 ft. on one side	8 ft. each side

These area restrictions have the general effect of locating the second story of an accessory private garage in an R-1 District used for domestic employee living quarters farther away from adjacent dwellings than would be the case in the R-3 District. The potential adverse impacts associated with increased development and population density from such an accessory building and accessory use include interference with light, air, and privacy; increased noise; adverse traffic and parking conditions; adverse public health and safety conditions, including more difficult access for firefighting and emergency vehicles; increased demand on municipal services; adverse impacts on property values; and adverse impacts on the appearance and character of the neighborhood, which, to a great extent, are influenced by the amount of separation between main dwellings and the location, appearance, and use of accessory buildings. The risks of such adverse impacts are significantly reduced in the less dense R-1 Districts as a result of the greater minimum lot area and lot width requirements, the lower maximum permitted lot occupancy, the greater minimum rear yard requirement, and the requirement of minimum side yards on each side of a one-family dwelling (and by extension under § 2500.6, on each side of a private accessory garage used for domestic employee living quarters).

Thus, the fact that a single lot located in the middle of a city square zoned R-3 may have greater lot dimensions than the other lots in the square does not eliminate the potential for adverse impacts. That is, even though the applicants assert that their lot is an "R-1-B size lot," it is located within a square zoned R-3 and surrounded by much smaller R-3 size lots developed with row dwellings. Moreover, the subject lot does not meet the 40-foot minimum R-3 lot width requirement, much less the R-1-B District's 50-foot minimum lot width requirement. In addition, the subject garage lacks the minimum eight-foot side yards that would be required under § 2500.6 on both sides of a garage used for domestic employee living quarters in an R-1-B District. While the dwelling and the garage with the addition would comply with the maximum percentage of lot occupancy restrictions, the minimum side yard requirements, by requiring open space on both sides of a building, provide additional, different, protection against the adverse effects of overcrowding. Because the proposed use and addition have the potential to drastically impact other properties in the R-3 District, including abutting row dwellings on small lots at the rear of the property, this application must be evaluated according to the greater burden of proof associated with a use variance. *See Taylor*, *supra*, 308 A.2d at 233.

Such review is further necessitated by the fact that under § 2300.7, the lot upon which an accessory private garage in a Residence District is located is exempt from the minimum lot area and minimum lot width requirements. In a historic district such as Georgetown, where many main dwellings may not comply with minimum lot dimension or other area requirements, but are permitted as nonconforming structures,[4] the use variance test is necessary to protect the character

[4] A "nonconforming structure" is defined in § 199.1 as:

> a structure, lawfully existing at the time this title or any amendment to this title became effective, which does not conform to all provisions of this title or the amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreational space requirements.

of the R-3 zone district and to protect against the adverse public health and welfare conditions that could result from the use of the second story of an accessory private garage for domestic employee living quarters or other human habitation.

Fourth, the regulations governing rooming and boarding and accessory apartments in the Residence Districts also lend support to the Board's conclusion that use of the second story of an accessory private garage is not a matter-of-right use in zone districts other than the R-1-A and R-1-B Districts. Rooming and boarding is permitted as a matter of right in the R-3 District pursuant to § 321.1, incorporating by reference the accessory uses permitted in an R-1 District under § 202. Subsection 202.6 specifies that the rooms must be located within the main building.

Subsection 202.10, pertaining to accessory apartments, specifies that such an apartment must be created within an existing one-family detached dwelling. Use as an accessory apartment is not a matter-of-right use, but rather requires approval from the Board as a special exception. Under § 202.10(d), the 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.*" The Board may waive or modify up to two of the conditions specified for special exception approval, with the exception of the owner-occupancy requirement. The regulations in § 202.10(i)(2) require the Board to evaluate whether any waiver or modifications of any of the specified conditions for approval have the potential to conflict with the "single-family residential appearance and character in the R-1, R-2, and R-3 Districts." Moreover, under § 202.10(i)(3), "Any request to modify more than two (2) of the requirements of this section shall be deemed a request for a *use variance.*"

Finally, in *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 9 n.2 (D.C. 1978), the court characterized §§ 2500.4 – 2500.6, then numbered § 7601.3, as prohibiting "a habitable structure in the backyard." The dissenting opinion recognized that the area and parking restrictions of the Zoning Regulations:

> are aimed at preventing population congestion, and population congestion is precisely what the use of petitioner's building for residential purposes causes. Such requirements are not trivial.
>
> > To limit the density of land use is to promote safety by keeping traffic congestion within manageable bounds, and the prevention of excessive land use tends to simplify the problem of providing essential municipal services and to promote public health. Indeed, the early zoning ordinances were, in large part, prompted by the overcrowding of urban land, and judicial approval of these ordinances was encouraged by an early appreciation of the health and safety hazards inherent in the intensive use of land in central city areas.

Nonconforming structures are governed by Chapter 20 of the Zoning Regulations.

383 A.2d at 15 (dissenting on grounds relating to the applicability of the doctrine of laches in zoning cases). As in *Wieck*, the use of an accessory building outside the parameters established in §§ 2500.4 – 2500.6 and without the higher burden of proof required for a use variance would be "detrimental to the welfare, safety, and health of the community." 383 A.2d at 15. See also *Davidson v. District of Columbia Board of Zoning Adjustment*, 617 A.2d 977, 980 (D.C. 1992), recognizing that "living quarters are not permitted in accessory buildings except for domestic employees."

The Board realizes that the Zoning Administrator had concluded that if the Board were to grant the applicants an area variance to permit a second story addition to the garage, then use of the second story for domestic employee living quarters would be permitted as a matter of right. The Board, with the responsibility under the Zoning Act to interpret the Zoning Regulations, has concluded that the Zoning Administrator's interpretation is erroneous. *See Murray v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 1055, 1056 (D.C. 1990); *see also* D.C. Code § 6-641.07(g)(4) (2001). The Zoning Regulations governing accessory buildings contain use restrictions in addition to physical restrictions. *Davidson*, 617 A.2d at 982. The parties in opposition in the instant case raised and briefed the necessity of a use variance as early as April 5, 2001. *See* Ex. 28. The applicants were aware that this was a contested issue in the case. Nonetheless, they have chosen to maintain that they merely require a five-foot height variance to permit the proposed use and addition. As in *Taylor*, *supra*, 308 A.2d at 233, the magnitude of the required zoning relief demands the greater burden of proof required for a use variance.

Based on the above, the Board concludes that the construction of a second story addition to an accessory private garage in an R-3 District for domestic employee living quarters or other human habitation would drastically alter the character of the zone district. Therefore, the applicants require a use variance from the provisions of § 2500.5.

Zoning Regulations that Are Not Applicable

The applicants rely on several provisions in §§ 320 and 321 to support their argument that the proposed use is a matter of right, and that they only require a five-foot height variance. The Board concludes that these provisions are not applicable.

Section 320, Consisting of General Provisions Pertaining to Uses in the R-3 District, Does Not Permit the Proposed Use. The applicants argue that the proposed use is permitted pursuant to § 320, which permits the same uses in R-3 Districts as in R-1 Districts. Subsection 320.1 states that "permitted related uses are the same in R-3 Districts as in R-1 Districts." The remaining subsections in § 320 provide greater specificity as to the permitted uses. It is a well-recognized rule of regulatory construction that specific provisions normally override the general provisions. *See, e.g., United Unions, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 554 A.2d 313, 318 (D.C. 1989).

Subsection 320.2, a more specific regulation, states:

320.2 Except as provided in chapters 20 through 25 of this title, in an R-3 District, no building or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one (1) or more of the uses listed in §§ 320 through 329.

Of the provisions in Chapters 20 through 25, §§ 2001.3 (b)-(c), 2300.2(b), 2300.7, and 2500.3 - 2500.6 are relevant and discussed above. Subsections 2500.3 – 2500.6 limit the applicability of § 320.2 and, as more specific provisions regulating the use and construction of accessory private garages, are controlling. Subsection 2500.5 would not have needed to include the phrase "or R-1-B" if the domestic employee living quarter use were intended to carry through all of the R-1 Districts and beyond. The phrase "or R-1-B" established the boundary of this use. Moreover, the uses listed in §§ 320 – 329 do not include the use of the second story of an accessory private garage for domestic employee living quarters or other human habitation. First, the uses listed in § 320 are found in § 320.3: Any use permitted in an R-2 District under § 300.3 and row dwellings. The uses permitted in an R-2 District under § 300.3 consist of any use permitted in an R-1 District under § 201 (which includes use as a private garage as a principal use, but which does not include use of an accessory private garage for domestic employee living quarters or other human habitation); a community house existing on May 12, 1958; a one-family detached dwelling; and various types of community-based residential facilities. Second, the uses listed in § 321, discussed below, do not include the use of the second story of an accessory private garage for domestic employee living quarters or other human habitation. Third, the uses listed in § 322 are uses permitted in the R-3 District as special exceptions and do not include the proposed use. Fourth, §§ 323 through 329 do not contain any listed uses, as these section numbers have been reserved for future rulemakings.

Subsection 320.3, pertaining to matter-of-right uses in the R-3 District and discussed above at page 16, does not include the use of the second story of a private garage for domestic employee living quarters or other human habitation.

Section 320 therefore does not permit the use of the second story of an accessory private garage in an R-3 District for domestic employee living quarters or other human habitation.

Section 321, Pertaining to Accessory Uses and Accessory Buildings in the R-3 District, Does Not Permit the Use of an Accessory Private Garage for Domestic Employee Living Quarters or Other Human Habitation. The applicants argue that the proposed use is permitted as an accessory use under § 321.1, and that the use of an accessory building for a family member is a permitted accessory use in the R-3 District.

Paragraph (a) of § 321.1, quoted above at page 16, only permits (1) the accessory uses listed in § 202: the use of an office by a physician or dentist residing on the premises; a child/elderly development home; a maximum of two roomers or boarders who room or board in the main building; a parking space; one yard sale, garage sale, or home sales party per year; a home occupation; an accessory apartment within a one-family detached dwelling (as a special exception or use variance); and uses that are incidental to the listed accessory uses; and (2) the accessory buildings listed in § 204, which include a private garage incidental to the principal

dwelling use, subject to the special provisions of Chapter 23. Subsection 2300.3 in Chapter 23 permits the use of an accessory private garage in a Residence District as an artist studio. No additional uses are permitted under Chapter 23. None of the provisions in Chapters 2, 3, or 23 include the use of an accessory private garage for the sleeping or living quarters of domestic employees of the family occupying the main building or for other human habitation, including use by a family member.

Paragraph (b) of § 321.1 likewise does not permit the use of an accessory private garage for domestic employee living quarters or other human habitation. The uses permitted in the R-3 District under Chapter 3 do not include the use of an accessory private garage for domestic employee living quarters or other human habitation. Moreover, use for human habitation is not customarily incidental to accessory use as a private garage. The term "private garage" is defined in § 199.1 as a building or structure used for the parking of motor vehicles. Human habitation is not customarily incidental to the parking of motor vehicles. As recognized in *Davidson, supra*, 617 A.2d at 980, unless permitted under § 2500.5, living quarters are not permitted in accessory buildings. Therefore, the proposed use is not permitted as an accessory use under § 321.1(b) as a use customarily incidental to the uses permitted in the R-3 District under Chapter 3.

Subsection 2001.3, Relating to Additions to Nonconforming Structures, Is Not Applicable. With the possible exception of the 12-foot alley center line setback requirement in § 2300.2(b), the existing garage is not a "nonconforming structure" as defined in § 199.1. The opponents argue that relief from § 2001.3 is required, however, since the addition would constitute a vertical extension of the side yard nonconformity. Ex. 79. The garage conformed to the R-3 District side yard requirements when they were adopted in 1958. It is the applicants' subsequent purchase of land on the west side that gives rise to the existing side yard nonconformity. The added land does not make the garage a nonconforming structure subject to the limitations and protections of Chapter 20. Moreover, the Board has evaluated the side yard issues in connection with the need for a variance from the requirements of § 2500.6, and additional scrutiny is not required in this regard.

The Applicants Failed to Meet Their Burden of Proof

To qualify for variance relief, an applicant must meet the three-prong test in D.C. Code § 6-641.07(g)(3), reprinted in 11 DCMR § 3103.2:

> Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under [the Zoning Act] would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from the strict application so as to relieve such difficulties or hardships, provided such relief can be granted without substantial

> detriment to the public good and without substantial detriment to the zone plan as embodied in the zoning regulations and map.

The "practical difficulties" test applies to area variances, while the "undue hardship" test applies to use variances. With respect to the undue hardship test, the District of Columbia Court of Appeals has stated that:

> ..A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations. An inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute a hardship. It must be shown that the regulations 'preclude the use of the property in question for *any* purpose for which it is reasonably adapted, i.e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof ?'.

Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C. 1972) (citations omitted, emphasis in original). To demonstrate practical difficulties, an applicant must demonstrate that compliance with the area restriction would be unnecessarily burdensome, and that the practical difficulties are unique to the particular property. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

With respect to both the variances required for the proposed use and addition, the Board concludes that the applicants failed to prove that there are any extraordinary or exceptional conditions of the property. The applicants maintain that their property is unique by virtue of its size; however, the Zoning Regulations applicable to the R-3 District recognize in § 320.1 that mingled among the predominant row dwellings are one-family detached dwellings. The Zoning Regulations prescribe different area restrictions for one-family detached dwellings in R-3 Districts. As shown in the summary chart above, a one-family detached dwelling in an R-3 District must have a significantly larger lot, greater lot width, smaller percentage of lot occupancy, and two side yards, as compared with a row dwelling in the R-3 District. Thus, the regulations themselves recognize that a one-family detached dwelling in an R-3 District is not extraordinary or exceptional. Moreover, the evidence indicates that there are one-family detached dwellings in the surrounding squares. The applicants also maintain that their property is unique by virtue of its historic character, landscaping, the presence of a historic cistern, and an underground wall. These qualities, however, are not unique or exceptional in the Georgetown Historic District.

With respect to the undue hardship test, the Board concludes that the applicants failed to demonstrate that they cannot make reasonable use of their property in a manner consistent with the Zoning Regulations. The existing dwelling currently has four bedrooms and four and one-half bathrooms. While the applicants would like to have live-in domestic help and to house an additional family member, they have not shown that they cannot make reasonable use of their property with domestic help that commutes, or that they cannot make other adjustments in the use of their interior living space, such as finding other accommodations for visiting guests, thus freeing up their guestroom to house an additional family member. The applicants' hardship

reflects a personal life style choice; it does not arise out of unique conditions of the property that preclude the reasonable use of the property for conforming uses.

With respect to the practical difficulties test, the Board concludes that the applicants failed to demonstrate that compliance with the Zoning Regulations would be unduly burdensome. As with the undue hardship test, the desire to add a second story to an accessory private garage rather than to make a conforming addition reflects a life style choice. It does not rise to the level of an undue burden. While the property does not meet the minimum lot width requirements, it exceeds the minimum lot area requirements. The depth of the lot provides the applicants the flexibility to make a conforming addition to their home. And while the Commission of Fine Arts disapproved of one such proposed addition, it does not mean that the Commission would disapprove all potential designs, that a design that is respectful of the existing character of the dwelling and landscaping cannot be found, or that the interior living space cannot be rearranged to accommodate a domestic employee or family member. As for the underground wall, the applicants failed to establish its location, dimensions, or direction, or to provide sufficient evidence that it would preclude a reasonable addition to the main dwelling. The construction difficulties that arise with respect to properties in a historic district, and the need to remove and/or replace trees, shrubs, and other plantings or to relocate a patio are neither uncommon nor unduly burdensome. The applicants characterize their gardens as "historic"; however, they are "historic" in the sense that the plantings are mature. The gardens do not have any legally protected historic status. Similarly, the cistern at the rear of the dwelling is of some historic interest, but such water storage structures are common throughout Georgetown and do not enjoy any legally protected historic status. Moreover, the applicants may be able to design an addition that would meet the requirements of the Zoning Regulations as well as preserve the cistern. As in *Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976), the "fact that an expansion requiring a variance is personally preferable to other methods not requiring a variance does not constitute a unique property situation." The practical difficulties cited by the applicants therefore do not rise to the level of "peculiar and exceptional practical difficulties" as required by the Zoning Act for area variance relief.

As the applicants have failed to demonstrate that they would encounter "exceptional and undue hardship" or "exceptional and peculiar practical difficulties" in complying with the Zoning Regulations as a result of extraordinary or exceptional conditions of the property, their application must be denied.

For the reasons stated above, the Board concludes that the applicants have not met their burden of proof. Therefore, it is hereby **ORDERED** that the application is **DENIED.**

Vote: 4 – 0 – 1 (Carol J. Mitten, David W. Levy, Sheila Cross Reid, and Geoffrey H. Griffis, to deny; Anne M. Renshaw, abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: FEB - 4 2002

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16696

As Director of the Office of Zoning, I hereby certify and attest that on FEB - 4 2002, a copy of the foregoing Decision and Order in BZA Application No. 16696 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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ATTESTED BY: Jerrily Kress

JERRILY R. KRESS, FAIA
Director