

# BOARD OF ADJUSTMENT

July 12, 2012

**Case Number**

BOA2012-3

**Applicant**

David & Lauren Fleming

**Owner**

David & Lauren Fleming

**Property Location**

2101 1st Ave SW, Mark 1E, Block 18, Sun River Park Addition

**Property Information**

Zoning of property: R-1 Single-Family Low Density Residential District

**Requested Action**

Variance to Section 17.20.4 Exhibit 20-4, Development standards for residential zoning districts related to maximum building height of other accessory buildings from 12 feet to 21 feet.

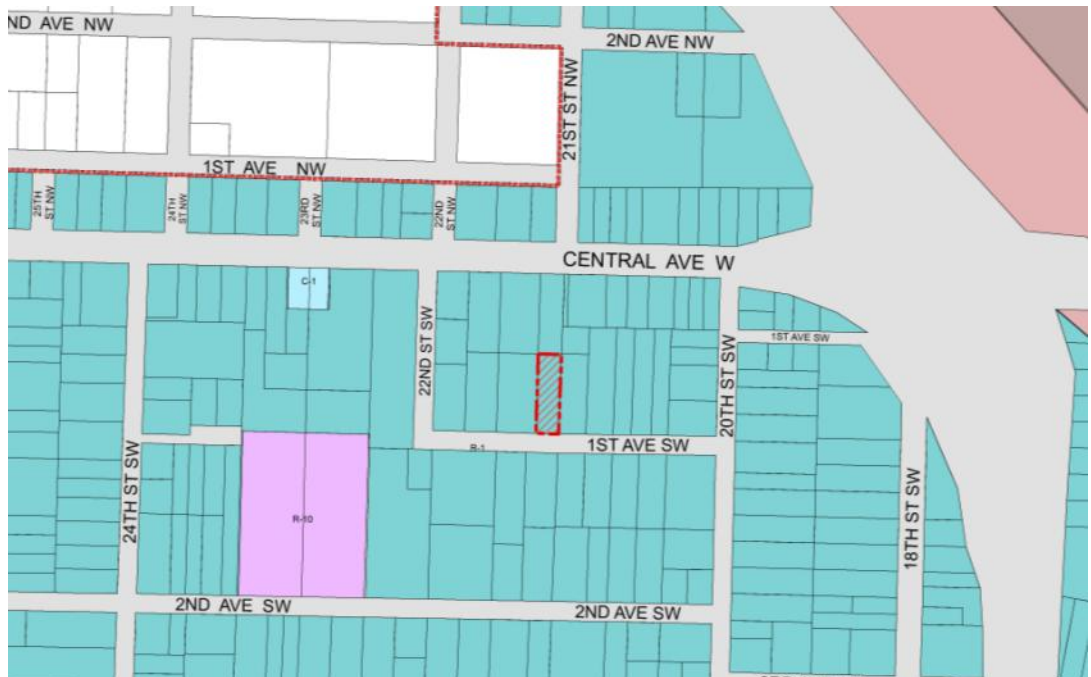
**Recommendation**

Approve with Conditions

**Project Planner**

Jana Cooper

## 2101 1st Avenue Southwest: Accessory Building Height Variance



Location Map

Subject Property



### Synopsis

The applicant is requesting a variance to City Code Title 17, Chapter 20, Article 4, Exhibit 20-4, Development standards for residential zoning districts. The requested variance is related to the maximum building height of accessory buildings. The maximum permitted height of accessory buildings in the R-1 zoning district per City Code is 12 feet. The applicant is requesting approval of a 21 foot high accessory structure.

### 17.16.32.040 Basis of decision for a dimensional variance.

A dimensional variance shall only be granted when the evidence shows and a finding can be made that each of the following conditions exist:

- The variance is not contrary to the public interest.
- A literal enforcement would result in unnecessary hardship, owing to conditions unique to the property.
- The spirit of the Title would be observed and substantial justice done by granting the variance.

## Background Information:

The subject property is located at 2101 1st Avenue Southwest. The property is zoned R-1 Single-family low density residential, which is intended to accommodate low-density, single-family residential development on larger lots. The property is approximately 18,250 sq. ft. There is an existing single-family residence located on the front (south) portion of the property (See Exhibit A - Aerial Photo). The variance request is related to a “detached garage” which is located on the back (north) of the property.

In May, 2009 the owner applied for and received a building permit to construct a detached garage. Email communication between the owner and the City’s Building Safety Division reveal the garage was approved at 21 feet high. The Community Development Department reviewed the plans for the garage and at that time questioned whether the owner planned to have a second story. The owner responded, “There will not be a second story. Kim (McCleary) has told me that a second story will exceed the square footage limitation. I am installing high deck terraces at the 8 foot mark on center and north walls. This will allow me to clear the floor space when a big project (Boy Scouting), comes along. This will probably work better. Using a rolling staircase, I have easier and faster access for shelving heavy items.” The garage plans were approved under the assumption there would be no second story in the structure.

From June 2009 - December 2010, inspections related to the garage were completed. Throughout the process, the owner requested building permit extensions, as necessary, and called for required inspections related to the construction that was being done on the project. The last inspection done by the City was related to framing and was completed on December 17, 2010. On June 15, 2011, the building permit expired. There was no request by the owner to extend the building permit or for final inspections. On August 2, 2011, the Planning and Community Development Department (P&CD) received a complaint from a neighbor stating that they believed a second dwelling had been established on the property—in the “garage.”

The P&CD Department contacted the owners of the property and setup an inspection for August 26, 2011. From the inspection it appeared that a second story dwelling unit had been established in the structure. (Exhibit E - Photos) Per the Official Code of the City of Great Falls (OCCGF) a *“Dwelling unit” means a single building or portion thereof providing complete, independent living facilities for one (1) family, including permanent provisions for living, sleeping, eating, cooking, and sanitation.* The second story consisted of a large room with a TV (living), two rooms with closets (sleeping), a full kitchen with stove, dishwasher, refrigerator, microwave and sink (eating & cooking) and a full bathroom with shower, sink and toilet (sanitation). In addition, there was a second bathroom with a shower, toilet, sink and laundry facilities on the 1st floor along with a large “shop” area and single vehicle stall. The subject property is located in the R-1 Single-family low density residential district. Only one dwelling unit is permitted on a lot in the R-1 zoning district. A violation letter was sent to the owners on November 14, 2011, providing options to bring their property into compliance. The options outlined by staff included:

- Remove the improvements and second story that were not permitted, inspected or finalized, and come into compliance with the approved building plans.
- Apply to the Board of Adjustment for a height variance to the accessory structure. Staff has determined, by reviewing code definitions, that because the owners are not using the garage to house vehicles and household items belonging to the owner or occupant of the principal residence, the garage is actually an accessory building/structure. See definitions below:

### ***17.8.120 – General Definitions:***

*“Garage, private” means a building that is intended to house vehicles and household items belonging to the owner or occupant of the principal residence.*

*“Accessory building/structure” means any building or structure that is clearly incidental and subordinate to and customarily found with a principal use.*

The City and the owner worked on developing a strategy to resolve the violations from November 2011 to May 2012. Ultimately the owner has applied to the Board of Adjustment to request a height variance to the accessory structure. (Exhibit B - Board of Adjustment Application)

### Applicant Statement:

The owner has provided a “Supplement to Height Variance Application” attached hereto as Exhibit C. In general, the applicant makes the following points:

1. The owner questions whether or not a variance is actually needed and states they are using the garage similarly to other citizens within the City of Great Falls.

City Response: Staff has determined that the addition of the improvements and the second story has changed the use of the structure from a garage to an accessory structure. The recommended solution to the problem is for the owners to apply for a variance to the height of an accessory structure. If the variance were approved, this would allow the owners to keep the majority of the improvements and be in compliance with code. To allow all the improvements made to remain would be in clear violation of zoning regulations with regard to the number of dwelling units permitted on a lot in R-1. The majority of detached garages in the City are used in a manner consistent with the definition of “garage” and there is a process in place for receiving and resolving complaints regarding specific zoning violations.

2. The owner questions the City’s use of the definition of a “private garage” as a restrictive measure and questions if that is the intent of the Code; further the owner states that the garages should not be limited to only storage of vehicles and household items.

City Response: OCCGF defines a “private garage” and provides a general definition. Staff is tasked with interpreting the Code, as necessary. In this case, it appears clear that the owners have gone beyond what was originally permitted for the garage and included an entire second story that has not been permitted or inspected by the Building Safety Division. The original plans did not include a second bathroom, kitchen facilities or rooms on the second level. A reasonable person would conclude by reviewing the definition of “private garage” that the additions to the second level of the structure do not fit this definition.

3. The owners state all of the activities for which they use the structure include Boy Scout activities, meetings, projects, woodworking, stained glass, sewing, metal working, auto mechanics, and family/friend social gatherings, which the owners state are consistent with how others in the City use their private garages.

City Response: As previously explained, OCCGF provide clear definitions of a garage and of an accessory building. A garage is to accommodate vehicles and household items of the owner. An accessory structure can accommodate other uses, short of being used as a separate dwelling unit.

4. The owner disputes the City’s determination that a second dwelling unit has been established, stating that the two rooms with closets are not bedrooms, but rather they are “segregated and independently temperature controlled storage areas, which are being used for sewing,” and further state they have not been able to identify the areas the City considers fulfillment of the requirements of eating and living.

City Response: Again, staff must apply and reasonably interpret City Code. After inspecting the improvements and reviewing the definition of dwelling unit, staff has made a reasonable conclusion that the improvements to the second story of the garage have created a second dwelling unit consistent with code definition. Attached photos in Exhibit E show full kitchen facilities (eating) and an open area with a TV consistent with what a reasonable person would call an area for living. Neighbors have complained that the space has been used as a second dwelling unit and staff have verified that the space includes all the components of a second dwelling unit. Further, the applicant has admitted that they were indeed living in the new structure at times while the principal structure was rented to a third party; which is a zoning violation and that elicited the initial complaints from neighbors.

5. The owner states that the definition of “accessory building/structure” is so vague that it should be completely void because no reasonable person could be expected to find any guidance in it.

City Response: Staff respectfully disagrees as outlined in earlier responses.

6. The owner requests that the newly adopted Land Development Code changes to “Accessory Structures” not apply to the subject property.

City Response: Amendments to the Land Development Code were adopted by City Commission on June 19, 2012 and will take effect on July 19, 2012. Some of those amendments expanded opportunities for homeowners to have bonus spaces and bonus living spaces in detached accessory structures, but only with certain conditions including that those spaces be subordinate in terms of location, height, square footage and lot coverage to the principal structure. This public hearing is held prior to the effective date of the code changes so staff confirm the subordination provision does not apply.

7. The owner states that it is not their intention to use the property as a second dwelling unit and are willing to file a permanent covenant that runs with the land, which states that the new structure is not a second dwelling unit, and may never be sold as or used as a second dwelling unit.

City Response: If the Board of Adjustment approves the height variance, staff recommends as a Condition of Approval that the owners be required to file a restrictive covenant at the Cascade County Clerk and Recorder’s Office that states the structure cannot be used as a second dwelling unit and cannot be rented or sold under that assumption. That restrictive covenant will run with the property, ensuring that future owners understand the restrictions on use of the accessory building.

### Variance Issues

In the R-1 single-family suburban zoning district, having two dwelling units on one lot is expressly prohibited. The R-1 district is the only residential zoning district in Great Falls that is strictly single-family. The R-1 district is generally characterized by larger lots and lower densities; it allows market gardens and keeping of livestock/chickens; and thereby provides an alternative for homeowners who prefer a more private and semi-rural lifestyle while still receiving City services.

In the R-2 single-family medium density and in the R-3 single-family high density zoning districts, a homeowner may seek planning approval for a second dwelling unit through the Conditional Use Permit (CUP) process. This process provides neighbors an opportunity for input on the merits of such an application in public hearings before the Planning Advisory Board and City Commission. The CUP process gives elected officials final authority to approve or disapprove such a request based on specific site conditions and taking into account public comment. The CUP process is not available in this case because the property is located in the R-1 zoning district.

The proposed variance to the height of the accessory structure does not allow the property owner to ever use, or in the future sell, the subject property as containing two dwelling units. The variance to the height of the accessory structure simply brings a non-complying structure into compliance. The Board of Adjustment is not approving or denying a second dwelling unit on the property. The Land Development Code is specific that two dwelling units are prohibited in the R-1 district and it is not the authority of the Board of Adjustment to approve a second dwelling unit.

### Staff Findings

Staff provides the following responses to the Basis of Decision for a dimensional variance:

1. The variance is not contrary to the public interest.

The variance is not contrary to the public interest. It is in the public interest to get the matter resolved and bring the property into compliance with City Code for the safety and the benefit of the property owner and the neighbors. While the situation was clearly self-created, the most reasonable solution to bringing this

property into compliance is a height variance approved by the Board of Adjustment, with conditions of approval that serve to satisfy the needs of all parties. The conditions of approval are:

- Remove the stove/oven facilities including any gas piping or other necessary features that provide permanent kitchen facilities; and,
- File restrictive covenant that runs with the land, which states the second story of the structure is not a dwelling unit and can never be used or sold as such in the future; and,
- Submit an application for extension of the expired building permit, pay the requisite permit fees and get all inspections and approvals as required by the Building Safety Division to ensure the structure meets all building codes.

The result of approval of the variance would be the owner not having to remove all of the installed improvements. It would also mean, after the conditions were met, the property would be in compliance with City Code.

2. A literal enforcement would result in unnecessary hardship, owing to conditions unique to the property.

Staff has given the property owner two options to bring the property into compliance: apply to the Board of Adjustment for a variance, or remove all improvements and bring the property into conformance with the originally submitted and approved building plans. Staff's position is that the variance would bring the property into compliance with Code without causing major financial hardship to the property owner. The proposed conditions of approval are intended to help protect the rights of neighbors by ensuring that the second story space cannot be easily converted into a second dwelling unit and that current and future owners of the property are on notice that a second dwelling unit is not permitted to exist.

3. The spirit of this Title (Land Development Code) would be observed and substantial justice done by granting the variance.

Approval of the variance with conditions of approval will bring the property into compliance with City Code. Substantial justice will be done by resolving this situation in way that is sensitive to the needs of the property owner, current and future neighbors, and to achieve final resolution.

Staff finds adequate basis and hardship and supports the granting of the height variance of an accessory structure from 12-feet to 21-feet.

(Recommendation continued on Page 6)

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Recommendation

**Suggested Motion:**

Board Member moves:

“I move that the Board of Adjustment (approve with conditions) the application from David and Lauren Fleming, property owners of 2101 1st Street Southwest, for the requested variance of City Code Title 17, Chapter 20, Article 4, Exhibit 20-4, maximum height of other accessory buildings of 12-feet to 21-feet, subject to the following conditions.:

- Removal of the stove/oven facilities including any gas piping or other necessary features that provide permanent kitchen facilities; and,
- File restrictive covenant that runs with the land, which states the second story of the structure is not a dwelling unit and can never be used or sold as such in the future; and,
- Submit an application for extension of the expired building permit, pay the requisite fees and get all inspections as required by the Building Safety Division to ensure the structure meets all building codes.

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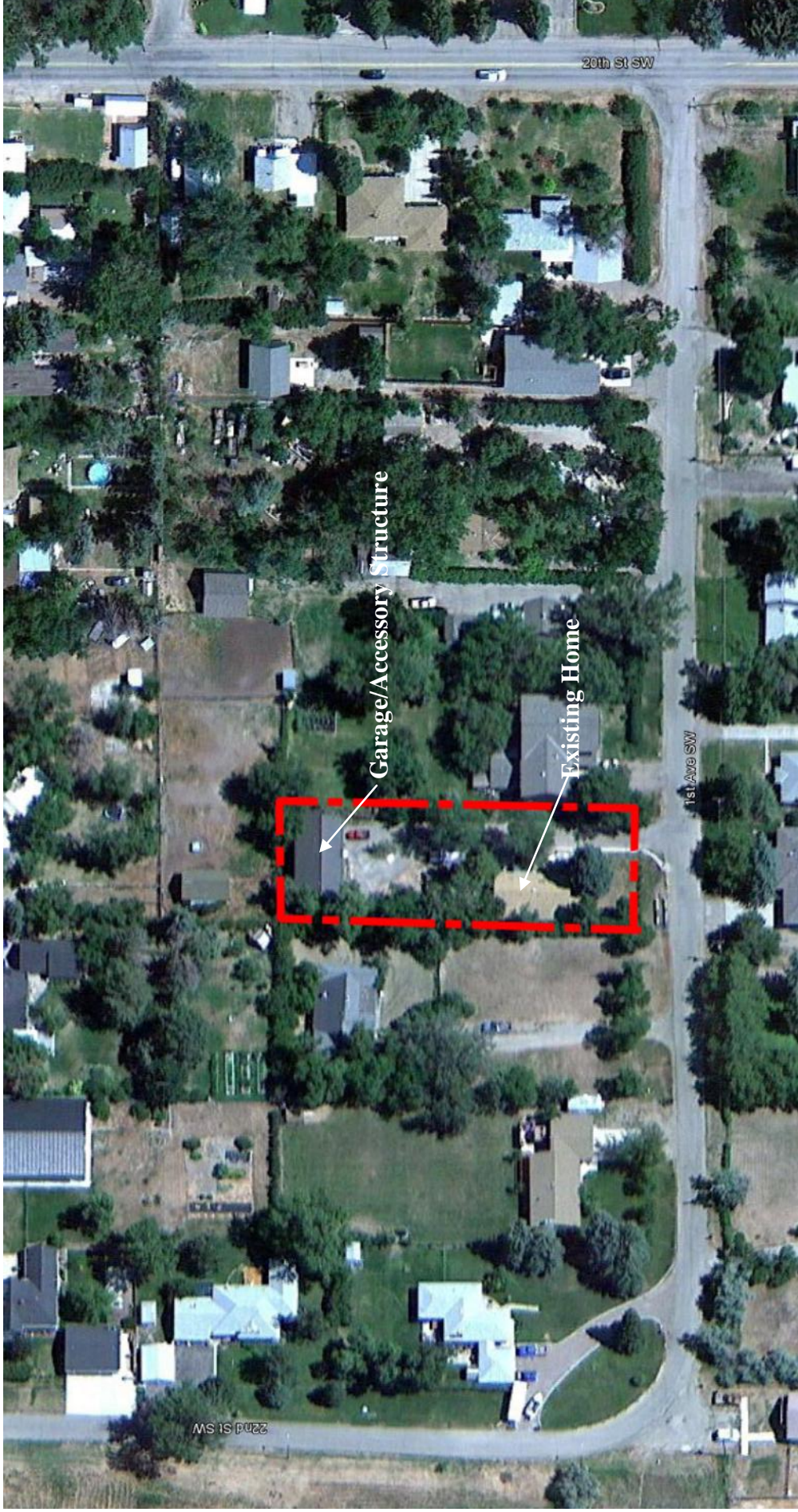
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Chairman calls for a second, discussion, inquiries from the public, and calls the vote.

CC: Patty Cadwell, Neighborhood Council Coordinator  
David & Lauren Fleming, PO Box 6185, Great Falls, MT 59406 & email arrowheadelectro@bresnan.net  
Tim & Laurie Miller, 2029 1st Ave SW, Great Falls MT 59404

EXHIBIT A - AERIAL PHOTO



# EXHIBIT B - APPLICATION

CITY OF GREAT FALLS  
 PLANNING & COMMUNITY DEVELOPMENT DEPT.  
 P.O. Box 5021, GREAT FALLS, MT, 59403-5021  
 406.455.8431 • WWW.GREATFALLSMT.NET

VARIANCE APPLICATION

Date: 2-15-12  
 Application Number: 12-00319  
 Fee: \$200  
 Paid (Official Use ONLY):  #7916

## CONDITION FOR VARIANCE

Montana Statues mention "unnecessary hardship" as a condition for a variance. Variance means a grant of relief from the strict application of a rule or regulation that would permit development in a manner otherwise prohibited.

David & Lauren Fleming  
 Owner / Representative Name:

P.O. Box 6185 Great Falls, MT 59406  
 Mailing Address:

406 836 9516 Phone: arrowheadelectro@mesa.net Email:

Requested Action: A variance from Title: 17 Chapter: 20 Article: 4.010

Please see attached supplement to variance application. If declared an "accessory building", a variance from the "height restriction, with a provision for a permanent use not prohibiting use as a second dwelling"

Basis for Request: Please refer to city property file and attached supplement to variance application.

## PROPERTY DESCRIPTION LOCATION:

Mark/Lot:	Section:	Township/Block:	Range/Addition:
<u>2104 151 Ave SW</u>	<u>Great Falls</u>	<u>MT 59404</u>	

Street Address:

## ZONING:

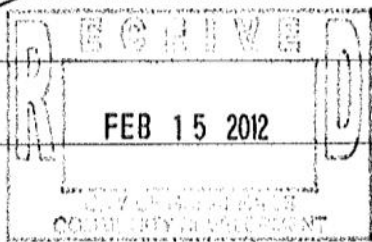
R1  
 Current:

Single Family Residence  
 Current:

I (We) the undersigned understand that the filing fee accompanying this application is not refundable. I (we) further understand that the fee pays for the cost of processing, and the fee does not constitute a payment for approval of the application. I (we) further understand that other fees may be applicable per City Ordinances. I (We) also attest that the above information is true and correct to the best of my (our) knowledge. NOTE: If the applicant is not the owner of record, the signature of the owner of record must also be obtained.

[Signature]  
 Property Owner's Signature: 2/14/12 Date:

Representative's Signature: \_\_\_\_\_ Date: \_\_\_\_\_





## EXHIBIT C - SUPPLEMENT TO APPLICATION

### Supplement to Height Variance Application

This supplement to the Application for Variance by David & Lauren Fleming addresses the basis for the height variance application, both with respect to the need and unnecessary hardship.

First, a close reading of the applicable zoning codes gives rise to the question of whether a variance is actually needed. The structure at issue is our garage which is used in ways typically found throughout Great Falls. Our garage, with its fully permitted and reviewed dimensions has no unresolved issues regarding subordination to the main residence due to the fact that all of these issues were negotiated and resolved during the original permitting process. This structure was designed to have three basic areas of use which include areas for storage of vehicles and household items as well as a wood shop area, but also provides an area that is less exposed to dust and vapor contamination from the first two a fore mentioned areas. This allows our garage to be equipped to facilitate activities such as repair, building, crafts, and other activities. These uses are consistent with uses typical of garages all over the city.

Second, the City's use of the definition of a "*private garage*" as a restrictive measure, is an enforcement that we believe was unintended when this definition was developed, and selective in its application to just our garage. 17.8.120 – General Definitions: "*Garages, Private*" means a building that is intended to house vehicles and household items belonging to the owner or occupant of principle residence." In the case of our garage, the City has already acknowledged its' suitability for multiple uses through the permitting and review process (see property file). We do not feel that our garage capabilities can now be restricted to a literal interpretation of this definition, requiring that it can now only be used for housing a vehicle and storing household items. It is our understanding that the City is not currently restricting garage usage to this level throughout Great Falls, thus it would be unfairly selective to hold just our garage usage strictly to this definition.

As a practical matter regarding our garage usage, we use our garage for various activities, not unlike others in Great Falls use their garage. For example, we are deeply dedicated to the support of the local Boy Scouts, and regularly facilitate meetings and projects. One project we recently hosted involved a four month long activity where boys designed and constructed 17 foot mahogany touring kayaks. This project required the use of the entire upper and lower levels of our garage. The amenities of our building (restrooms, cooking, washing facilities, etc) promote these activities for Great Falls youth in a safe and pleasant atmosphere. Other uses of our garage include woodworking, stained glass, sewing, metal working, auto mechanics, and family / friend social gatherings. Again, these uses are consistent with the uses of garages throughout the city.

Third, the City has performed a comprehensive inspection of our property. Upon completion of this inspection, the City has determined that a dwelling may have been established. This is understandable when one first visually examines but then, fails to take the time to investigate the usage of the upper level (clean area) of our garage. We feel that the inspection affirms that this area does not have a complete dwelling unit contained therein.(See property file photos) 17.8.120 – General Definitions: "*Dwelling unit*" means a single building or portion thereof providing complete, independent living facilities for (1) Family, including permanent provisions for cooking, eating, sanitation, living, and sleeping. Our garage only has permanent provisions for cooking and sanitation. The areas that the City claims are bedrooms, are actually segregated and independently temperature controlled storage areas, portions of which are currently being used for sewing. We have not yet been able to identify the areas that the City considers fulfillment the of the requirements of eating and living.

As a practical matter regarding this upper area of our garage, the storage areas being the only portions

## EXHIBIT C - SUPPLEMENT TO APPLICATION

of our garage that are routinely heated at a comfortable level, greatly reduces our overall utility costs. Our Ogden family connections go back over 20 generations, consequently we have many treasured antiques, some of which are over 400 years old. Safely storing these items is of great importance to us, and we feel that properly storing personal family items is a proper use of our garage. The kitchen area was installed to help facilitate the many friend and family gatherings that are held on our property, including the adjacent patio area. We also intend to use our kitchen extensively when we raze and rebuild the main residence. A proposal to resolve our differing interpretations of this upper area of our garage is contained further herein this document. Please see the property file for other points of disagreement that we have regarding our property that are not mentioned herein.

The next two points of our supplement addresses the City's primary concerns regarding the compliance of our property. The City feels that because of the activities that take place within the four walls of our garage are contrary to the literal definitional use of a garage, that the building is no longer a garage but an accessory structure. And that an accessory structure is unsuitability permissible for these activities because of building height limitations contained within the land development code. Stated more simply, our building with its legally permitted height, is too tall to legally support these activities.

First, the City code defining "accessory building/structure" is so vague as to be completely void. 17.8.120 – General Definitions: *"Accessory building/structure" means any building or structure that is clearly incidental and subordinate to, and customarily found with a principle use.*" While that portion of the definition referring to a building or structure is clear enough, the balance of the definition is so vague that no reasonable person could be expected to find any guidance in it. There is no issue regarding the propriety of our garage. Beyond the vague and incomprehensible definition of "accessory building/structure", there is no guidance provided to citizens regarding what is actually considered an "accessory building/structure" as opposed to a garage. When a rule, statute or ordinance is so vague as to fail to provide notice of the activity required or prohibited, it is generally deemed void. And reliance upon those charged with enforcing the ordinance, to provide the definition by application, actually furthers the fact that the ordinance is so vague as to be void.

Second, the recent passage of the new land development codes now allows accessory structures to be a maximum height of 24' and contain bonus living areas. It is the City's position that our property is not eligible to qualify for these new provisions because the structure is not subordinate to the main residence as required in the new codes. We feel that this subordination requirement is for new construction only. It would be patently unfair to now impose definitions of "subordination" that did not exist at the time our garage was constructed, and then use those new definitions as a basis for claiming lack of compliance. As stated earlier, our building's subordination issues were long ago resolved during the original permitting process. While working extensively with the city staff in early 2009, we negotiated the development of the house that will soon be built, the needed distance from the new house to the garage, the outer dimensions and placement of the garage, and the necessary landscaping needed to minimize the visual effects of my property that may give rise to any subordination concerns. Only for the purpose of prevailing in this matter, are we willing to concede that our garage may now indeed be an accessory structure. But this redefinition does not in our view nullify the original permit agreement. It is our position that should we concede that our garage is now an accessory structure, that it only be done so with the understanding that the subordination issues regarding our building were long ago resolved in our favor, are still in force, and qualify it for the newly approved land development code changes allowing a 24' height and a 2<sup>nd</sup> level bonus living area. In this case a height variance is still not needed?

There has been some expressed concern by the City that due to the presence of the amenities in our

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## EXHIBIT C - SUPPLEMENT TO APPLICATION

garage, the structure may be easily converted into and used as a second dwelling on the property. That is not our intention. However it is understandable that the City desires some concrete assurance that our garage will never be illegally converted to, and used as a second dwelling on the property. To alleviate those concerns we are willing to attach a permanent covenant to the property prohibiting the use of our garage as a second dwelling. This covenant will also reaffirm the restrictions of an R1 zoned area, prohibiting any development that would convert any area of our garage into a full dwelling unit.

As to the unnecessary hardship of this issue, it is the City's position that should this application be denied, that the entire second level of my garage be removed. Both climate controlled storage areas, upper bathroom, kitchen, storage cabinets, all interior walls and, depending on how one interprets the City's letter, even the 2<sup>nd</sup> level floor. The prospects of this economic hardship are unacceptable. And we question the propriety of now redefining the building as an accessory structure from previously recognizing it as a garage. I ask that you the members of the Board of Adjustments also declare this technicality, and its resulting consequences to be an unacceptable consequence.

The building permit issued for our garage recognized and permitted a 21' garage, and that is what I built. It seems inconsistent that a garage constructed pursuant to a clear permit should now be challenged by seeking to call it something other than a garage.

In the hopes of resolving this matter peacefully, we respectfully submit that; (1) no variance is needed; and (2) if a variance is deemed necessary due to our building's conversion to an accessory structure, that it be granted; (3) that in either of these two outcomes, that a provision for a permanent covenant that affirms the necessary restrictions of an R1 zoned area as they apply to our garage, be filed with the property, thus guaranteeing notice to future prospective purchasers of our property's restrictions.

# EXHIBIT D - SITE PLAN



## Site Map

2101 1st Ave SW  
01/10/2012  
David O. Fleming

18250 sq.ft  
.418962 acres

Scale 1" = 30'

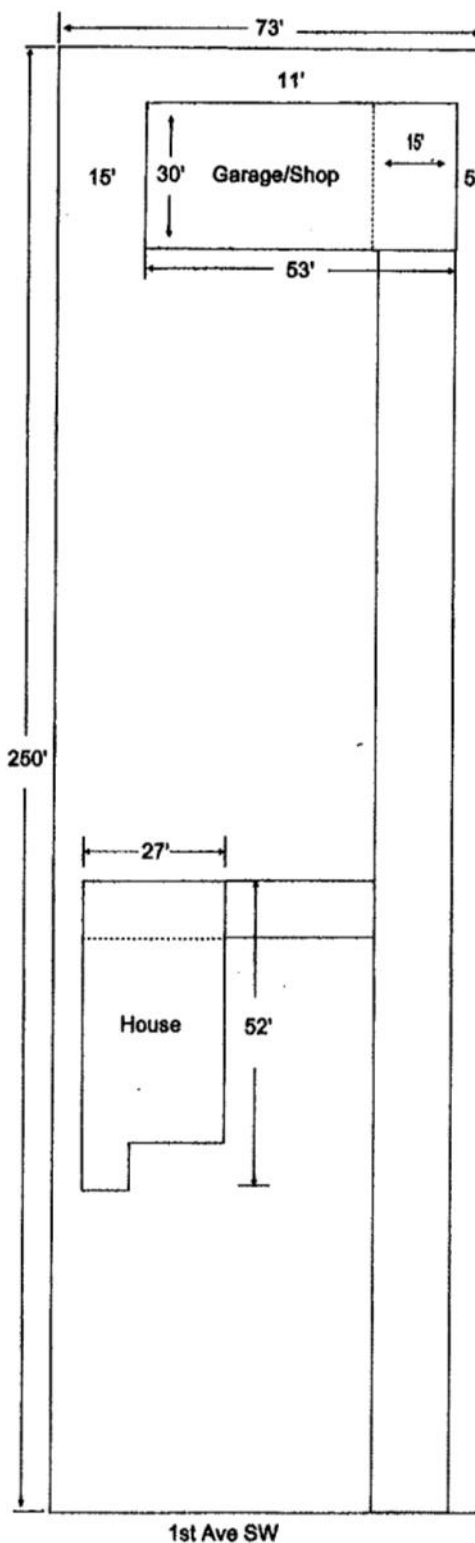


EXHIBIT E - PHOTOS



View looking north from 1st Ave SW toward subject structure, an existing single-family home is on the left.



View of front of structure from driveway.

EXHIBIT E - PHOTOS



View of Single Stall Garage Area



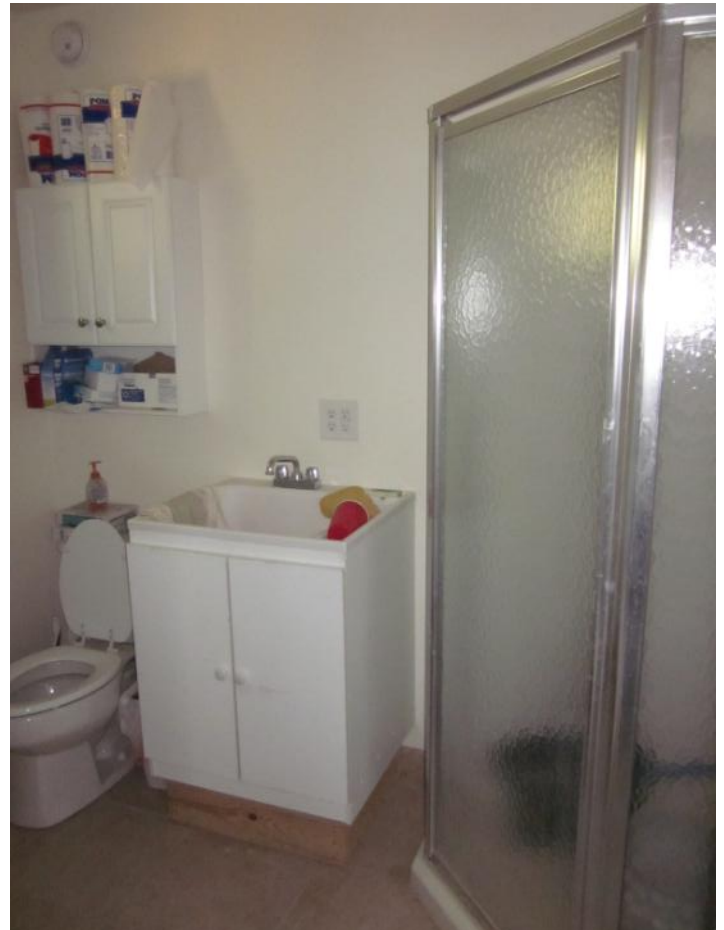
1st Floor Shop Area



1st Floor Shop Area

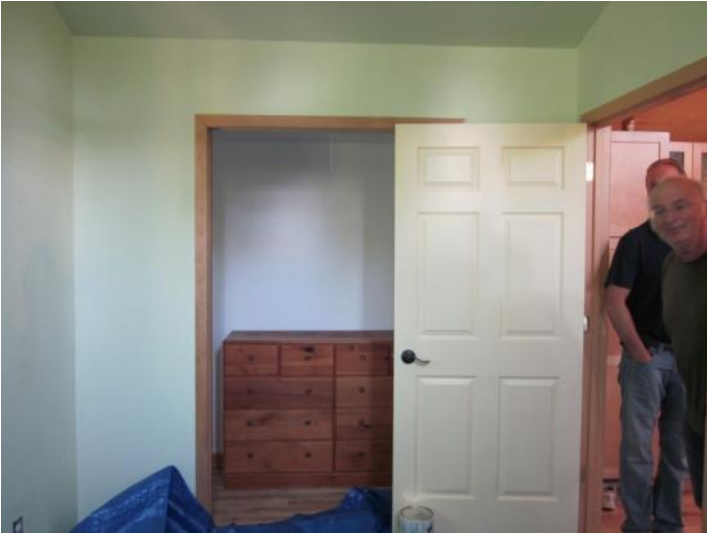


Unfinished Stairs to 2nd Floor



Bathroom Facilities on 1st Floor

EXHIBIT E - PHOTOS



Bedroom 1



Bedroom 2



Kitchen and Living Area



Bathroom Facilities on 2nd Floor