

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

888 WORCESTER STREET • SUITE 160 • WELLESLEY, MA 02482

J. RANDOLPH BECKER, CHAIRMAN  
ROBERT W. LEVY, VICE CHAIRMAN  
DAVID G. SHEFFIELD

LENORE R. MAHONEY  
EXECUTIVE SECRETARY  
TELEPHONE  
(781) 431-1019 EXT. 2208

WALTER B. ADAMS  
DEREK B. REDGATE  
RICHARD L. SEESEL

DEC 22 2022  
WELLESLEY  
MASSACHUSETTS  
02482

ZBA 2022-36

Petition of Jennifer & Marc Charney  
4 Twitchell Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, May 5, 2022, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of Jennifer & Marc Charney requesting after-the-fact approval<sup>1</sup> of a Special Permit/Finding pursuant to the provisions of Section 5.1 and Section 6.3 of the Zoning Bylaw that enlargement of a pre-existing nonconforming garage with less than required right side yard setbacks, at 4 Twitchell Street, on a 9,750 square foot in a Single Residence District in which the minimum lot size is 10,000 square feet, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On April 7, 2022, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Present at the public hearing were Stanley Brooks, Esq., and Marc Charney, the Petitioner.

Mr. Brooks said that the request is for relief for a garage that was reconstructed in the right side yard setback without a special permit or a building permit. He said that special permit, ZBA 2009-28, authorized work for the house but did not address any matters related to the garage. He said that building permits were pulled in 2011 and were closed when work on the house was completed. He said that the permits were reopened in 2016 and additional work was completed on the house. He said that work was done that exceeded the parameters of the building permit. He said that work done on the garage was not authorized by a special permit and was done inadvertently.

Mr. Brooks said that the bulk of the single car garage was demolished except for the original studs of the right side wall remaining at the 12.8 foot setback. He said that the slab was expanded further into the lot, resulting in a 20 by 24 foot garage with the roof line raised approximately three feet.

<sup>1</sup> 'After-the-fact approval' indicates that the requested enlargement of the garage was completed prior to the application for a Special Permit/Finding, in contravention of the Zoning Bylaw requirements.

Mr. Charney discussed the history of the project that included moving his family in and out of the house during construction from 2012 to 2016. He said that when his father passed away in the fall 2016, he was somewhat overwhelmed. He said that the project got out of control and the garage happened in the fog of all the craziness.

A Board member said that there is a big backyard and Mr. Charney could easily have moved the building over. He discussed the detriment of having a larger garage within 12.8 feet of the neighbor's property.

A Board member said that the Building Inspector found that the basement was finished and the attic was fully dormered and finished without any permits. He said that permits have still not been pulled to rectify that. He said that a plumbing permit and a building permit from 2016 and 2017 have not been closed out.

Mr. Charney said that the garage was done during the last phase of construction. He said that a Certificate of Occupancy was not required from the Building Department. Michael Grant, Inspector of Buildings, said that a final inspection is required. Mr. Grant said that he met with Mr. Charney about sequencing and Mr. Charney said that he would prefer to go to the Zoning Board of Appeals (ZBA) first and then file for building permits after he was done with the ZBA.

Mr. Grant said that based on Google Earth Satellite photos, the garage change happened sometime between April 2017 and April 2018. He said that it was not picked up by the Building Inspector at the time. He said that when the violation was picked up, Mr. Grant sent a letter to Mr. Charney regarding the increased work on the house and the garage.

A Board member said that the property is located within the 200 foot buffer from Fuller Brook. He said that nothing from the Wetlands Protection Committee (WPC) was submitted to the ZBA. Mr. Brooks said that the matter is before the WPC on May 12, 2022. The Board said that the petition will be continued until the WPC has ruled on it.

The Board discussed Section 17 of the Zoning Bylaw (ZBL), M.G.L. Chapter 40A, Section 6 and State Case Law. Mr. Brooks asked about the Board's policy going forward regarding detached garages.

The Board said that it cannot amend the 2009 special permit because there was nothing in the original decision about the garage.

A Board member said that the Board often tries to get some concession from the applicant in order to give the requested relief. He said that the garage expansion was never vetted by the Building Department.

Vahideh Nilforoshan, 6 Twitchell Street, said that her house is to the right, next to the subject garage. She said that her family purchased their home in 2016 and for the last six years they have enjoyed living next door to the Charneys. She said that the renovations were done tastefully.

Ms. Nilforoshan said that Mr. Brooks' brief referenced a privacy fence along the property line. She said that it was noted at a recent Planning Board meeting that the Nilforoshans cannot see the garage from their property line. She said that is correct on the ground but it is the only thing that they see from many of their second story windows. She said that they used to be able to see their kids play on the Brook Path but no longer can. She said that the surface area of the roof is significantly larger than it used to be and

that is what affects them the most. She said that had there been hearings prior to construction, they would have requested a re-evaluation of the need for such a high sloped ceiling, creating a loft-like internal space.

Ms. Nilforoshan said that her understanding is that the property is under contract and will be sold as soon as some of the issues are settled. She said that her understanding is that the garage is wired for sound and has insulation, so it could be a good hangout spot for teenagers or an accessory apartment. She said that her biggest concern is that if the relief is granted, the garage will become a large, town sanctioned nonconforming structure that opens up a huge range of possibilities for the future. She asked that some restrictions be placed on its use.

Mr. Grant discussed concerns about setting a bad precedent by taking enforcement out of the Zoning Bylaw for people who do illegal work that requires relief. He said that a lot of work is done in town without permits but he has never been involved in a project where someone blatantly altered a structure without zoning or building code approval. He said that he typically writes an enforcement action to evoke a reaction to gain compliance. He said that it is disrespectful to the Building Department, the Town and the ZBA when things are built without approvals.

Mr. Grant said that if the Board grants relief, the garage will have to be dismantled to the point where the Building Inspector can ascertain code compliance. He said that it will require demolition of portions of the structure such as wall coverings to check the framing and wiring but will not require taking the building apart.

Barbara McGrath, 2 Twitchell Street, said that her family has been in Wellesley for over 80 years and have watched the neighborhood grow. She said that Mr. Charney's house has been a huge improvement to the neighborhood. She said that her opinion is that Mr. Charney made a mistake, has apologized and wants to rectify the mistake. She said that it would be absurd to knock the structure down and moving it over is questionable. She said that Mr. Charney offered to take part of the structure down. She said that is a good example of conflict resolution.

Erin Hester, 3 Twitchell Street, said that she lives directly across from 6 Twitchell Street. She said that from her front door, she looks across to the Charneys' house on the garage side of the property. She said that she has a good view of the garage and the additions. She read an excerpt from a letter that she submitted to the Board earlier in the day.

The Board asked that Mr. Brooks provide information about the Board's legal authority with respect to relief for the garage.

The Board voted unanimously to continue the petition to July 7, 2022.

July 7, 2022

At the request of the Petitioner, the Board voted unanimously to continue the petition to August 4, 2022.

August 4, 2022

Mr. Charney said that he is a member of the Planning Board but was not part of the Planning Board's recommendation for this matter. He asked if the Board would prefer that he resign as a Planning Board member and then come back before the ZBA.

The Board confirmed that the Order of Conditions has not been issued yet. Mr. Charney said his original request with the WPC was for a Request for Determination (RDA) but after review, the WPC requested that a Notice of Intention (NOI) be submitted.

Mr. Charney said that he closed out an electrical permit and a plumbing permit is scheduled to be closed out. He said that the other permits hinge on the garage.

Mr. Charney said that the Building Inspector has the power and will most likely impose a triple fee for building the garage out of compliance, which is a significant increase in the cost of the retroactive permitting process. He discussed added costs for intrusive inspections. He said that a buyer for the house canceled the sale. He discussed potential longer term financial costs because the market has changed and interest rates have gone up. He said that he has received a fair amount of scrutiny around this matter and his public position as a Planning Board member. He discussed out of pocket costs for attorney's fees and surveys drawn up for the WPC. A Board member said that most of the engineering costs would have been incurred if a permit was sought in the proper order.

Mr. Charney said that he reviewed the Comstock, Bellalta and Bjorklund cases and his interpretation is that the shed and garage are protected. He said that he never knocked the existing garage down but enveloped it. He discussed two cases that came before the ZBA in 2022 and 2003. A Board member said that the Board is holding Mr. Charney to a higher standard, based on the fact that he is a land use professional with experience and either knew or should have known better. The Board is not persuaded that the construction of the garage was inadvertent as claimed by the Applicant.

Mr. Charney discussed difficulties with moving the garage. He said that the WPC discussed whether it would be best for the environment to leave it alone because it is in the resource area. A Board member said that when the work has already been done, it takes away from the Board's ability to ask for changes that it thinks will make it not detrimental.

The Board said that it would hold a business meeting to discuss policy for detached garages, the ZBL and M.G.L. Chapter 40A, Section 6.

The Board voted unanimously to continue the hearing to October 6, 2022.

### **October 6, 2022**

There was no discussion. The Board voted unanimously to continue the petition to October 20 at 7:30 pm.

### **October 20, 2022**

The Chairman said that the Board has been in contact with the WPC, who said that they will deal with the wetlands portion of the project at their meeting on October 27, 2022.

The Chairman said that he spoke with Mr. Charney before tonight's hearing. He said that Mr. Charney would like to have the Board take whatever action it is going to take and add a condition to accommodate the WPC order. The Chairman said, and Board members concurred, that the Board typically looks for the decision from the WPC before taking action.

The Board voted unanimously to continue the petition to November 3 2022.

### **November 3, 2022**

The Chairman said that the Board's understanding is that a meeting is scheduled with the WPC on November 17, 2022. Mr. Charney said that this is an after the fact situation where the impact to the wetlands has already occurred. He said that the only issues under consideration for the upcoming WPC meeting concern planting of additional blueberry bushes and installation of a Cultec system for the garage. The Chairman said that the Board should get a copy of the draft Order of Conditions.

Mr. Charney asked the Board to apply the law reasonably so that the matter can be put to rest one way or another. He read an excerpt from the Zoning Board of Appeals Rules & Regulations, Waiver of Rules & Regulations. He said that he articulated the consequences that he is facing as a result of this matter, consequences that continue to accrue. He discussed the timeline for the petition. He said that he has been trying diligently to resolve the matter.

A Board member said that the Board tries to be consistent about requiring that other Boards and Commissions that are involved in projects have their permits resolved before coming to the ZBA. Mr. Charney said that in most cases that preference is based on the idea that the Board does not want something started. He asked that the Board exercise Article 5, Section 3 of the Zoning Board of Appeals Rules & Regulations, which gives the Board the opportunity to waive it. He asked that the Board discuss the merits or different points of what the application is requesting and make a decision at tonight's hearing. He said that the petition has stalled on procedure.

The Board voted to continue the hearing to November 17, 2022.

### **November 17, 2022**

Mr. Charney discussed an issue that came up at his meeting with the WPC related to abutter notifications. He said that his case was continued to December 8, 2022.

Mr. Charney discussed a prior ZBA case at 39 Atwood Street where a special permit was approved and granted extension without an Order of Conditions.

The Board discussed concerns about creating living space in the garage and incremental creeping of nonconformities.

The Board discussed disregarding that the building exists and looking at the plans to consider whether it is something that the Board would have granted relief for in a normal context. The Chairman said that the

Board typically has the opportunity to ask Petitioners to modify the plans and takes comments from neighbors and the Planning Board.

A Board member said that the size of the nonconforming garage increased. Mr. Charney said that the goal was to have a two car garage. He said that when he realized that his wife's minivan would not fit in an 18 foot garage, he added a de minimis one level structure at the end to accommodate it. He said that the nonconformity was extended but not exacerbated.

A Board member said that in addition to setbacks and dimensions, the Board looks at volume and height. He asked about use of the second floor of the garage. Mr. Charney said that it will be for storage. He said that there will be a pull down stair.

A Board member said that two letters were submitted, one in support and one in opposition. He said that the letter in opposition seemed to be more concerned with the procedural aspect than the structural aspect.

A Board member asked if Mr. Charney spoke with the neighbor who lives to the right facing the house. Mr. Charney said that when the garage was originally built, that neighbor remarked that their view from the second floor window was obstructed. He said that he documented the current situation with photographs of the bushes that the neighbor planted for a tree mitigation plan. He said that the bushes exceed the height of the garage. He said that when the neighbors look out their window, they see the bushes, not the garage.

Mr. Charney said that the neighbor was also concerned that someone might try to turn the garage into an Accessory Dwelling Unit (ADU). He said that he spoke to the neighbor about the requirements of the ADU bylaw for approval by the Zoning Board for detached garages or new detached structures.

Mr. Charney that neighbors on State Street, behind the house to the right, wrote a letter of support. He said that the neighbor across the street supports the project.

The Chairman said that he was never persuaded by Mr. Brooks' statement that oversight of a special permit and a building permit for the garage was inadvertent. He questioned how the Board can grant a special permit without recognizing it and conditioning consequences for it. He said that the Board is not empowered under the Zoning Bylaw to impose fines. Mr. Charney said that he will face penalties from the Building Inspector after the Zoning Board makes its decision.

A Board member said that the petition before the Board is to raze a one car garage and build a two car garage as a pre-existing nonconforming structure. He said that the Board typically inserts a condition in its approval of detached garages that there be no plumbing allowed in the garage. He said that the Board typically looks at drainage and imposes conditions for it.

Mr. Charney said that TLAG for the garage did not count in 2016 but is currently required in the calculation. He said that TLAG will be approximately 3,900 square feet, roughly 300 square feet over the 3,600 square feet trigger for Large House Review. The Chairman said that although applications for special permits are exempt from Large House Review, the Board looks at TLAG as part of its determination that the proposed structure will not be substantially more detrimental to the neighborhood. Mr. Charney said that he will submit an updated TLAG affidavit.

A Board member said that the addition at the back of the garage detracts from the form. He said that had it been presented to the Board at the time, he would have found that the band aid was better off not being used and that the project should have been thought through before starting. He said that Mr. Charney pointed out the benefits that it does not extend to the full height of the garage and is not as impactful to sight lines. He said that it is at the back of the garage and is probably not visible to most people. He said that, had this gone through the normal process, he may have considered a full depth garage to be too big.

Mr. Charney said that he submitted plans of the construction process where he enveloped the existing structure. He said that he maintained the wall that is on the property line.

The Chairman said that the proposed garage does not seem to be out of proportion with the house or to what is around in the neighborhood.

A Board member asked if permits have been closed for the house. Mr. Charney said that the Building Inspector is hung up on the TLAG and will not close the permit because he believes that the project is subject to LHR. Mr. Charney said that the lot is nonconforming, so the project is not subject to LHR.

#### December 8, 2022

The Chairman said that an Order of Conditions for the project has been signed.

A Board member said that the revised the TLAG calculation exceeds the threshold for the district at 3,986 square feet in a 10,000 square foot Single Residence District.

Mr. Charney said that a requirement of the Order of Conditions is for a Cultec to be located behind the garage to catch water off of the roof. He said that it is not shown on the plan. He said that the draft Order of Conditions was improved with additional planting. He said that now there is a "U" shaped planting plan versus the corner and there are two additional trees to be planted.

The Chairman confirmed that the Order of Conditions will be recorded at the Registry of Deeds. He said that one of the conditions of the Order of Conditions is that it is in effect in perpetuity, which places any obligations on future owners.

A Board member said that the garage was built without a special permit or a building permit and without an Order of Conditions. He said that work on the house was done without permits. He said that the work was done willfully in violation of the Town's Zoning Bylaw and the Building Code. He said that the purpose of building permits is to protect the public for health and safety reasons, and to notify the Assessor that improvements are being made to the property that should be included in the tax assessment so that everyone pays their fair share. He said that he was disappointed about the situation. He said that he is also mindful of the economic waste if the Board does not grant the special permit and the garage has to be torn down. He discussed the issue of setting precedent. He said that in the normal course of events, he did not see anything about the garage that, had it been reviewed in the proper manner, the Board would not have given relief for. He said that the Board may have asked that the Petitioner tweak it. He said that the Building Inspector has the ability to charge two to three times the permit fee for a retroactive permit.

A Board member said that a neighbor expressed objections to the Board about allowing the potential for an ADU. He questioned if a condition that no water be allowed in the detached garage is sufficient to discourage anyone from living in the structure. He said that would not necessarily prohibit someone from coming back for a special permit for an ADU. The Board discussed imposing a broader condition that would prohibit living space, including an ADU, within the garage.

The Chairman said that if this was coming before the Board as a first application without an after the fact component, he would have approved it. He said that the Board did not have the opportunity to go through its typical analysis or to hear from the public at the time about what their concerns were.

A Board member said that there is currently an enforcement order that the Building Inspector issued to remove the structure due to noncompliance. He said that the order has been held in abeyance, subject to the Zoning Board's proceedings. He said that the Board typically puts a directive to the Building Inspector in its decision that a building permit can issue. He said that he did not want to include that in this case because whether or not a building permit issues will be up to the Building Inspector. He said that he did not want this decision to be at all opining on the propriety or impropriety of the Building Inspector's enforcement order. He said that the Board is not advocating one way or another on how he should proceed with it. The Chairman said that the Building Inspector is the entity who is allowed to create consequences under the bylaw.

A Board member said that the Board expects everyone in town to comply with the State Building Code and the Zoning Bylaw.

The Board said that the decision is subject to compliance with the Order of Conditions.

#### Statement of Facts

The subject property is located at 4 Twitchell Street, on a 9,750 square foot in a Single Residence District in which the minimum lot size is 10,000 square feet, with a minimum front yard setback of 28.6 feet where 30 feet is required and a minimum left side yard setback of 10.5 feet where 20 feet is required. The existing nonconforming garage has a minimum right side yard setback of 12.7 feet where 20 feet is required.

The Petitioner is requesting a Special Permit/Finding pursuant to the provisions of Section 5.1 and Section 6.3 of the Zoning Bylaw that enlargement of a pre-existing nonconforming garage with less than required right side yard setbacks, on a 9,750 square foot in a Single Residence District in which the minimum lot size is 10,000 square feet, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

Letter to Zoning Board of Appeals with attachments, dated 3/25/22, from Stanley A. Brooks, Esq., Letters to Zoning Board of Appeals, dated 8/14/22, 11/3/22 and 11/29/22, from Jennifer and Marc Charney, Email to Lenore Mahoney, dated 11/16/22, from Marc Charney, re: Special Permit – detached garages – pre-existing non-conforming structures, with attachments, Letter to Marc W Charney and Jennifer A Lydum-Charney, dated 2/8/22, from Michael T. Grant, re: Building Code and Zoning Violation, a Plot Plan, dated 2/20/22, revised 3/28/22, stamped by Michael P. Clancy, Professional Land Surveyor, Floor

Plans and Elevation Drawings, dated 3/22/22, prepared by Design & Restoration Inc., and photographs were submitted.

On May 4, 2022, the Planning Board reviewed the petition and submitted comments.

On December 13, 2022, the Wetlands Protection Committee issued an Order of Conditions, DEP#324-1009.

Statement by the Board

This matter came before the Board seeking a Special Permit for a garage that had previously been wrongfully constructed without a Special Permit from this Board, without a Building Permit from the Building Department and without an Order of Conditions from the Wetlands Protection Committee. It is the Board's understanding that the Building Inspector has issued an Order requiring the garage to be demolished (the "Order"), which Order is still outstanding, not having been appealed to this Board. The Board takes no position on the Order, and nothing contained in this Decision shall be deemed to grant any relief from the Order which is within the authority of the Building Inspector. This Decision specifically does not authorize or direct the issuance of a Building Permit or any other required permit. As evidenced by the numerous public hearings the Board was troubled with this matter. The Board finds that the Petitioner's statement that the construction of the garage was "inadvertent" to be disingenuous, that the garage (as well as other work on the property not subject to this permit) was constructed by the Petitioner, an experienced realtor and developer, knowingly and intentionally in violation of law. On the one hand the Board does not condone the conduct of ignoring legal requirements and asking for relief only after the Building Inspector issued the Order and the on other hand it is cognizant of the economic waste which would result from a denial of the Special Permit (given that if the garage was demolished the Petitioner could seek a Special Permit at that time, likely resulting in the same garage being reconstructed). In balancing those interests the Board finds that if the applicant had timely applied for a Special Permit, it likely would have been granted. The Board is not empowered to impose any sanction for the failure to obtain the Special Permit, however, it recommends that Building Inspector impose the maximum fine within his authority.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing.

It is the opinion of this Authority that enlargement of a pre-existing nonconforming garage with less than required right side yard setbacks, on a 9,750 square foot in a Single Residence District in which the minimum lot size is 10,000 square feet results in the intensification of an existing nonconformity, does not result in additional nonconformities, and will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

Therefore, a Special Permit is granted, as voted unanimously by this Authority at the Public Hearing, for enlargement of a pre-existing nonconforming garage with less than required right side yard setbacks, subject to the following conditions.

1. There shall be no plumbing allowed in the garage.
2. There shall be no living space allowed, including an Accessory Dwelling Unit, no amplified sound or other sound which could create a nuisance allowed in or about the garage.
3. The Order of Conditions, DEP#324-1009, dated December 13, 2022, is incorporated in this decision, and all conditions contained therein shall be complied with.
4. There shall be no lighting which migrates off the premises.
5. All other permits required for occupancy of the garage shall be obtained with all appeal periods expired, without appeal.

If construction has not commenced, except for good cause, this Special Permit shall expire two years after the date time stamped on this decision.



ZBA 2022-36  
Petition of Jennifer & Marc Charney  
4 Twitchell Street

APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN THE  
OFFICE OF THE TOWN CLERK.

J. Randolph Becker (l.m.)

J. Randolph Becker, Chairman

Robert W. Levy (l.m.)

Robert W. Levy

Walter B. Adams (l.m.)

Walter B. Adams



ZBA 2022-36  
Applicant Jennifer & Marc Charney  
Address 4 Twitchell Street

NOT VALID FOR RECORDING UNTIL CERTIFIED BY TOWN CLERK

In accordance with Section 11 of Chapter 40A of the Massachusetts General Laws, I hereby certify that twenty (20) days have elapsed after the within decision was filed in the office of the Town Clerk for the Town of Wellesley, and that no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied.

Date:

Attest:

Cathryn Jane Kato  
Town Clerk

cc: Planning Board  
Inspector of Buildings  
lrm

