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As of: March 17, 2017 10:41 AM EDT

## [Matter of Darji Props. II, LLC v Zoning Bd. of Appeals of the Vil. of E. Hampton](#)

Supreme Court of New York, Suffolk County

July 1, 2015, Decided

31152/2013

### Reporter

2015 N.Y. Misc. LEXIS 2420 \*; 2015 NY Slip Op 31164(U) \*\*

[\*\*1] In the Matter of the Application of DARJI PROPERTIES II, LLC and KATHARINE J. RAYNER, Petitioners, For a Judgement under Article 78 of the Civil Practice Law and Rules -against- ZONING BOARD OF APPEALS OF THE VILLAGE of EAST HAMPTON, Respondents, Index No: 31152/2013

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**Prior History:** [Matter of Pond House, Inc. v. Zoning Bd. of Appeals of the Vil. of E. Hainpton, 2015 N.Y. Misc. LEXIS 2312 \(N.Y. Sup. Ct., June 25, 2015\)](#)

### Core Terms

zoning board, variance, conditions, Strip, encroachments, Appeals, parcel, determinations, applicant's, properties, structures, pool, removal, Zoning, compound, petitioners', gate, constructed, companion, utilize, fence, feet, foot, predecessor, approvals, adjacent, premises, parties

**Counsel:** [\*1] For Petitioner: Esseks, Heffer & Angel, LLP, Of Counsel, Anthony C. Pasca and Kevin A. McGowin, [Ackerman, O'Brien, Pachman & Brown, LLP](#), Riverhead N.Y.

Zoning Board of Appeals of The Village of East Hampton (By Service Upon Village Clerk, pursuant to [CPLR 312](#)).

**Judges:** Hon. RALPH T. GAZZILLO, A.J.S.C.

**Opinion by:** RALPH T. GAZZILLO

### Opinion

**ORDERED** that the petition is denied in its entirety, and it is further

**ORDERED** that the Village of East Hampton's decision to place conditions upon its October 25, 2013 determination granting petitioner an approval with conditions which require the petitioner to remove certain encroachments from Village property is affirmed, and it is further

**ORDERED** that counsel for petitioner shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to [CPLR §§2103\(b\)\(1\), \(2\) or \(3\)](#), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

[\*\*2] This proceeding involves petitioners' variance application to allow it to maintain certain structures and improvements on its property together with improvements it made on an adjacent 50 foot wide strip of real property (SCTM #0301-015.00.-05.00-12.001) located in the Village [\*2] of East Hampton and owned by the Village of East Hampton. The 50 foot strip (hereinafter "the Strip") of land runs north and south and connects Georgica Pond (on the north) to the Atlantic Ocean (on the south). The Strip was conveyed to the Village of East Hampton through a series of deeds all recorded in the Office of the Clerk of the County of Suffolk on May 12, 1979 from descendants of the Keck family. Each of the deeds conditioned the transfer as follows:

"TO HAVE AND TO HOLD the premises unto the Village of East Hampton so long as said premises are held for the benefit and use of the people of East Hampton as a memorial to Caroline S. Keck and Walter M. Keck. In the event that the premises are used for any other purpose, they shall revert in ownership to the

grantor."

The petitioner owns an approximately 12 acre parcel of land that fronts on Georgica Pond and was acquired by the petitioner by deed in 1985. Petitioner's parcel is adjacent to the western boundary of the Strip and is used in connection with another adjacent single and separate parcel of land owned by Darji Properties, II, LLC and Katharine J. Rayner, LLC. (hereinafter "Darji") as a "family compound". The Pond House [\*3] property is comprised of approximately 2.4 acres and fronts on the Atlantic Ocean.<sup>1</sup> The Pond House and Darji properties are enclosed by a common 6'6" high fence along their westerly boundaries and utilize a common driveway that exits from the Pond House property through a private gate (which is attached to stone pillars) onto West End Road. The properties also utilize a single address, to wit: 93 West End Road. In other words, although the parcels are legally "single and separate," the owners utilize them together as a single family residence. Together (like the Strip), the properties comprising the "family compound" run from Georgica Pond on the north through to the Atlantic Ocean on the south. West End Road, which petitioner uses to access its property, bisects the Strip, and is a private road. The 6'6" fence enclosing the "compound" crosses over into the Strip in several places and it, along with the pillars that connect the gate to the fence and some mechanical equipment that services plaintiffs' properties are actually located on the Strip and are at the center of this dispute. It is significant to note that since both parcels utilize the single access provided by the gate located [\*4] on West End Road the Darji parcel has no independent access to West End Road. In addition to the encroaching fencing, the petitioner has constructed a pool heater and related equipment on the Village's strip. A survey of the boundary between the family compound properties and the Village's Strip shows the encroachments to be quite significant and nearly twenty (20) feet in some locations

Due to the numerous municipal regulations (federal, state and local) that impact the development of waterfront properties in the subject area, in 2004 plaintiffs Darji and Raynor's predecessor in title (Anne

Cox Chambers) as well as The Pond House petitioners applied to the Village's Zoning Board of Appeals in 2004 to receive area variances to allow "the installation of drainage pools [\*5] ... installation of [a] retaining [\*\*3] wall and swimming pool ... pool mechanical equipment and enclosure and ... underground propane tanks." The 2004 Pond House application sought variance relief for the maintenance of an underground generator. Pursuant to the 2004 determination of the Village's ZBA (adopted on June 11, 2004), the applicants received the variance approvals sought. However, the approvals granted to Anne Cox Chambers (now Darji) were conditioned in part on the removal of certain encroachments constructed by the Darji predecessors upon the Strip. That ZBA determination for the Pond House property, however, did not contain any conditions requiring the removal of the encroachments onto the Strip.

Specifically, that 2004 Anne Cox Chambers determination states as follows:

"The Board notes, however that the survey depicts certain encroachments on the Village-owned strip of land. Although the application is entitled to use the private road crossing the strip for access to the property, it appears that there are posts and possible a gate across the private road within the Village-owned strip of land, outside the applicant's property boundaries. Likewise, a portion of the stone drive [\*6] leading up to the applicant's house meanders into the Village-owned strip of land. These encroachments should be removed from Village property before the issuance of the certificate of occupancy or certificate of compliance for the pool and its related structures."

Although Darji's predecessor in title built the swimming pool and the other improvements which were approved pursuant to the 2004 ZBA determination, for some unknown reason the conditions of that approval (namely the removal of the gate and other encroachments from the Strip) were never completed. In addition, it is significant that neither of the 2004 ZBA determinations were appealed by the then-applicants<sup>2</sup>.

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<sup>1</sup>The Pond House, Inc. has a companion Article 78 proceeding pending also challenging the 2004 Zoning Board approvals it received on its companion application. Additionally, Darji, Rayner and the Pond House have commenced a declaratory judgment seeking a determination from the Court that they have adversely possessed the areas of The Strip upon which they have constructed the improvements for which they later sought approval.

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<sup>2</sup>A second variance was also obtained for the Darji property on October 22, 2004 which approved Coastal Erosion Hazard Area variances and area variances associated with the relocation of the pool equipment shed, drywells and buried propane tank. That variance also conditioned the approval on Darji's removal of "the structures that encroach on Village property". This determination was not appealed by Darji.

Subsequently, the owners of the Darji and Pond House "family compound" constructed further improvements (apparently without [\*7] the prior permission of the Village) for which they sought approval in 2013. Specifically, Darji and Rayner applied to the ZBA for variances from the Coastal Erosion Hazard Area (which requires a minimum setback of 100 feet and the Dune Setback Variances sections of the Village Code to allow: "(1) the continued maintenance of an enclosed frame porch of approximately 640 square feet to be maintained 60 feet north of the 15-foot contour; 2) the proposed construction of a 525-square foot basement at a setback of 81.2 feet north of the 15 foot contour, which will involve the excavation of 21 temporary 16 square-foot pits around the perimeter of the proposed basement area; (3) the construction of a proposed 677 square-foot second story addition and elevated walkway between the existing residence and an attached building 89.2 foot north of the 15-foot contour; and (4) the continued maintenance of existing air conditioning units, a bin, and pool equipment vault 87.9 feet north of the 5 foot contour, all of which are seaward of the Coastal Erosion Hazard area line". Although admittedly used as a "family compound", because the Pond House is technically on a separate parcel of real property, [\*8] it also applied for these variances to the extent that they have impacted that separate parcel. Specifically, the Pond House [\*\*4] sought permission to maintain the following structures within the Fresh Water Wetlands set back areas: a greenhouse/shed and adjacent brick walkways, a coop, an air conditioning unit, wooden walk way, slate walkways and a rock wall. All of the requisite public hearings on the applications were conducted simultaneously. Apparently, even though the issue of the improvements' encroachment onto The Strip were not discussed at any public hearings, the prior approvals and surveys showing the encroachments were part of petitioners' variance application as well as the public record.

On October 25, 2013, the Village issued companion determinations on the Darji/Raynor and Pond House variance applications. With regard to the Pond House, all of the variances sought were granted however, the approvals were conditioned in pertinent part as follows:

"11. Part of the applicant's argument in support of granting the rear yard variances is that the use of the subject premises in integrated with the use of the premises to the south, which is owned by affiliates of the applicant. [\*9] Either the applicant or its affiliates or a predecessor in title who is also an affiliate erected fencing and pillars and a gate that

encroach onto the Village-owned parcel to the east. The erection of these structures should have been subject to freshwater wetlands permits, as well as the consent of the Village. Neither consent of the Village nor the required permits were obtained before these structures were erected. The granting of the relief requested here is conditioned upon the removal of those structures from the Village-owned property."

Simultaneously, on October 25, 2013, the Zoning Board granted the applicants on the Darji property were granted all of the variance relief requested in its applications. As with the Pond House application, the Zoning Board determination contained the following condition:

"8. The applicant's predecessor in title was granted variance relief in 2004 for the swimming pool and related structures (not including the pool heater in its existing location) on the condition that the applicant remove the structures encroaching in the Village-owned adjacent parcel, which at the time included gate posts and fencing. The applicant has accepted the benefits of [\*10] this variance but has failed to comply with the condition imposed in the 2004 variance. Indeed, additional structures seem to have been installed over the boundary line on the Village-owned property by the applicant in the interim. Compliance with the 2004 condition is continued as a condition of this determination, as well as the removal of the applicant's subsequent encroachments, including but not limited to the pool heater."

The instant proceeding seeks relief pursuant to [CPLR Article 78](#) annulling the October 25, 2013 determination of the Zoning Board of Appeals of the Village of East Hampton. As is set forth in the petition, petitioner seeks to annul the determination only "to the extent that it was conditioned upon the removal of Pond House Disputed Structures, and to remand it to the ZBA for removal of the condition placed upon the grant."

[\*\*5] Specifically, petitioners in both proceedings assert that the Zoning Board's condition contained in the October 25, 2013 determination which granted all of the variance relief it sought subject to the petitioners' full compliance with their June 11, 2004 determination granting is unlawful since, according to the petitioner, the Zoning Board had no authority [\*11] to impose conditions "*sua sponte*" related to "off-site improvements." Additionally, petitioner argues that the

Zoning Board had no authority to make any determinations regarding "questions of title." Lastly, petitioner claims that the Zoning Board's condition which requires petitioner comply with an earlier Zoning Board determination (from which it benefitted) is an "Unconstitutional Exaction" of its property rights in the improvements that it constructed outside of its lawful property boundaries. These arguments lack any merit and, therefore, must be rejected.

In reviewing the petition the Court must give broad discretion to local zoning boards in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion (see, [Stone Landing Corp. v. Board of Appeals of Village of Amityville](#), 5 A.D.3d 496, 773 N.Y.S.2d 103). Furthermore, where determination of a zoning board of appeals is rational and supported by substantial evidence, reviewing court may not substitute its own judgment for that of board, even if such contrary determination is itself supported by record (see, [Rossney v. Zoning Bd. of Appeals of Inc. Village of Ossining](#), 79 A.D.3d 894, 914 N.Y.S.2d 190; [Matter of Khan v. Zoning Bd. of Appeals of Vil. of Irvington](#), 87 N.Y.2d 344, 662 N.E.2d 782, 639 N.Y.S.2d 302, [Matter of Rogers v. Baum](#), 234 A.D.2d 685, 650 N.Y.S.2d 452).

Initially, it should be noted that in the companion declaratory judgment action, this Court has determined [\*12] that the petitioner and the petitioners in the companion Article 78 petition have no valid claim of adverse possession to the Strip, which is owned, subject to the provisions in the deed, by the Village of East Hampton. Accordingly, any arguments relating to its claim of title to the areas where its improvements encroach onto the Strip (i.e. its "Unconstitutional Exaction" claim and the claim that the Zoning Board was outside its jurisdiction making determinations as to the ownership of property<sup>3</sup>) are rendered moot. Moreover, contrary to the petitioners' assertions the Zoning Board did not impose any of the complained of conditions "sua sponte." The petitioners' application and the Village's records relating to the subject property contain both

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<sup>3</sup> It is important to point out that Petitioners argument that the Zoning Board could not condition its determination on the removal of encroachments from The Strip because the issue was never raised by the Zoning Board of Appeals while the application was under review and its argument that the Zoning Board was outside of its jurisdiction by making determinations regarding "questions of title" are contradictory and irreconcilable.

surveys and copies of the prior Zoning Board determinations, all of which clearly indicate that the petitioner has constructed improvements on property owned by someone else, to wit: the Village. The Zoning Board is not required to look at *only* what the applicant provides, nor is it required to view applications in a vacuum. No such jurisdictional limitation exists and to impose it would wreak havoc on all Zoning Board determinations (see, [W. Park Corp. v Zoning Board of Appeals of City of Long Beach](#), 43 AD3d 1068, 843 N.Y.S.2d 106). [\*13]

As a matter of law, pursuant to [Village Law 7-712-b](#), in making its determination, a Zoning Board is mandated to review: "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting or the area variance; (2) whether the benefit sought by the applicant can be achieved by some method. feasible for the applicant to pursue, other than an area variance; (3) whether the [\*\*6] requested area variance is substantial; (4) whether the proposed variance will have an *adverse effect or impact on the physical or environmental conditions in the neighborhood or district*, and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but [\*14] shall not necessarily preclude the granting of the area variance" (emphasis supplied). This is so whether or not the applicant identifies them at a public hearing or not. In fact, a zoning board member can properly rely upon a personal knowledge regarding the characteristics of a neighborhood (see, [W. Park Corp. v Zoning Board of Appeals of City of Long Beach](#), 43 AD3d 1068, 843 N.Y.S.2d 106). Since the Village Law clearly mandates that the Zoning Board consider the aforementioned criteria in its determination, the conditions requiring the removal improvements built on someone else's property are entirely appropriate, especially since these conditions were contained in the 2004 Zoning Board variance determinations relating to Darji/Raynor parcel which is used with the subject parcel as part of a "family compound."

Petitioners' remaining argument that the conditions placed on the variance are arbitrary, capricious or outside of the Zoning Board's jurisdiction are completely unpersuasive. Initially, it bears noting that the October 25, 2013 petitioner granted petitioner all of the variance relief it sought subject only to its adhering to the 2004 Zoning Board of Appeals determination concerning the same property (which was never appealed). Clearly, the Zoning Board of Appeals [\*15] was within its rights when it conditioned the October 25, 2013 determination

(the application for which included surveys and the prior decisions which showed and/or discussed the encroachments) upon compliance with the simple conditions contained in its earlier 2004 determination, i.e. remove any encroachments onto the Village owned property. Petitioners' attempt to challenge the conditions placed on the 2004 Zoning Board determinations is merely a circuitous attempt to circumvent to "appeal" the conditions well beyond the applicable four month statute of limitations. Said another way, as a matter of law, the fact that no one appealed the 2004 determinations within the applicable four month statute of limitations set forth in [CPLR 217](#) precludes the petitioner from challenging any of those conditions at this juncture (see, [CPLR 217](#); [Kumpel v. Wilson 241 AD2d 882, 660 N.Y.S.2d 482](#); see also; [Hamptons, LLC v. Zoning Board of Appeals of the Incorporated Village of East Hampton, 98 AD3d 738, 950 N.Y.S.2d 386](#); [Town of Somerset v. Perry, 67 NY2d 1014, 494 N.E.2d 455, 503 N.Y.S.2d 324](#)).

Finally, after arguing throughout its papers in the action and in both proceedings that the properties are utilized together as a "family compound" it is disingenuous (at best) for any of the parties to argue that any of the encroachments were installed by the parties to the companion proceeding or the action and that, as such, there is no "nexus" between [\*16] the conditions imposed and the impacts of the proposed land use. Clearly the Zoning Board did as the parties wanted and made its determinations based upon the fact that the Darji/Raynor and Pond House properties were utilized as one parcel and that any potential impacts were analyzed as if the two properties were one. Throughout the 2004 and 2013 determinations for both parcels the Zoning Board's analysis of the impacts was based upon the properties being used in that manner and at the parties' insistence that that was the case. Therefore, the nexus between the conditions and proposed land use, i.e. the "family compound" are clear, undeniable, appropriate and well within the ZBA's authority (see, [Village Law 7-712-b](#); [W. Park Corp. v Zoning Board of Appeals of City of Long Beach, 43 AD3d 1068, 843 N.Y.S.2d 106](#)).

Since the determination of the Zoning Board of Appeals is clearly supported by substantial evidence and because the petitioner is time barred from challenging the [\*\*7] determinations of the Zoning Board of Appeals made in 2004, the Court must sustain the Zoning Board's October 25, 2013 determination (see, [Rossney v. Zoning Bd. of Appeals of Inc. Village of Ossining, 79 A.D.3d 894, 914 N.Y.S.2d 190](#); [Matter of Khan v.](#)

[Zoning Bd. of Appeals of Vil. of Irvington, 87 N.Y.2d 344, 662 N.E.2d 782, 639 N.Y.S.2d 302](#), [Matter of Rogers v. Baum, 234 A.D.2d 685, 650 N.Y.S.2d 452](#)).

Submit Judgment on Notice.

Dated: 7/1/15

/s/ Ralph T. Gazzillo

Hon. Ralph T. Gazzillo

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