



# ***Town of Colchester, Connecticut***

127 Norwich Avenue, Colchester, Connecticut 06415

Website: [www.colchesterct.gov](http://www.colchesterct.gov)

**COLCHESTER  
ZONING BOARD OF APPEALS  
MEETING MINUTES  
TUESDAY, SEPTEMBER 17, 2019  
Town Hall, 127 Norwich Avenue, Colchester, Connecticut  
MEETING 7:00 P.M.**

**MEMBERS PRESENT:** Chairman Laurie Robinson; Patrick Reading; Michael Solis, Bob Setschinsky and Jason Radachy; Stan Soby, Board of Selectman Liaison; Staff: Daphne Schaub, Assistant Planner/Zoning Enforcement Officer, and Kamey Cavanaugh, Clerk. Members of the Public.

**1. CALL MEETING TO ORDER**

Chair Robinson called this meeting to order at 7:00PM

**2. LEGAL NOTICE D. Schaub read the legal notice into the record.**

Chair Robinson asked if Mr. Setschinsky had an opportunity to listen to the recording from the previous meeting in order to be a voting member for the hearings on the agenda this evening. Mr. Setschinsky stated he did listen to the recordings.

Chair Robinson asked if the board members or the applicant had any concerns or issues with any of the members of the board seated to hear the application before them; hearing none

**3. APPLICATIONS/PUBLIC HEARINGS**

- A.** Application No. 19-001ZBA of Cynthia A. Baribeault (Applicant/Owner), 167 Christy Lane, for a variance of Section No. 4.4.1 of the Colchester Land Development Regulations, to reduce the minimum side yard setback requirement from 20' (effective 9/1/19: 15') to 11'(+/-) (Tax Map 4W-03/Lot 001-18A) in the SU Zone;

Ms. Baribeault was before the board requesting a side yard setback to construct a garage and stated the reason for her hardship is due to the shape of the cul-de-sac, her home being place off center and to the back on the property, the narrow rectangular shape, the multiple slopes on the lot, the peculiar shape of the lot to the cul-de-sac causing the home to be off centered, and due to the engineering aspects of the cul-de-sac. Ms. Baribeault also stated the uniqueness to her property in comparison to other properties on the street, other lots are level, or they do not have an issue with them being off centered, and sidewalks.

Chair Robinson stated the concerns and issues that are being presented while understandably an inconvenience for Ms. Baribeault, they are not considered to be a hardship.

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Ms. Baribeault addressed the extra expenses there would be if she were to construct the garage in any other location. Chair Robinson stated those points are financial and cannot be considered a hardship.

Patrick Reading asked if there had been given any consideration to constructing the garage forward of the existing home, that way there would be no impact to the building entrance door or the existing deck. Ms. Baribeault does not feel that would be in character with the other homes on the street.

Ms. Baribeault presented to the board case studies from other towns where she felt they were comparable to her application in addition to other States and Town samples of setbacks and overhangs.

Chair Robinson asked if anyone was present to speak in favor, in opposition or had any questions on the application being discussed. Hearing none.

***J. Radachy made a motion to close the Public Hearing for application No. 19-001ZBA. Motion was seconded by P. Reading. Motion carried unanimously.***

J. Radachy stated there is an existing use being made of the property, therefore makes it very difficult to provide a hardship. The garage may be desired by the homeowner, but the specific configuration of the location is not required. Finally stating there was discussion of other locations and sizes for a garage which may not be ideal or desired by the application but it is possible, therefore finding no hardship in this case.

Chair Robinson stated there are other locations to site the garage that are reasonable and believe they can be accommodating, feeling there is not an acceptable difficulty for this. Having to move a window or door does not fall to exceptional difficulty.

M. Solis noted the regulations are not the cause of the issue, the property itself was created after the regulations were in place.

P. Reading reminded the board of the recent regulation change that would permit the applicant to return to the original setback from what has been recently proposed.

***P. Reading made a motion to deny Application No. 19-001ZBA of Cynthia A. Baribeault (Applicant/Owner), 167 Christy Lane, for a variance of Section No. 4.4.1 of the Colchester Land Development Regulations, to reduce the minimum side yard setback requirement from 20' (effective 9/1/19: 15') to 11'(+/-) (Tax Map 4W-03/Lot 001-18A) in the SU Zone; due to the board finding no grounds for hardship. Motion was seconded by J. Radachy. Motion carried unanimously.***

- B.** Application No. 19-002ZBA of Robert Keefe (Applicant/Owner), 54 Lebanon Avenue, for a variance of Section No. 3.4.1.C of the Colchester Land Development Regulations, to reduce the minimum lot frontage on an arterial street requirement from 300' to 280.74' (+/-) (Tax Map 06-02/Lot 002-000) in the RU Zone

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Chair Robinson asked if the board members or the applicant had any concerns or issues with any of the members of the board seated to hear the application before them; hearing none

Members of the board were provided a copy of the Deed of Conservation Easement as requested.

J. Radachy stated to the board his interest of the concept of whether acts of a person employed by the owner can be imputed to the owner themselves in terms of if the hardship is created. After doing some research Mr. Radachy found authority from the CT Supreme Court that he believes holds that if the condition creating the need for the variance is due to the property owner's action, or those employed by him, is a self-created hardship. P. Reading asked if that would also be true if the agents of the individual acted maliciously or incompetently. Mr. Radachy could not find a distinction and presented a case study from the North Haven ZBA vs. Highland Farm Market where the owner constructed a building on a site 5' into the setback and the facts of the case stated was due to an error made by either the surveyor or foundation contractor, employed by the owner. Ultimately the court held that if the hardship was not due to the property and due to the actions of whoever made the mistake. P. Reading stated in this case the individual responsible for this particular property is deceased.

Attorney Breslau, of Kahan, Keresky, and Capossela, representing the Estate of Gary Keefe, reported a time line of events to the board starting with Mr. G Keefe contacting him when he was terminally ill and very anxious to close the development rights and sale while preserving the farm. The understanding and agreement was the farm land restrictions would not apply to both of their personal residences, in addition to an additional area within the 60 acres where a future farm house could be built if the package was sold, but the houses were to be excluded. The Agriculture Land easements are complex and lengthy. In this case the Land Trust hired the surveyor and Attorney Breslau is confident that the instructions to the surveyor were consistent with the agreement made with the Keefe brothers to exclude their homes. During that time the main focus was placed on the land that was to be conserved and all the rules and regulations that applied to that process. Attorney Breslau is convinced that the issue before the board has to do with a very simple survey error and feels the surveyor misunderstood both the instructions that he was provided, the zoning regulation and the strictness of the conservation easement that was about to be placed on the property. Attorney Breslau submitted to the board the hardship is the inability of the Keefe family to transfer the homestead to its rightful heir was not self-created. It was the result of a survey error. Granting this variance and allowing a Keefe family member to purchase this property, will preserve the farm and the home, and sale and ownership by a family member is much better than renting to a non-owner occupant. The viability of the farm is enhanced by having the next generation of Keefe in the residence. The benefit extends to the town and the Colchester Land Trust. All parties involved want this preservation effort to be successful. In summary, the hardship was not self-created in that the employment was not by the applicant at hand and the result was an unfortunate external survey error.

J. Radachy asked if the board could be provided with documentation or evidence of who hired the surveyor and what instructions were given to them. Mr. Radachy feels the surveyor error could and should have been caught and remedied.

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D. Schaub stated what is being dealt with is basic imaginary lines and in this case even more imaginary as the land has been preserved in perpetuity. The site lines will never change as another driveway cannot be put in place and a rear lot cannot go on an arterial road.

Lisa Hageman, Co-President of the Colchester Land Trust, explained the Colchester Land Trust worked hand and hand with the Keefes to execute a legacy on behalf of their family. The members of the Land Trust are made up of volunteers that worked together to do what is good for the Town of Colchester. Ms. Hageman noted the Land Trust did employ the surveyor and was part of the process to protect the land in addition to having a hired attorney to work throughout the 18 month process. When the Land Trust entered into this process the only intention was to protect the farm forever and to leave a legacy for the Keefe family. Ms. Hageman stated it is extremely unfortunate an error was made by the surveyor.

Kevin Burne, Land Trust member stated they have since put a policy / checklist in place for any land trust purchase or conservation easement to review the file with the Planning and Zoning office to prevent this happening again in the future.

J. Radachy asked if Ms. Hageman had any documentation or instructions that were given to the surveyor. Ms. Hageman does have an agreement in her records and noted the surveyor was specifically hired to survey the easement and also to leave out a 4 acre parcel that would be intended for a legal lot. Attorney Breslau asked if it would be acceptable testimony to hear verbally from Ms. Hageman what the intent was and what was asked of the surveyor to provide.

Attorney Catherine Marrion, of Waller, Smith and Palmer, representing the Land Trust in the transaction expressed support for the variance application request. Attorney Marrion attested to both the Keefes desire to protect this farm from development and also to insure they excluded areas sufficient to allow them to conduct their business and their personal lives including the two areas that were excluded, in addition to a 6 ½ acre excluded agriculture facility that is not part of the easement property, however is tied to it so there will always be agricultural facility on the property. Attorney Marrion said this variance should be granted as the intent of the Keefes was to protect their property and the intent to exclude those parcels was to allow them to have residential areas while protecting the bulk of the farm.

Kevin Burne, stated to the board that as far as he is aware this has never happened before and feels that efforts have been made to not have it happen again in the future, and is in favor of the ZBA approving the variance.

Leslie Curtis, 110 Cato Corner Road, Board member of the Land Trust, feels this is clearly a transaction that was taken in the best interest of the entire town of Colchester by keeping open space and feels this should be an easy decision of the board to grant the variance.

Scott Sivek, 322 Bulkeley Hill Road, Board member of the Land Trust, stated the Land Trust board is made up of a honest and hardworking group of people whose intentions are incredible well defined and are about the benefit of the town. This was an honest error made by honest people and would hope the board can see through that and grant the variance.

J. Radachy stated it has been discussed the Land Trusts hired of the surveyor. He further asked Attorney Breslau what his stance is on whether or not the surveyor was acting for the benefit of

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Gary Keefe since the easement itself states the easement is that his intention is to preserve the land. Attorney Breslau said there is a benefit to all parties involved; to the town, to the land trust, and to the Keefes. He stated his concern with the focus beyond the facts that are presented; an error was made and it was not the applicant who made the error.

D. Schaub read into the recorded Pg. 4 of the easement; 2<sup>nd</sup> full paragraph, in part stating the goals for the Keefes and the land trust was to protect the sited conservation of the property.

D. Schaub read into the record staff report (see attached)

Stan Soby, ZBA liaison to the Board of Selectman, asked the board to give strong consideration to the recommendation of staff who has provided a simple elegant solution to resolve the issue that benefits all parties.

P. Reading asked Attorney Breslau if at the time the property was set in easement who was the owner of record for the 4 acres of property. Attorney Breslau responded Gary Keefe. Mr. Reading went on to state in the Deed of Conservation Easement, 1<sup>st</sup> page, Gary Keefe is listed as the owner. Mr. Reading asked, who is the owner of record for the application before the board at this time? Attorney Breslau responded the Estate of Gary Keefe and Robert Keefe. Mr. Reading stated the applicant is not the individual who was the owner of the property at the time the deed was recorded, therefore the applicant cannot be responsible for the actions of the previous owner.

***M. Solis made a motion to close the Public Hearing for application No. 19-002ZBA. Motion was seconded by P. Reading. Motion carried unanimously.***

M. Solis said the intent is clear and all parties intended to divide off the pieces. It is unfortunate it was not further discussed with staff to prevent this error.

B. Setschinsky said he believes it was a simple mistake that was made by someone who was not employed by the applicant and the board is in a position to resolve this matter very simply and relatively quickly.

J. Radachy stated there is a clear statement in the law that you cannot grant a variance when the hardship is due to the actions of the owner. In this case, the surveyor made the error, technically employed, although not technically not paid by the owner. The owner directed the actions of the surveyor by entering into this negotiation for the easement. Based on those factors he sees the surveyor as an agent of the owner of the property even if not technically employed by them.

P. Reading does not agree this to be a self-created hardship in part the actions by 3<sup>rd</sup> party and also the owner of record at time the decision was made is no longer the owner of the property and is not the applicant.

Chair Robinson understands the process as the surveyor was acting as an agent for the applicant and the Keefes benefited, however, they did not hire him or pay for the work. The board has the ability to remedy this mistake and provide better communication for this not to happen again.

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*M. Solis made a motion to uphold the Zoning Enforcement Officers decision to deny application for the creation of a flag lot subdivision located at 564 Lebanon Ave, due to flag lots are prohibited on arterial roads by section number 6.2.7.2 of the Subdivision Regulations. Motion was seconded by P. Reading.*

*P. Reading made a motion to grant Application No. 19-002ZBA of Robert Keefe (Applicant/Owner), 564 Lebanon Avenue, for a variance of Section No. 3.4.1C of the Colchester Land Development Regulations, to reduce the minimum lot frontage on an arterial street requirement from 300' to 280.74' (+/-) for the following reasons;*

- 1. The hardship is peculiar to this property alone*
- 2. The hardship is not the result of the applicant Robert Keefes own actions*
- 3. The hardship is not financial*
- 4. The hardship relates specifically to the real property in question*

*Motion was seconded by B. Setschinsky. Motion carried 4-1-0 – Jason Radachy voted NO.*

**4. MINUTES OF PREVIOUS MEETING - Minutes for August 20, 2019**

*P. Reading moved, and J. Radachy second to approve the minutes of August 20, 2019. Motion carried unanimously*

**5. OLD BUSINESS None**

**6. NEW BUSINESS None**

**7. CORRESPONDENCE None**

**8. ADJOURNMENT**

*P. Reading made a motion and J. Radachy seconded to adjourn the September 17, 2019 Zoning Board of Appeals meeting at 9:36p.m. The motion carried unanimously.*

Respectfully Submitted,

*Kamey Cavanaugh*, Clerk

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