



CITY of PORTSMOUTH BOARD of ETHICS

Minutes of the September 21, 2020 Meeting

Access: Via Zoom

Present via Zoom: Board of Ethics Chair John Tabor, Board Member Ann Walker, Commissioner Richard Gamester, Commissioner Tom Hart, City Attorney Robert Sullivan (ex officio).
Also present: Synthia Ravell, moderator and Marian Steimke, both of the City Legal Department.

Panelists: Councilor Esther Kennedy, Ms. Nancy Pearson, Attorney Duncan MacCallum

The Portsmouth Board of Ethics (BoE) hearing commenced at 6:01 p.m.

Chair Tabor read the following from the Governor's Executive order:

Per NH RSA 91-A:2, III (b) the Chair has declared the COVID-19 outbreak an emergency and has waived the requirement that a quorum be physically present at the hearing pursuant to the Governor's Executive Order 2020-04, Section 8, as extended by Executive Order 2020-18, and Emergency Order #12, Section 3. Members will be participating remotely and will identify their location and any person present with them at that location. All votes will be by roll call.

Chair Tabor called the roll of Board members who identified their locations and who was present physically at their location.

Chair Tabor stated the purpose of the hearing was to hear a rebuttal from Councilor Kennedy and to allow time for cross examination of Councilor Kennedy by Ms. Pearson. Cross examination would be limited to 30 minutes unless the Board voted to extend time.

The Chair stated the charge of this BoE was to determine whether Councilor Kennedy met the test of the Conflict of Interest Ordinance – specifically, when she registered the

trade name PopUp Portsmouth, did she engage in a transaction which sought to defeat a goal supported by the Portsmouth City Council. That was the decision the BoE must make. Ms. Pearson stated her complaint previously. Tonight we hear the response of Councilor Kennedy. The Board must gather the facts on the timeline, the impact on the PopUp project, and if it was in conflict with the 9-0 vote of the City Council to approve funding for the project.

Attorney Sullivan summarized the history and goals of this Board and the ground rules which were adopted on September 10, 2020 and are documented in the minutes of that meeting. Ground rules, he said, have been flaunted by numerous parties. This has resulted in difficulty maintaining fairness and transparency and in avoiding chaos. He then held up a thick binder containing printed emails that came in to the Board since Wednesday night.

He read from the 9/10/2020 minutes a ground rule: *"The Board will make its determination based upon evidence presented during the hearings and not upon any information generated or provided prior to the hearings."*

What that means, he said, is that documentation received by the BoE should not be considered in making its decision unless it is presented during the hearings. It means if a citizen should see a member of the Board at the store and should share their opinion, that opinion should be disregarded. The Board, in order to ensure fairness to everyone, has said clearly it will make its decision based upon evidence presented during the hearing. Yet over the weekend, 200 pages of documentation were sent. The situation has become a bit chaotic. There are numerous reasons for this ground rule, some of which are: inconsistency of who sees the writings, difficulty in maintaining fairness to all parties and credibility tests. Attorney Sullivan indicated that if an individual has information they think should go to the BoE, that individual should contact one of the parties who will appear before the BoE during the hearings.

Chair Tabor underscored Attorney Sullivan's discussion regarding how the Board will do its findings of facts.

Attorney Sullivan said to keep control of flow of evidence, the Board also adopted ground rule 2: *"All documents to be submitted by any party must be received by email addressed to each member of the Board no later than noontime on the date of the hearing at which the party desires the document to be considered."*

This is a prerequisite to the submission of the document during the hearing, he said. He added that the Board is free to modify their rules as long as it is done in a way that is fair to all parties.

Additional ground rules include witnesses being placed under oath and limiting cross examination of witnesses to 30 minutes per witness unless further time is authorized by the Board.

[14:21]

Attorney Sullivan recommended that for the sake of transparency and fairness that all correspondence received by all Board members and himself be placed into a public database so it can be seen by anyone that wants to read it.

Chair Tabor discussed two documents: first, a letter from Attorney MacCallum stating why he believes the hearings should be quashed. The second was an affidavit from Kathleen Cavalaro. The Board asked her to be present during the hearing because she disputed the timeline submitted by Attorney MacCallum. She and her attorney were not present, so the Board would discuss whether to allow that affidavit to be considered.

Attorney Sullivan said Attorney MacCallum has raised objections to the proceedings, including perceived irregularities in the manner in which Ms. Pearson presented her case and whether individuals in the room with her were able to help her present. Attorney MacCallum also raised that in-person hearings would be better than Zoom. Attorney Sullivan said unfortunately, it was not possible to have in person hearings as public health must be given the priority.

All members of the Board said they had read Attorney MacCallum's letter requesting the proceedings be quashed.

Commissioner Gamester made a motion to dismiss the letter of complaint from Attorney MacCallum and dispose of the request itself. Board Member Walker seconded the motion.

Discussion of motion: the letter contains information that has been rehashed. Help is always available to witnesses via text and the Board should continue with the proceedings as proposed by the original operating instructions.

Attorney Sullivan clarified that the letter in question was received Monday, September 21, 2020 at 9:35 am.

Chair Tabor said the Board agreed not to use courtroom rules of evidence. The facts and testimony are the important parts to the Board. Having someone else in the room does not warrant starting over. If Councilor Kennedy or Attorney MacCallum want to have advice from anyone else, the Board is not opposed. This is a hearing and not a courtroom. Attorney Sullivan clarified that Attorney MacCallum wants to quash the entire case, but the motion was to dismiss the letter.

The motion passed by roll call vote 4-0.

Commissioner Gamester said another letter came in that afternoon after 3:00 p.m.

Commissioner Gamester made a motion to exclude the letter/affidavit from Attorney Gerald Zelin, and place it on file, and Board Member Walker seconded the motion.

Discussion: The letter regarding Ms. Pearson is outside the scope of this hearing. Chair Tabor agreed the letter was not relevant to PopUp NH or the trade name dispute. Ms. Pearson is not on trial here and is not the subject of this inquiry. The Board members agreed.

The motion passed by roll call vote 4-0.

Attorney Sullivan summarized the affidavit of Kathleen Cavalaro which stated that Attorney MacCallum mischaracterized actions she took and statements she made during his cross examination of Ms. Pearson. The affidavit was filed by sending it to the Board. This was in lieu of her appearing before the Board. Since some Board members did not receive the affidavit the Board can discuss at the next meeting. The Board discussed the irregularities of documents submitted for their consideration.

Commissioner Gamester made a motion to defer consideration of Ms. Cavalaro's affidavit until the next meeting, along with a request to the City Attorney's office to forward copies of the affidavit to the members of the Board. Board Member Walker seconded the motion.

The motion passed by roll call vote 4-0.

[33:58]

Commissioner Gamester would consider making a motion to eliminate all submissions sent via social media. Attorney Sullivan discussed rules of evidence and hearsay. He added that it is the members of the Board who determine the credibility and weight given to any piece of evidence. Attorney Sullivan said it was probably too late in this hearing to not be able to submit any third party documentation. Chair Tabor said some social media was in the exhibits for that night. Included in the record was donations via social media and sequences of events. But the Chair also shared the concern verifying accuracy.

The Board discussed a public database for all the submissions, how to administer and what to include and exclude. Commissioner Hart suggested including only the items that the Board considers.

Commissioner Gamester made a motion to discuss a potential database for submissions at the next meeting of September 23, 2020. Board Member Walker seconded the motion.

The motion passed by roll call vote 4-0.

[42:54]

Commissioner Hart asked about determining credibility of witnesses and evidence. Attorney Sullivan said the Board is free to use their own experiences in determining credibility.

There were no other pieces of evidence or mail that the Board considered at this time.

Councilor Kennedy and Attorney MacCallum joined at this time 6:45 p.m. Attorney Sullivan swore in Councilor Esther Kennedy.

Commissioner Gamester asked Councilor Kennedy to read her testimony.

Councilor Kennedy said she was choosing not to bring forth social media or negativity towards others. She thanked the Board for the opportunity to share her story. Part of her evidence included exhibits, she said. She read her statement dated September 21, 2020 in its entirety, which had been submitted to the Board.

She discussed her background, employment and current and past membership of the City Council. She discussed her extensive experience in grant writing and dealing with federal funds, ensuring criteria are met and consequences of when criteria are not met. She spoke about the difficulties of local businesses, the CARES Act and the appointment of the 19 member Citizens Response Task Force (CRTF) by the Mayor.

The CRTF proposed the popup format. She described the popup venue idea, the location history and the City Council vote for \$100,000 for the CRTF to get the project going.

Councilor Kennedy wanted to help in any way she could, and the suggestion by Ms. Pearson that she wanted to undermine the project is preposterous, she said. She added that she was the one who came up with the idea of using CARES Act funds for the project and reducing the burden to the taxpayers. She made a motion in Council to amend Assistant Mayor Splaine's motion to assure that the money came from the CARES Act. She said a video would be part of her exhibits. She discussed her concerns regarding funding and the limited number of Portsmouth businesses she believed would be benefiting from the funding. She said she shared her concerns with the City Council and the City staff.

[1:02:41]

On July 2, 2020, she became concerned when the location and name of the project changed to PopUp Portsmouth at the Bridge Street Lot, because it was not clear the criteria for the legal funding was being met. She was also concerned that the businesses being helped were not Portsmouth businesses. She did not see a record of a nonprofit with the name PopUp Portsmouth registered with the Secretary of State (SoS). She discussed concerns about the project's GoFundMe web page, their mention of non-profit status and their not having an Employer Identification Number (EIN). On July 15, 2020 she again checked the SoS website, saw that the name was not registered, and purchased it with the intention of releasing the name so someone else could have it. She later explained to Mrs. Cavalaro she was willing to turn over the name to the project and said in return she wanted an apology from the entity to those who donated, a set of by-laws prepared, and to actually create the non-profit. She never asked for any money, she said.

Councilor Kennedy shared her evidence: exhibits 1 – 17, which included two videos that she displayed in part. Her concerns included the large amounts of money being spent for logistics such as water, fencing and a generator. She said of 15 registered businesses, only three had brick and mortar presence in the City. Councilor Kennedy said because of the action she took, that conversation took place.

[1:43:56] The Board presented questions to Councilor Kennedy.

Commissioner Hart asked about the appointment of the task force and communication. He asked her to explain her tasks and responsibilities with respect to the task force. She said she did not have any with respect to this project, but she was acting as a City Councilor. He also asked what sense of responsibility she had. Councilor Kennedy said she felt responsible regarding the funding and federal funds being managed appropriately. He asked if she tried to communicate prior to purchasing the name. She said they were going to go ahead that Monday, and there was no stopping it. He asked if she benefited at all. Councilor Kennedy said not at all. She had to take the next day off from work because she and her business were treated poorly via social media.

Board Member Walker asked what she paid to have this done. Councilor Kennedy paid \$50 for the trade name. She just wanted to slow down the process, not stop it. An LLC would have been hard to dispose of. Board Member Walker said it sounded like they were not all talking to one another, and that the task force did not understand what they needed to be doing.

Councilor Kennedy distinguished between the task force and the non-profit entity that was receiving the funds. They are two different things.

Commissioner Gamester asked, in light of the pass-through of the funds into an escrow account being a legal arrangement, what was her concern about CARES Act funds. The nonprofit was forming, so what was the gain in all this, he asked.

Councilor Kennedy said the money being held by Seacoast Rep, she was fine with. When the project became their own non-profit, they were going to receive water, sewer, generator, in-kind services. They were not yet an entity. She said Seacoast Rep was not there after the 13th of July, yet they were claiming to be a non-profit. Councilor Kennedy said she shared her concerns but it got nowhere. She encouraged the Board to watch the video of the 14th which showed the situation.

Commissioner Gamester asked if she felt her purchase of the trade name served any purpose. Councilor Kennedy said yes, they were up and running with a legal name. Portsmouth businesses had not been in the original plan. Getting the bylaws written did not happen. They then discussed the other trade names that she owns, including City names that she does not benefit from, but would be for the people of Portsmouth.

Commissioner Hart asked about the phone calls she received from councilors after the purchase. He then asked if she would do it differently if she could to do over again.

Councilor Kennedy said probably, and restated her case. She believes something needed to be done.

[2:06:52]

Chair Tabor said that Ms. Pearson stated the Seacoast Rep never did pull back and is still the fiscal sponsor. He asked Councilor Kennedy how she knew the Seacoast Rep was taken out as sponsor. Councilor Kennedy stated they said they were their own nonprofit on their website and on the GoFundMe page. He asked if she ever asked any of the PopUP volunteers about the sponsorship. She said no.

The Chair asked if she considered taking her concerns to the task force subcommittee. Councilor Kennedy said on the 14th they knew but did not do one thing. They knew and were still willing to move forward on the 20th and put in power and water. No one stopped it and they made a bit of a joke out of it. She encouraged them again to watch the remainder of the video exhibit.

They discussed the legality of the City providing the infrastructure and of who might benefit. The Chair asked if it was true that she told Kathleen Cavalaro that she wanted to teach them a lesson. Councilor Kennedy did not remember that, but also said that she could not deny saying it.

He asked if she said she wanted them to publicly apologize, Councilor Kennedy said yes she did. The Chair asked if she asked anyone to clarify their relationship with Seacoast Rep and if they were still the fiscal agent. No she said. They then discussed the FB posts regarding tax deductible donations.

The Board took a five minute recess at 8:15 p.m.
The hearing resumed at 8:20 p.m.

[2:22:50] Attorney Sullivan swore in Nancy Pearson.

Ms. Pearson thanked the Board for the opportunity to ask questions.

Ms. Pearson began her cross examination of Councilor Kennedy. She asked and they discussed the role of City Council in forming policy; Councilor Kennedy's support of and concern with the project and allocation and use of CARES funds; the receipt of federal funds and in-kind services from the City to the project and matching funds.

Ms. Pearson continued with questions on whether the Council had granted Councilor Kennedy additional authority over recovery projects; on whether she had tried to reach out to anyone involved in the project to verify the status. She questioned the Councilor's understanding of incorporation rules for nonprofits being retroactive to the date of filing and IRS rules on pending status of nonprofits and the process.

Ms. Pearson asked the Councilor if her purchase of the name PopUp Portsmouth and the URL and domain name prevented anyone else from purchasing that name, and she asked if she knew the project had previously claimed the name for business use. She

asked the Councilor if she had notified the City Council, City staff or the CRTF about her intent to register the name PopUp Portsmouth.

Ms. Pearson asked the Councilor about her knowledge of the established practice of fiscal sponsorship and about Seacoast Rep as fiscal agent.

Councilor Kennedy read an excerpt from her Exhibit 6 that included "PopUp Portsmouth is now a nonprofit..." Ms. Pearson asked if she based her understanding of a dissolution of fiscal agent from that statement. She asked if the Councilor had contacted the head of Seacoast Rep to voice her concerns.

Ms. Pearson asked about the Councilor's quote in the Portsmouth Herald and about her support and vote from July 13, 2020 Council meeting.

Councilor Kennedy said she chose to be proactive and after that things started going in the right direction.

Ms. Pearson asked the Councilor about her knowledge of a DBA vs. a business name. She asked the Councilor about each of the other business names that Councilor Kennedy has registered with the NH SoS. Ms. Pearson also asked the Councilor if she had made three demands in return for release of the PopUp Portsmouth without the authority of City Council.

At this time Ms. Pearson concluded her questions and repeated the scope of the hearing was a very narrow scope.

[2:47:55]

Chair Tabor asked Ms. Pearson if the Board of Directors of the entity had been meeting on a regular basis in order to be able to give Councilor Kennedy a chance to voice her concerns and Ms. Pearson answered she believed they had been meeting almost nightly via Zoom in the very beginning.

Commissioner Hart asked Councilor Kennedy if she had ever sold any of the names she owned, and Councilor Kennedy said never.

Chair Tabor asked if she had worked in nonprofits, and Councilor Kennedy said she did not have a lot of non-profit experience. Chair Tabor asked what the effects of the fundraising would have been if the group had submitted to her request and apologized to donors. Councilor Kennedy said she did not know.

Commissioner Gamester asked why the Councilor was worried about not having an EIN, and Councilor Kennedy said because they were collecting funds. Chair Tabor said wouldn't the EIN be required for the disbursement of funds. Commissioner Gamester said that was his point, that they hadn't disbursed any funds at that point. Commissioner Gamester said he was baffled that Councilor Kennedy didn't tell anyone about her concerns before purchasing the name and the URL. Councilor Kennedy responded that she did talk to members of Council. Commissioner Gamester asked if it

was brought up before the Council so he could see it. Councilor Kennedy said it did come up at the meeting of the 13th. She did share her concerns. Commissioner Gamester repeated to confirm that she never told anyone she was going to buy the name and URL. Councilor Kennedy said people knew. Commissioner Gamester asked her to name them. She declined. Was it councilors, Chair Tabor asked, and she said there were several Councilors she conferred with, but they didn't know she was buying the name. Commissioner Gamester asked if it was anyone in the Legal Department or the City Manager office, and Councilor Kennedy said no.

Chair Tabor said wouldn't it have been possible to ask the Mayor to discuss this in a special Council meeting or work session. Councilor Kennedy said she could have, and that there were other Councilors that had concerns. The Mayor questioned the grant. There were many people questioning it but she had purchased it.

Commissioner Gamester asked about how the group found out about her purchase of the name PopUp Portsmouth. The Councilor said through the bank.

Chair Tabor asked the Councilor if when Mr. Bagley spoke to the SoS about the prior use of the PopUp Portsmouth name if she would take that as proof as the application being in process. She said she did not know about that and their process. The Chair asked if she would have known that if she had reached out to anyone on the Board. Councilor Kennedy said she guesses she would have known that.

[3:00:03]

The Chair asked if there were any other questions, and as there were none, Councilor Kennedy, Attorney MacCallum and Ms. Pearson left the Zoom meeting at 9:00 p.m.

Commissioner Gamester would like clarification on what source allows an entity to be legal or not, and at what time.

ACTION: Attorney Sullivan took the question of when an entity comes into existence.

Commissioner Gamester would like an understanding of why actions related to the timeline are seemingly so difficult to put together.

ACTION: Chair Tabor posed the question to Attorney Sullivan: For federal and for state, when is the start of incorporation? Is it when paperwork is filed, and is that also true of a LegalZoom filing, and is it retroactive to when the LegalZoom filing happened?

ACTION: Chair Tabor posed the question to Attorney Sullivan: If CARES Act money is used for infrastructure improvements, with no direct money to the entity or the PopUp and there's a hitch in the step of the nonprofit being formed, is there a legal liability? Is it the same liability if there is indirect vs direct aid?

ACTION: Attorney Sullivan said the BoE would receive the affidavit of Mrs. Cavalaro.

Commissioner Gamester asked about the Wednesday meeting goals. He suggested a nonpublic session with the City Attorney. [3:06:37]

Chair Tabor said at the next meeting the Board would start deliberating and agreed a nonpublic session would be needed. He said they would discuss the Cavalaro affidavit, which documents to post, the issues, determine any gaps, and maybe call back a witness for further questions. Discussion of evidence may be in nonpublic session with their attorney on legal issues, and also discussion of the answers to the legal questions they posed.

Attorney Sullivan is at the Board's service, he said. He added that the Board is heading in a defined direction, as long as by October 2, 2020, they make a decision. A report must be ready by October 2nd. The Chair said a report could be bullet points of facts on which they agree.

Attorney Sullivan discussed the options of entering nonpublic session. The Board can always meet with counsel in nonpublic any time they want. They must vote to enter. Navigating this via Zoom involves some logistical issues which they discussed.

The Board decided to schedule a nonpublic session for 6:00 – 7:00 p.m. on Wednesday, September 23, 2020. The public session will resume at 7:00 on a new Zoom link. 6:00 – 7:00 (nonpublic); then 7:00 – end.

Commissioner Gamester made a motion to adjourn until September 23, 2020 at 6:00 p.m. on Zoom. Board Member Walker seconded.

On a roll call vote 4-0, the motion to adjourn passed.

The meeting adjourned at 9:18 p.m.

Dated: 10-7-20

John Tabor
John Tabor, Chair
Board of Ethics Chair

Respectfully Submitted,
By Marian Steimke