September 16, 2020 Materials for the Ethics Board Submitted by Nancy Pearson

This document serves as the timeline that led to my ethics complaint filed against Councilor Esther Kennedy on July 23.

As Attorney Sullivan explained last week, the scope of this hearing is very narrow. It pertains to one claim in the complaint: By registering the trade name, Kennedy engaged in a "transaction" with a "direct interest" in the outcome of Pop Up Portsmouth which is "in conflict with the proper discharge of her official duties.

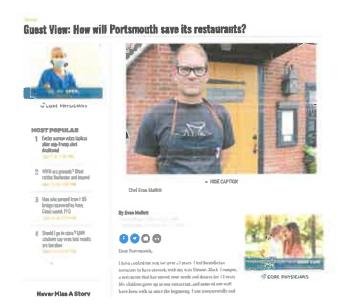
This boils down to just two things. Did Councilor Kennedy engage in this transaction? And does that act meet the threshold of being in conflict with the proper discharge of her duties as a City Councilor?

I will address only those things, the events that led to my filing the complaint, and the immediate aftermath when she was discovered.

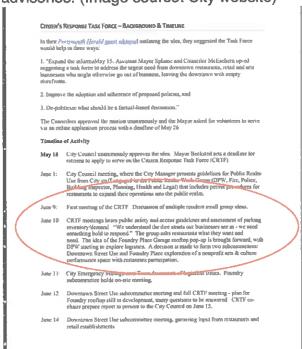
On March 26, Governor Sununu shut down all non-essential business.

For the next five weeks we stood still as a community. Meanwhile, businesses were closing their doors for good.

On May 9, Chef Evan Mallet wrote an op-ed asking the City to take steps to address the economic crisis and create a recovery plan. He suggested a task force. (Image source: Seacoastonline.com)



On May 18, in an effort to address the economic crisis brought on by the shutdown, the City created a Citizens Response Task Force to advise the City management and City Council on decisions related to COVID-19 that affect the business community and organizations in addressing the needs of re-opening, within the confines of health care advisories. (Image source: City website)



After the formation of the Task Force, members of the business and nonprofit community went immediately into action. Small working groups sprung up to work on a variety of recovery efforts. One of these projects was a "Pop Up" venue to feature performance, food, drink, and retail, in a safe outdoor setting, on the rooftop of the Foundry Garage. (Image source: Seacoastonline.com)



There were some structural challenges with the Foundry Garage rooftop, so the venue was relocated to the Bridge Street Parking Lot. (Image source: Seacoastonline.com)

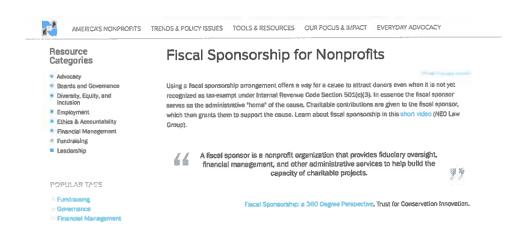


On June 10, the Task Force met to discuss recovery proposals and how the City might support these efforts.

Russ Grazier, CEO of the Portsmouth Music and Arts Center and a member of the Task Force, was named Chair of the Task Force subcommittee for the Pop Up proposal.

The Task Force discussed allocating City funds toward the recovery projects and supporting them with resources and infrastructure. This support would include costs incurred by the city and not monies given directly to the volunteer groups. A stipulation for allocating funds was to require the Pop Up project to match the funds. Fundraising would be needed to realize the Pop Up project because support from the City would not cover all the costs. In the interest of time, the Pop Up project planned to raise funds through private donations using a mechanism called fiscal sponsorship.

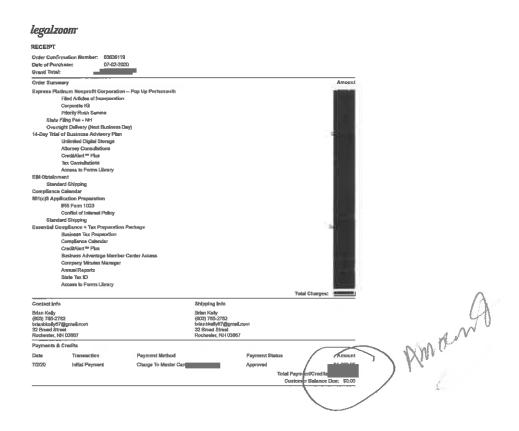
Fiscal sponsorship is a well-established method for short term or one-time fundraising by a group or entity that does not have legal status as a nonprofit. Seacoast Repertory Theatre agreed to act as fiscal sponsor for the Pop Up project fundraising efforts. The Pop Up project raised just under \$120,000 in private donations toward the project. (Image source: councilfornonprofits.org)





On July 2<sup>nd</sup>, the volunteer working group for the Pop Up project formed a nonprofit organization under the name **Popup Portsmouth** using the full-service online platform, Legal Zoom.

Of Note: A nonprofit's articles of incorporation officially mark the creation of the organization. Pop Up Portsmouth recruited their Directors and filed their paperwork to incorporate as a nonprofit on July 2nd, which marks the official creation of the nonprofit. The week to ten day waiting period to be approved by the Secretary of State would be RETROACTIVE to July 2. (Images source: Brian Kelly & City website)



## IV. Pop-up venue Sub-committee update

- Russ Grazier: The permit application for the overall venue will be submitted by Friday, July 10. A dry run will be held Wednesday evening, July 22. The target opening is for the next day, Thursday.
- Russ Grazier: For fiduciary oversight, the independent community workgroup that developed the Popup project has applied to become a non-profit organization with the name "Popup Portsmouth." Seacoast Rep will act as fiscal agent for Popup Portsmouth until the organization reaches its own nonprofit status. The new non-profit has the following officers and board members:
  - 1) Josh Denton, President
  - 2) Joanna Kelly, Treasurer

Citizen Response Taskforce Meeting Minutes of July 8, 2020 Page 2 of 5

To confirm, the volunteer working group for the Pop Up project took all legal and necessary steps to incorporate on July 2<sup>nd</sup>, which marks the date that Popup Portsmouth was created as an official nonprofit. I have included supporting documents from the NH Center for Nonprofits that confirm this. (Images source: nhnonprofits.org)

## How to Start a Nonprofit in New Hampshire

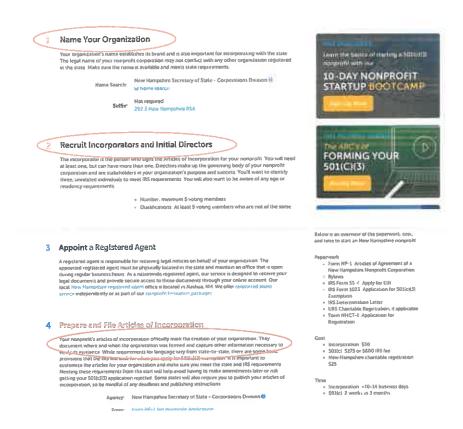
Welcome to our New Hampshire Nonprofit Startup Guide! If you're passionate about helping others and have an idea to serve your community, starting a nonprofit is a great way to turn your vision into a reality. There are many different types of nonprofits - religious, educational, human service oriented, animal welfare, and more. What all nonprofits have in common is a focus on helping others and benefiting their community. You are genuinely committed to these goals so you are already well on your way!

According to the Nabional Center for Charlable Statistics, there were over 7,000 nonprofit organizations in New Hampahire in 2012. Before you start a new morphofil, make sure you have identified an unmer raised in your community and finance that there are not any asstring organizations serving your cause. If another organization exits, consider working together, as that may be a better way to make an impact in your community and use exalting resources.

When you are ready to start your nonprofit, plan to incorporate and apply for 503(cl)31 status, as these are important steps to fully achieve your goals. As a 501(cl)31 nonprofit, you will be able to apply for grants and accept donations, be exempt from federal corporate income tax, and find the leability of your organization's officers and directors. Most importantly, you will gain credibality and legitimacy for your cause, institling the public with confidence in your organization.

This ouiside will walk you through the basic stess to start your nonprofit in New Hampshire. Let's out started!



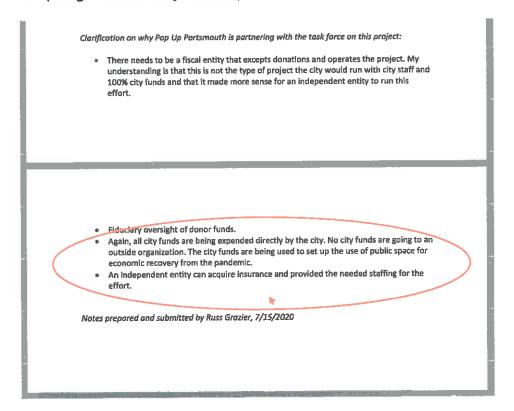


On July 13, there was a regular City Council meeting. All Council members were present. Task Force Chairs James Petersen and Mark Stebbins, along with State Senator Martha Fuller Clark, also a member of the Task Force, presented the economic recovery projects related to the re-open and recovery plans for the small business, arts and nonprofit community. Among the points they made to City Council were that the goal of the efforts was to "save businesses, provide jobs, and provide safe options for the public." They stressed that the City needed to "move fast, not try to be perfect out of the start, and adjust on the fly as needed." Senator Martha Fuller Clark stated these efforts were a "plea for arts and culture" and that the city should be prepared to "modify and move forward" as needed.

The intention of the Task Force recovery efforts was clearly communicated: move fast, try not to be perfect out of the start, adjust on the fly, modify and move forward as needed.

The co-chairs recommended a \$50 thousand-dollar allocation of funds from the City to support the Pop Up project. The co-chairs explained to the Council that the funds **would not be passed on to the Pop Up volunteer group**, but would be directed toward

infrastructure costs incurred by the City for the project. This point was reiterated in writing by Task Force subcommittee chair Russ Grazier in meeting minutes dated June 15. (Image source: City website)



At the 1:52:25 mark in the video of that July 13<sup>th</sup> meeting, co-chair of the Task Force James Petersen stated to the Council that the volunteer group for the Pop Up event was "going through the process of 'incorporating as a nonprofit' under the name, POP UP PORTSMOUTH."

This was now the second time that information was stated publicly in an official City meeting by a City official.

After this update, in a unanimous roll call 9-0, the Council voted "to authorize the Portsmouth Citizen Response Task Force to create a plan and begin implementation for full or partial street closures, and use of street parking areas and other city-owned parking locations for restaurant, retail, and non-profit organization use through October 18<sup>th</sup> of this year, with the approval of our Police, Fire, Health, Planning, Public Works, and Inspection Departments with funding for a budget up to \$100,000.00 from the CARES Act."

This unanimous vote on July 13, made the Citizens Response Task Force recovery efforts official City policy.

Just two days later, on July 15, according to the New Hampshire Secretary of State's Office, Councilor Kennedy reserved the business name POP UP PORTSMOUTH, preventing the newly formed nonprofit organization from using the name. (Image source: sos.nh.gov)



By registering the business name POP UP PORTSMOUTH, Councilor Kennedy delayed and jeopardized the project. The discussion related to her action is reflected in the Task Force subcommittee meeting minutes from July 20. (Image source: City website)

Guestions then become: Cannot open a Bank Account. Need to apply for a new name to incorporate under. This could negatively impact Pop Up Portsmouth's ability to secure Insurance In a timely manner. There will be come discussions in the next days about escrow of funds for the project.

Critical issue: Without the business name approved by the Secretary of State NH the Rep cannot open bank account. Without bank account they cannot purchase insurance for the building of the lot. Question arose if the City could carry insurance until the Rep and new Pop Up Portsmouth ID completed and allow rep to secure bank account and insurance.

Peter Rice suggested he would discuss the Issues of insurance with the City Atty. Possibly the City could do a "set up" or "pre operation" insurance to keep the project moving forward.

Construction of Stage: Kathleen noted the same contractor building sheds will build stage. It will be 20'

It has been confirmed to me by the working group for the Pop Up project, the members of the Board of Directors of Pop Up Portsmouth, and Russ Grazier, that Councilor Kennedy never attempted to contacted any of them to ask questions, seek clarification, or try to understand the nuances of nonprofit incorporation and fundraising. At no point during the July 13, City Council meeting did Councilor Kennedy state her intention to register the business name Pop Up Portsmouth.

By circumventing the nonprofit application process via Legal Zoom and registering the business name herself, Councilor Kennedy inserted herself into the process, obstructing the City's own public policy.

Councilor Kennedy's action were now public knowledge and newsworthy. The Portsmouth Herald reported on July 21, that "Kennedy spoke with an advisory board member Monday night and made it clear she will give the registered name, as well as the domain name she bought, to the group if it forms as a legal nonprofit. She said that includes written bylaws she would like to include limiting vendors to Portsmouth businesses."

First, the volunteers had already gone through the legal and necessary steps to form a nonprofit.

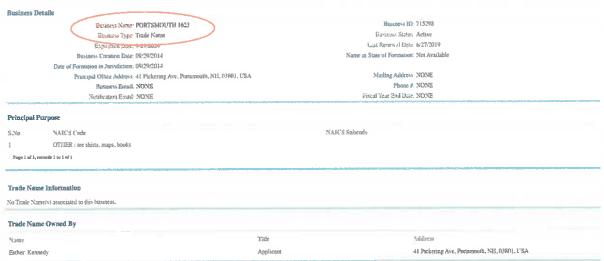
Second, with the July 13, unanimous vote, the Council created policy that gave the *Task Force* authority and oversight over the Pop Up project, not Councilor Kennedy. By registering the business name herself and then circumventing the City's own Task Force to make demands on the group above and beyond the Task Force, Kennedy overstepped her authority in an attempt to control the outcome of Pop Up Portsmouth.

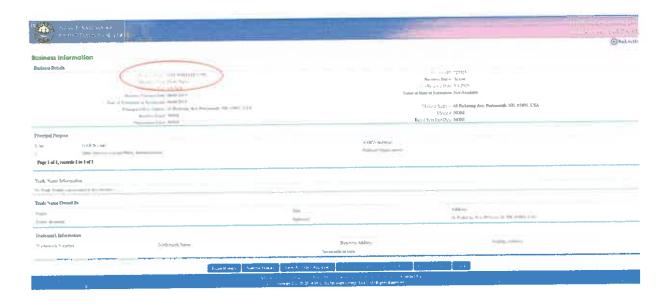
Last, if Councilor Kennedy had intended to give the business name to the group, she should have registered the name as a nonprofit in the first place. But she did not. She registered it as a trade name. A trade name is a different legal entity and cannot be "given" to a nonprofit entity. Councilor Kennedy knows how to register business names because she is an experienced and knowledgeable business woman and has registered many types of different business names in New Hampshire: (Images source: sos.nh.gov)



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## **Business** information





For reference, a nonprofit business name registration looks like this: (Image source: sos.nh.gov)



I have provided screen shots and the source of meeting minutes, articles, legal documents, and NH Secretary of State public records to show that Councilor Kennedy registered a business name already claimed by a nonprofit organization, just two days after voting to support their project in her official capacity as City Councilor.

By she inserted herself into the process, and obstructed official Council policy. She circumvented the City's own Citizens Response Task Force and by her own admission, made demands of the volunteer group above and beyond the Task Force. She overstepped her authority in an effort to control and affect the outcome of Pop Up Portsmouth and the City's recovery efforts.

This Ethics Board is left to decide, did Councilor Kennedy engage in this transaction? And does it meet the threshold of being in conflict with the proper discharge of her duties as a City Councilor?