

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss.

CITY OF PORTSMOUTH

ETHICS COMMITTEE

In re Complaint against Esther Kennedy

STATEMENT OF ESTHER KENNEDY

My name is Esther Kennedy. I reside at 41 Pickering Avenue, Portsmouth, New Hampshire 03801. I have lived in Portsmouth for 31 years, having moved here in 1989, starting out as a renter and buying my first house on Bartlett Street. I am currently a sitting member of the Portsmouth City Council. I also served three previous terms on the City Council, from 2009 to 2015. In 2015, I ran for reelection and lost. I ran again in 2019 and was reelected.

I am employed in a full-time capacity as the Director of Student Services for the Gilford School District, Gilford, New Hampshire. I also own and run a kayak rental business and marina “on the side” at my premises at 41 Pickering Avenue in Portsmouth’s South End.

Apropos to the CARES Act grant which is part of the subject of the ethics complaint which the complainant Nancy Pearson has lodged against me in the above-captioned matter, I have extensive experience with the handling of federal grants and federal funds as part of my employment with the Gilford School District. I deal with federal funds all the time, virtually on a daily basis. The School District relies on federal funds for special needs students, and Title I students, and part of my job is to apply for those funds and to oversee them once they are

obtained. One of my specific jobs with the School District is as a grant writer, and I am responsible for writing four separate grants. (For the uninitiated, a more descriptive term for “grant writer,” and one which better promotes understanding, might be “grant application writer”. It is my job to put together the application, make sure that all required supporting documentation is attached, make sure that all of the criteria for qualifying for the grant are met and that they is so stated in the application, make the written presentation showing that the School District is eligible for the grant and that it is deserving of it, and generally making sure that all of the *i*'s are dotted and the *t*'s are crossed in the application.) I am responsible for writing grants for Individual with Disability Act Grants. This includes a preschool grant and a grant for students of school age which are federal grants for children that have special needs; and for grants under Title I, which are funds for children who do not quite fit into the prior two categories but need special services nonetheless. Lastly, I write the Title IV Grant that supports technology and Stem Classrooms.

By virtue of my extensive experience in dealing with federal grants, I am aware of the importance of strict compliance with the terms of the a given grant, and I am aware of the serious consequences that can result if those terms are not complied-with. I will mention some of these consequences in the specific context of the grant that was given to the City of Portsmouth pursuant to for the benefit of Pop Up Portsmouth in the discussion which follows.

As everyone knows, the advent of the coronavirus brought about severe financial hardship for local businesses in Portsmouth (and, of course, elsewhere), particularly restaurants. For health reasons, Portsmouth restaurants started closing for indoor dining in around mid-March, whether pursuant to the Governor’s emergency order or otherwise. Some restaurants were in a position to provide take-out service and to thereby lessen the financial crisis somewhat;

others were not. Several popular Portsmouth restaurants closed, never to reopen. By mid-May, those restaurants and coffee shops which had survived, whether through take-out service or otherwise, were teetering on bankruptcy and were in jeopardy of closing, having been closed to indoor dining for two full months, and many other types of local businesses were in the same boat. They were struggling for survival and begging for some form of financial relief. Talk began concerning the possibility of using city taxpayer funds to do so. Meanwhile, the CARES Act (Coronavirus Aid, Relief, and Economic Security Act) was passed by Congress and signed into law in late March, 2020.

On May 18, 2020, Mayor Rick Becksted appointed a 19-member Citizen Response Task Force, whose mission was to (among other things) make recommendations for ways of finding financial relief for those businesses which have been most adversely affected by the pandemic. A few weeks later, the Task Force reported back to the mayor and the City Council and proposed the idea of a "Pop Up"-type format for the city streets. The essentials of the idea were that local restaurants and ancillary businesses would erect so-called "Pop Up" restaurants and food stands outdoors, where the risk of infection by the virus was vastly reduced in contrast to indoor dining, and the setting would also be used as concert and theater venue for live entertainment, as indoor theaters such as the Music Hall, the Players Ring, and the Seacoast Repertory Theater were closed because of the pandemic. The idea was that the Pop Up venue would attract tourists and stimulate local commerce, as the visitors who came to the venue would hopefully cause an increase in foot traffic downtown, and the cash-starved restaurants would make a little money by selling their food at the venue, theoretically on a rotating basis. The initial cost of establishing the venue would be underwritten by the City.

Originally, the plan was to establish the venue on the top two floors of the Foundry

Garage, inasmuch as those floors were generally empty, anyway, and hopefully the food and entertainment being offered would hopefully fill the garage. The name was to be "Rooftop Portsmouth" or the like. For some reason, however, the use of the Foundry Garage ultimately proved to be infeasible, and the location was eventually changed to the Bridge Street parking lot instead, accompanied by a change in the name.

On June 15, 2020, the Portsmouth City Council voted to appropriate \$100,000 to the Citizens Response Task Force to fund the project and get it going. I whole-heartedly supported the project and joined the unanimous vote in favor of the appropriation. Throughout my career in public service I have been very supportive of the businesses in our community, especially during these extreme times of the pandemic. Being a small business owner myself, I am dependent upon a vibrant Portsmouth for an income from my own business. As a city councilor who is herself a small business owner and is thereby aligned with the smaller businesses of Portsmouth, I felt obligated to help any way that I could during these trying economic times. The suggestion by the complainant in the above-captioned proceeding, Ms. Pearson, that I wished to undermine the project is frankly preposterous.

I was the one who came up with the idea of using CARES Act funds be used to help fund the project, thereby reducing the burden on Portsmouth's own taxpayers. I knew that the CARES Act funds were available and that this project qualified for them, and so I made a motion to amend the original motion that had been made by City Councilor Jim Splaine, which was to disburse the funds to the Task Force, in order to ensure that the money came out of the CARES ACT funds that we had received from the State, which was a "pass-through" for the federal funds. I am sharing the video of the June 15, 2020 City Council meeting as evidence of my positive promotion of the Task Force. See **Exhibit 1** hereto. (I do not recall when I and the rest

of the Council had been specifically informed that the parking garage was to be the site of the venue, however.)

Two days later, on June 17, 2020, I happened to be watching the morning news on Boston News Station 10, when the station did a news story about how the top of the Foundry Garage was to be used as a place to hold events and food vendors. Kathleen Cavalaro, who was a member of the Task Force and was reportedly one of the members whose brainchild this project was, was interviewed. At first, I thought this would be great; we are going to finally fill the garage, which up to that time had been a huge financial disappointment. Then I started wondering how residents and local business would be affected by the project. However, my last thought was how are we going to use federal funds on this project.

It was suggested in the news segment that the nonprofit was going to make \$40,000-\$50,000 off the top of the Foundry Garage. As a result of one or two of the remarks made by Ms. Cavalaro in that interview, I became concerned, for the announced purpose of the \$100,000 appropriation from the CARES Act funds was to benefit as many businesses as possible, and Ms. Cavalaro's comments suggested that "her organization" alone was going to make \$40,000-\$50,000, leaving me to wonder how much money was going to be left for everybody else and how many other businesses were going to benefit (and in what amounts). It was known to me that Ms. Cavalaro is one of the directors of the Seacoast Repertory Theater (popularly known as "the Seacoast Rep"), and the Black Trumpet was the only other entity mentioned in the interview.

I was not the only one who saw this news story and had questions. My phone rang almost immediately after the story had concluded, and it turned out that other residents had the same concerns that I did. I also started wondering how many entities in Portsmouth were going

to be involved in Rooftop Portsmouth. Lastly, I started wondering at what point if one entity was doing well that they might include others and share profits.

On June 22, 2020, at the City Council meeting during the task force meeting, I shared the fact that I had watched the June 17, 2020 news story on Boston Channel 10, and I asked about the \$40,000-\$50,000. I asked how would funds be distributed on Roof Top Portsmouth? Exhibit 3.

On June 24, 2020, a resident informed me that a web page relating to the project and the CARES Act grant had been created on the well-known fund raising website, GoFundMe.com. On the GoFundMe page, it stated that the City of Portsmouth Task Force had voted to give \$50,000 of its funds to a nonprofit entity on a matching funds basis. The nonprofit entity had to raise funds on its own, and the Task Force would match whatever funds it raised, up to \$50,000. It was at this point that I started to worry about the use of federal funds for the project. As noted above, I happen to work with federal funds on a daily basis in my position of employment with the Gilford School District. Currently I am responsible for the administration of four federal funds as a “pass-through” entity in my position. With federal funds, unlike general funds, both the recipient and the “pass-through” are held to strict, specific guidelines concerning how the funds are used. There are significant consequences and potentially substantial penalties if the funds are mishandled, or not used for the purpose for which they are earmarked.

Upon receiving the news of the GoFundMe page and examining it myself, I did a bit of research and investigation and soon realized that the Seacoast Rep was holding the funds for the Foundry Garage Pop Up as the latter’s fiscal agent. This was entirely legal. The CARES Act and the regulations promulgated thereunder specifically provide that no nonprofit entity that was formed after February 15, 2020 was eligible to receive CARES Act funds. However, the

Seacoast Rep is a nonprofit entity whose existence, of course, long predated February 15, 2020, and so the Seacoast Rep was eligible to receive the funds and disburse them on the new nonprofit entity's behalf. So long as the Seacoast Rep continued to serve as the "pass-through," the arrangement was perfectly legal. I was satisfied. Other than the fact that some of the residents living in the vicinity of the garage were understandably concerned about the prospect of excessive noise coming from the top of the garage, I did not have any problem with the project at this point.

On July 2nd, that changed. It was announced in the Portsmouth Herald that the entire operation was being moved from the roof of the Foundry Garage to the Bridge Street parking lot. I was also told that it was being run under a new name by an entity called Pop Up Portsmouth.

Because of the issue of the proper receipt and handling of federal funds, I became a bit unsettled.

I visited the GoFundMe website and found the following in connection with the project: "We Got Our Match from The City". "If you are able to make a Tax-Deductible Donation Please send me an email and I can help facilitate that." This caused me considerable concern, because it was unclear to me who Pop Up Portsmouth was, who was running it, whether it was a nonprofit entity, and whether it was eligible to receive CARES Act funds.

On that same day, I contacted the Portsmouth city manager, Karen Conard, via telephone and shared concerns that citizens were having with the Bridge Street lot and Pop Up Portsmouth. Besides the concerns that the citizens had with the use of food trucks and the prospect of the venue being transformed into a beer garden, I also informed Ms. Conard that I was concerned that we were using federal funds for a nonprofit that had not yet been formed. In response, Ms.

ASK Sullivan

Conard assured me she was “working on it.” However, I never heard anything further from her concerning that subject.

Still on that same day, July 2, 2020, City Councilor Petra Huda wrote the city manager an e-mail message and shared the same concerns on the same topics. See Exhibit 4 hereto. The city manager responded with a time line of what had happen but, in my view, never really gave an answer to Councilor Huda. See Exhibit 5 hereto.

On July 11, 2020, I received a Facebook post which had been posted by Kathleen Cavalaro and which caused me considerable concern. It stated that Pop Up Portsmouth was a nonprofit entity, that it was receiving funds from the city, and that any donations made to it were tax-deductible. It has included the following quote: “If you are able to make a tax-deductible donation, please throw in a few bucks into this fundraiser!” Exhibit 6. Equally disconcerting was the fact that Ms. Cavalaro’s Facebook post also indicated that the new group--~~whoever it was--~~was severing its ties to the Seacoast Rep, the organization which had served as the project’s sponsor and “pass-through” and had rendered the arrangement legal. The posting stated: “This non-profit structure will allow Pop Up Portsmouth the ability to directly accept donations and not have to rely on the Seacoast Repertory Theater anymore” This revelation caused me extreme unease, for without an established nonprofit entity formed prior to February 15, 2020, such as the Seacoast Rep, to serve as a “pass-through”, the solicitation and receipt of CARES Act funds was clearly illegal, not only exposing the City to serious liability but also exposing the city councilors themselves to potential personal liability.

By now I was becoming more concerned than ever over question of whether Pop Up Portsmouth was illegally receiving federal funds because it was not registered as a nonprofit entity and, if it existed at all, it was not created before February 15, 2020 and was therefore

ineligible to receive CARES Act funds, directly or indirectly. Not only myself, but also Mayor Becksted and Councilors Paige Trace and Petra Huda were also becoming concerned over the fact that as far as anyone knew, there was still no nonprofit entity formed to legally receive services or funds. Furthermore, since Ms. Cavalaro's message suggested that the new Pop Up group was being spun off as an independent entity that was no longer controlled by or answerable to the City or to the Task Force (or so it appeared), there was concern whether the federal funds would be handled responsibly and concern that there was no oversight. Finally, in researching Pop Up Portsmouth's vendors I was finding that they were not Portsmouth businesses but were out-of-town vendors, which was also very disturbing, inasmuch as it was contrary to the purpose for which the City Council had voted to appropriate \$100,000 to the Task Force.

At this point I starting investigating Pop Up Portsmouth somewhat in earnest, beginning by seeing what information was available concerning that entity on the New Hampshire Secretary of State's website. As of July 12, 2020, there was no nonprofit entity registered with the Secretary of State's office under that name, according to the Secretary's website. I also realized that this new group that called themselves Pop Up Portsmouth did not have a nonprofit EIN (Employer Identification Number). I found this to be very misleading, given the fact that they were soliciting funds from businesses and individuals.

There were other suspicious circumstances as well. On July 13, 2020, the group altered their GoFundMe web page to match their Facebook page and made everything Pop Up Portsmouth. See **Exhibit 8** hereto. According to their web page on GoFundMe.com: "Pop Up Portsmouth Is Now a Non-Profit with seven board members." "We have raised approximately \$90,000 through sponsorships and donations along with city's match we have raised \$140,000 in

Funds". At this point, all reference to the Seacoast Rep has been eliminated from Pop Up Portsmouth's website and its GoFundMe page. See **Exhibit 8**.

On that same day, July 13, 2020, there was a regular meeting of the Portsmouth City Council. Two of the members of the Citizens Response Task Force, James Petersen and Mark Stebbins, made a presentation and gave a status report, and Petersen and Stebbin fielded questions from the city councilors. Mayor Becksted, Councilor Trace, Councilor Huda and myself all asked questions concerning Pop Up Portsmouth, but we did not always get satisfactory answers. We were told as a Council that Pop Up Portsmouth was a non-profit organization. I found this to be puzzling, as I had checked with the Secretary of State's office only the day before. I wanted to make sure that Pop Up Portsmouth was not a subcommittee of the subcommittee, to make sure they were not associated with the City or the Task Force. At this meeting I was told they were not. Councilor Trace asked about the group and asked about donations in relation to Bridge Street lot and Pop Up Portsmouth. At this time the City Manager offered to update the City of Portsmouth website so as to enable donations to Pop Up Portsmouth. **Exhibit 7**. On this same night, Mayor Becksted stated his concern that we were dealing with federal funds and therefore we had to be careful.

The Task Force's representation that a nonprofit entity had actually been formed, and that its own board of directors named, piqued my curiosity, for it had only been a day or two before that I had visited the Secretary of State's website and found no evidence that any such entity had been formed. Accordingly, the next day, on July 14, 2020, I again logged onto the GoFundMe.com website and the Pop Up web page in order to verify that Pop Up Portsmouth claimed to be a nonprofit on both websites. Given the fact that we were dealing with federal funds and not local funds, I found this to be a very serious situation. I was worried that we were giving an

illegal entity in-kind funds as a city. I then looked it up on the Secretary of State's website to see whether this new entity was registered, and it was not. As of July 14th, it was clear that the City was providing goods and services to an entity that was not legally registered as a nonprofit company with the State of New Hampshire called "Pop Up Portsmouth". On this same day, July 14, 2020, I received information from an individual who watches all the Task Force meetings, a neighbor. It was clear that at this time the City was moving forward with the rental or purchase of generators, fuel, fencing, sewer, water, and electrical hook-up. My neighbor shared that it was going to start on Monday, July 20, 2020. During this meeting it was also shared that Pop-Up Portsmouth **did not have an EIN number**. The city officials in attendance were not stopping the process but encouraging the moving forward.

Based on the facts above and the lack of action on the part of the City to validate or verify the stats of Pop Up Portsmouth Prior to the initiation of providing CARES Act monies, and given my knowledge of strict requirements of federal grants, I felt compelled to act on behalf of all Portsmouth residents. I was not going to allow our citizens to be mistreated in the use of city and federal funds. It also became noticeably clear that this project was not being used primarily to assist Portsmouth businesses, as had been its express purpose. The majority of the businesses to be included in the plans for the project were not brick-and-mortar stores from the City of Portsmouth. **Exhibit 9**. Lastly, it was also clear that POP Up Portsmouth was misleading potential donors by leading them to believe that their contributions would be a tax write-off.

Consequently, two days later, on July 15, 2020, I visited the Secretary of State's website again to see whether anything had changed. I did not find any evidence that a nonprofit corporation or other nonprofit entity by the name of Pop Up Portsmouth had been formed, but I did find that someone had registered the name "Pop Up Portsmouth" as a trade name in or

*Act Along
City should do legal work*

around 2011. The owners of the trade name, who apparently are unrelated to anyone who is presently associated with Pop Up Portsmouth, Pop Up NH, or the Citizens Response Task Force, had allowed their registration of the name to lapse, and so I decided to purchase it. I bought the trade name for \$50.00, I knew that for \$10.00 and signing and uploading of one piece of paper, I could release the name so that someone else could have it.

All was quiet for the next several days. Then, on Monday, July 20, 2020, the representatives of Pop Up Portsmouth finally discovered that I had purchased the trade name. Reportedly, they made this discovery when they attempted to open a bank account in Pop Up Portsmouth's name and to deposit some donations into it. According to what I was later told, the bank did its due diligence, checked with the Secretary of State's office, found that no nonprofit entity by the name of Pop Up Portsmouth had yet been created according to the Secretary's records, and that I was the current owner of the trade name "Pop Up Portsmouth". Consequently, the bank refused to open the account. I subsequently received telephone calls that day from City Attorney Bob Sullivan, Councilor Deaglan McEachern, and Kathy Cavalaro, and I also got a personal visit the next morning, July 21, 2020 from John Tabor, at around 10:30 or 11:00 a.m. In each instance I told them exactly what I did and why I did it, pointing out that both the City and the group that was calling itself Pop Up Portsmouth was in clear violation of the law by soliciting donations for a nonprofit when, in reality, no nonprofit entity had yet been formed. As I have alluded-to above, because the appropriation of the CARES Act funds had to be voted-on and approved by the City Council, the individual city councilors who voted for it (which was all of us) were each potentially exposed to personal liability, as was the City itself, if the funds were mishandled or used for a purpose other than that for which they were intended. There would also be long-term ramifications in terms of the City's ability to be eligible for and apply for future

federal funds. I was also concerned because I had never gotten a straight answer as to what Pop Up Portsmouth status was after severing its ties with its sponsor or “pass-through,” the Seacoast Rep, as announced by Kathy Cavalaro in a July 11, 2020 Facebook or Twitter post. Because of the cavalier attitude with which the organizers of Pop Up Portsmouth appeared to be taking care of the various business and administrative details, especially their failure to form a nonprofit entity and to obtain an EIN number, at this point I was becoming extremely uneasy.

Ms. Cavalaro’s phone call came in the evening (that is, of July 20, 2020). She was the one who told me about the episode at the bank and informed me that that is how they found out that I had purchased the trade name. After explaining to her what I did and why I did it, I made it unmistakably clear to her that I was willing to turn over the trade name to Pop Up Portsmouth absolutely free of charge; I wasn’t even asking to be reimbursed for the \$50.00 that I had paid to purchase it. However, I told her that I wanted three things in return: (1) Pop Up Portsmouth apologize to everyone from whom it had solicited and accepted a donation to date, doing so at a time when no legal nonprofit entity had actually been formed. (2) Pop Up Portsmouth prepare a set of by-laws which specifically state that the use of the Bridge Street lot by Pop Up Portsmouth is for the benefit of Portsmouth businesses, as opposed to out-of-towners. (3) Pop Up Portsmouth file the necessary paperwork with the Secretary of State’s office and do whatever else is necessary to actually create a nonprofit entity and, more generally, to bring itself into compliance with all laws. I even offered to pay the State’s fee for the filing of the paperwork necessary to create the nonprofit entity. I never asked for so much a penny by way of compensation for the transfer of the trade name.

Ms. Cavalaro got angry and rejected my offer. I later learned that the organization had created a nonprofit entity using the name “Pop Up NH” instead. To my way of thinking, there is

absolutely no reason why the leaders of the organization could not have accepted my offer and taken the trade name registration. They would have saved themselves a lot of trouble if they had. Perhaps the prospect of apologizing for having solicited and accepted funds without having formed a nonprofit entity would have been a somewhat bitter pill to swallow, but the fact of the matter is that they had acted illegally, and so they had no one but themselves to blame in that regard.


Nancy Pearson's claim that I acquired a direct interest in Pop Up Portsmouth which was in conflict with the proper discharge of my official duties or that I acted in a manner that was contrary to the City Council's directive via its June 15, 2020 vote is sheer nonsense. Not only didn't I act in a manner that was inconsistent with that directive, but I acted in a manner which furthered its objective: making sure that both the City and Pop Up Portsmouth were in compliance with federal law, and preventing both the City and the city councilors personally being exposed to individual liability.

*Next Meeting
Did you enjoy -*



Esther Kennedy

Sworn to and subscribed
before me on this 21st day of
September, 2020.



Notary Public/Justice of the Peace

Duncan J. MacCallum
Justice of the Peace
My Commission Expires: September 27, 2022