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September 23, 2020

Robert P. Sullivan, Esquire  
City Attorney  
City of Portsmouth  
One Junkins Avenue  
Portsmouth, New Hampshire 03801

Re: Ethics Complaint Against Esther Kennedy

Dear Bob:

Accompanying this transmission is the respondent Esther Kennedy's request for findings of fact and conclusions of law.

In the interests of full disclosure, these proposed findings were drafted by Jerry Zelin, rather than by myself, although I have signed them and stand behind them, as they are fully consistent with Esther Kennedy's contentions and, I believe, faithful to the facts.

I know that you and the committee members feel that there has been an unnecessary proliferation of paper in this case--a position with which, by the way, I strongly disagree; if this were a lawsuit or other civil proceeding in court, the amount of paperwork that has been filed in this case would be no more than average--but I have a duty to Esther Kennedy as her attorney and a duty to make my record for appeal, in case there is a need for one. For that reason, I would respectfully ask that the Committee take this request for findings seriously.

I was a bit dismayed that at the conclusion of Monday's hearing there was no opportunity given for summation--a closing argument, as it were. I am well aware that I have worn out my welcome with this Committee, but I would like to leave its members with just this one brief, final thought:

I think that it is important to remember that the issue in this case is not whether Councilor Kennedy was wise or foolish, whether there weren't better ways that she could have solved the problem with which she found herself to be confronted, or whether there were not other, alternative avenues which she could have exhausted. Rather, the narrow issue, as framed in your letter

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of September 2, 2020 itself, is whether she engaged in a transaction which intentionally sought to defeat a legislative goal established by the Portsmouth City Council. Reasonable minds can have honest differences of opinion as to whether what she did was wise, but it is clear that there was no ethical violation. The complainant Nancy Pearson has come forward with no evidence which would dislodge the conclusion that Councilor Kennedy's only motive in purchasing and registering the Pop Up Portsmouth name was simply to shield the City from potential liability for the mishandling of the CARES Act funds and to force the organizers of Pop Up Portsmouth to comply with the law.

In that regard, those of you who may have watched the City Council meeting last night already know that there is considerable question as to whether the CARES Act funds were properly handled by the City Manager, anyway, for reasons that cannot be laid at Ms. Kennedy's doorstep, and whether they were handled by Ms. Conard in a manner that was consistent with the City Council's directive. I trust that the significance of that fact is not lost on you.

A few final housekeeping details:

Russ Grazier's e-mail message, which was submitted to the committee by Ms. Pearson, is not under oath. Therefore, it cannot be considered, under the guidelines which the committee has established for this hearing.

We continue to object to the affidavit of Kathleen Cavalaro and insist that it cannot be considered as evidence. If you will recall, the original plan was that Ms. Cavalaro was to appear and testify live (whether by Zoom or otherwise) so that I could cross-examine her, and that she and her attorney were to submit a writing by noon on Monday, identifying the specific facts set forth in my Time Line that she disagreed with, so that I could prepare to meet her contentions during my cross-examination that evening. Instead of appearing live and submitting a writing in advance, she submitted only the writing and didn't appear, and I was never able to cross-examine her. Under the committee's own guidelines and according to what we specifically agreed-upon, therefore, the affidavit cannot be received into evidence or otherwise considered.

Pursuant to the Right to Know Law, RSA 91-A, we object to the Committee conducting its deliberations in secret. Conducting the deliberations in that manner is contrary to the interests of transparency which the committee members themselves promoted during the hearing and contrary to the Right to Know Law itself. Just as Ms. Pearson insists that Councilor Kennedy be held accountable for the actions of which she accuses her, I believe that the members of this Committee itself should be accountable to the citizenry for the decisions they make and for their rationale for those decisions, and I believe that the sunlight should shine brightly on those deliberations. Accordingly, I ask that all deliberations by the Committee be conducted in public via

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Zoom and/or Channel 22, except when the committee members are conferring with you specifically for legal advice in your role as City Attorney.

That's all that I have for now. I look forward to watching the proceedings tonight, and Councilor Kennedy will be available via Zoom to field any questions.

Very truly yours,



Duncan J. MacCallum

DJM/cap

Enclosure

cc. John Tabor, Committee Chairman  
Ann Walker  
Richard Gamester  
Tom Hart  
Esther Kennedy  
Nancy Pearson

VIA E-MAIL ONLY

CITY OF PORTSMOUTH, NEW HAMPSHIRE

BOARD OF ETHICS

Re: Complaint by Nancy Pearson against City Councilor Esther Kennedy

**Esther Kennedy's Requests for Findings and Rulings**

Esther Kennedy submits the following requests for findings and rulings and asks the Board to grant or deny each one.

1. The question is not whether Board members agree with the wisdom of what Ms. Kennedy did.
2. The question is whether Ms. Kennedy's violated Section 1.802-A of the City's Code of Ethics. (Letter, Splaine and Sullivan to Pearson and Kennedy, Sept. 2, 2020.)
3. Section 1.802-A of the Code of Ethics provides as follows:


"No Officer or employee shall engage in any business or transaction or shall have a financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his/or her [sic] official duties."

The term "Officer" includes "every member of the City Council." Section 1.801-A.

3. The precise charge is that, "by registering the trade name [Pop Up Portsmouth], 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.'" (Letter, Splaine and Sullivan to Pearson and Kennedy, Sept. 2, 2020.)
4. It is a stretch to conclude that *registering* a trade name with the New Hampshire Secretary of State amounts to a "transaction." The ordinance does not target "actions." It targets "transactions." The common meaning of "transaction" is a bilateral deal between two parties involving the buying and selling of goods or services.
5. The term "transaction" must also be interpreted in a manner consistent with the context in which it appears. In this instance, the context is an ethics ordinance prohibiting conflicts of interest. A conflict of interest arises when a government official's loyalties are divided between two competing interests. For example, Section 1.802-A in effect prohibits city councilors from voting for transactions whereby the city purchases goods or services from their own businesses or close relatives' businesses.

6. When Ms. Kennedy registered the trade name "PopUp Portsmouth," she engaged in an "action," but not a "transaction."
7. Even if registering the trade name was a transaction, Ms. Kennedy did not violate Section 1.802-A of the Code of Ethics unless the transaction was "in conflict with the proper discharge of her/or her [sic] official duties."
8. Section 1.801-D-1 of the Code of Ethics defines "Official Duties" as follows: "In the case of members of the City Council ... those duties and responsibilities set forth in the City Charter and/or established by State law."
9. The complainant ignored that precise and narrow definition of "Official Duties." She failed to explain how Ms. Kennedy's actions violated any specific *duty or responsibility set forth in the City Charter or established by State law*. The complainant did not even mention the City Charter or relevant state laws.
10. The evidence does not establish that Ms. Kennedy engaged in a transaction that was in conflict with the proper discharge of her official duties and responsibilities set forth in the City Charter or established by State law.
11. Ms. Kennedy was motivated to protect the City's interests, not to compromise them for personal gain. Her loyalties were not divided by any conflict of interest.

Date: September 23, 2020

By:   
Duncan MacCallum  
Attorney for Esther Kennedy