Richard Gamester

From: Synthia Ravell [sravell@cityofportsmouth.com]
Sent: Thursday, September 03, 2020 4:26 PM
To: John Tabor (johnktabor@gmail.com); amwjcw@comcast.net; rgamester@comcast.net; Joe Onosko (jonosko@comcast.net)
Cc: Robert P. Sullivan; votenancypearson@gmail.com; Esther Kennedy (estherkennedyportsmouth@gmail.com); Karen Conard
Subject: Ethics Complaint
Attachments: Pearson 8-3-2020 Refiled Ethics Comlaint #1.pdf; Pearson 8-3-2020 Refiled Ethics Comlaint # 2.pdf; Pearson & Kennedy ltr re response to 8-3-2020 ethics complaints 9-2-2020.pdf; Ethics Code.pdf

Board of Ethics

As you are aware from prior correspondence, a question raised by Ms. Nancy Pearson against Councilor Esther Kennedy is being referred to the City's Board of Ethics. Accordingly, you will be contacted by Synthia Ravell of this office in an effort to determine the earliest convenient time when the Board can be called together for an organizational meeting. At the organizational meeting, it is anticipated that the Board will select a Chair and determine ground rules for moving forward. It is not anticipated that any substantive decisions will be discussed at the first organizational meeting.

Attached for your review are the following:

1. A copy of the complaints filed by Ms. Pearson dated August 3, 2020
2. A copy of the response letter issued by Assistant Mayor Splaine and myself which highlights the question which has been referred to the Board.
3. A copy of the City's Code of Ethics which contains the relevant ethics law and describes the role of the Board of Ethics in the administration of the ordinance.

The Board of Ethics is a public body and consequently its proceedings will be governed by the Right to Know (RTK) law of the State of New Hampshire RSA 91-A. You may call this office with RTK questions.

The Board has 30 days under the ordinance, "to investigate and hold meetings and to report to the appropriate governing body as a whole if their findings warrant further action." Therefore, the final decision must be made by October 2, 2020.

You may expect to receive an email from Ms. Ravell tomorrow for scheduling purposes.

RPS

Robert P. Sullivan, City Attorney
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

(603) 610-7204 (Direct Dial)
(603) 427-1577 (Fax)

rpsullivan@cityofportsmouth.com

August 3, 2020

City Attorney Robert Sullivan:

Pursuant to the Municipal Code of Ethics, Reference Chapter I, Article VIII, Section 1.802 I am filing this ethics complaint for violating Portsmouth's CONFLICTS OF INTEREST A. City Councilor Esther Kennedy which states: "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 official duties."

During the June 15, City Council meeting, the Citizens Response Task Force chairs updated the City Council, which included Esther Kennedy, on several developments related to the re-open and recovery plans for the small business, arts and nonprofit community. Among the points they made to 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 also spoke to Council at that evening, stating these efforts were a "plea for arts and culture" and that the city should be prepared to "modify and move forward" as needed.

On July 1st, Task Force Pop Up subcommittee chair Russ Grazier said in the Portsmouth Herald, "the Seacoast Repertory Theater will serve as fiscal agent for the summer-long project, after announcing organizers had exceded fundraising goals.

During the July 8, Citizens Response Task Force meeting, the subcommittee for the Pop Up event updated with the following information, which can be found in the official meeting minutes, "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."*

During the July 13, City Council meeting, the chairs of the Citizens Response Task Force, appointed by the Mayor, informed the City Council, which includes Esther Kennedy, that the $50,000 contribution from the city to support Pop Up project would not be passed on to the Pop Up working group, but would be directed toward costs incurred by the city for the project, which was approved and funded with a unanimous vote by the city council.

These examples, all public and well documented, state very clearly the intent of the Task Force projects, an expectation of expediency, a lawful and legal fund-raising mechanism called 'fiscal agency,' as well as the important point that no city funds would go directly to the Pop Up working group.

On July 21, Kennedy was quoted in the Portsmouth Herald saying otherwise. Kennedy said, "the local Pop Up Portsmouth group has been promoting itself as a nonprofit and the city committed $50,000, which is expected to be reimbursed with federal CARES Act money."

This was a false statement that is contrary to the updates and information she received as a city councilor and that I have listed above. Further, fiscal sponsorship by an existing nonprofit is lawful standard practice in short-term or one-time fundraising, much like the Clipper Strong Fund which Kennedy serves as administrator.

On July 23, Kennedy was quoted again in the Portsmouth Herald. She said that she "registered the name (Pop Up Portsmouth) to prove it wasn't registered because the city was contributing $50K which is expected to be reimbursed through federal CARES Act funds."

This too was contrary to the public updates and information she received as a city councilor. City funds were never to be transferred to the Pop Up group, as she was officially told on July 13.

During the June 15 City Council meeting, the Citizens Response Task Force chairs discussed how the community came together to support the arts and business community, giving their time and expertise to the city for free. They expressed the enormous good will and positive energy behind these efforts.

By making intentionally misleading statements to the media that contradict official city records and information she was given directly from city committee chairs, Kennedy caused harm to the unanimously approved and funded city initiative by casting doubt among members of the public on the validity of the project. Kennedy took what was once a popular and positive city initiative and through the use of misinformation and imagined misdeeds, cast a shadow over it in the eyes of some members of the public. There are letters to the editor that support Kennedy's claims, which go directly against official meetings records and minutes.

Kennedy willfully engaged in a miscommunication "transaction" with a "direct interest" to mislead the public and cast doubt and suspicion on a city initiative. Her actions endanger the project by creating doubt about the validly of the efforts and the volunteers. This is in conflict with "the proper discharge of her official duties" which is to support community initiatives unanimously approved by the City Council that aim to save businesses, provide jobs, and provide safe options for the public.

Further, on January 6, 2020, Kennedy took an oath of office to "Faithfully and *impartially* discharge and perform all the duties incumbent upon her as a city councilor." Her irreparable actions and refutable accusations against a singular group of community volunteers were not *impartial*, and not commensurate with the oath she swore to uphold.

The aforementioned individual has therefore violated Portsmouth's CONFLICTS OF INTEREST Ordinance and that is the basis for this ethics complaint against her.

In event that the Board of Ethics determines that councilor Kennedy has engaged in an act that is prohibited by the ethics ordinance I am seeking a remedy in accordance with:
Section 1.805: enforcement, paragraph A. Sanctions. 1.a. Vote for removal of counselor Kennedy from the city council pursuant to the city charter as amended.

Sincerely.

Nancy Pearson

7/3/2020

NANCY Pearson stood before me and signed on this 8th day of August, 2020.

State of NH; Rockingham County.

Kimberli Kienia
Notary Public

KIMBERLI KIENIA
★ NOTARY PUBLIC - NEW HAMPSHIRE ★
My Commission Expires October 31, 2023

August 3, 2020

City Attorney Robert Sullivan:

Pursuant to the Municipal Code of Ethics, Reference Chapter I, Article VIII, Section 1.802 I am filing this ethics complaint for violating Portsmouth's CONFLICTS OF INTEREST A. against City Councilor Esther Kennedy which states: "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 official duties."

For background, Pop Up Portsmouth is the working title of a volunteer group who presented a project to the city's Citizens Response Task Force, appointed by the Mayor, to provide a Covid safe outdoor venue on city property to support local arts, nonprofits, restaurants and retail. The City Council, which includes Esther Kennedy, unanimously agreed to support the project with $50,000 if the volunteers could raise matching funds. **It is worth noting that per the Task Force Chairs, city funds would never go to the working group, but be used to directly cover the project expenses incurred by the city.** Using the fiscal agency of the 501c3 nonprofit, Seacoast Reparatory Theatre (SRT), the volunteers, now a 'working group' raised nearly $100,000 in private donations in four days, exceeding the city's matching criteria. This is when the working group went into action to begin steps to incorporate legally as a nonprofit.

During the July 13, City Council meeting, the chairs of the Citizens Response Task Force, appointed by the Mayor, reported to the City Council, which includes Esther Kennedy, at the 1:52:25 mark that the working group for the Pop Up event was ***going through the process of 'incorporating as a nonprofit'*** under the name, POP UP PORTSMOUTH.

Two days later, on July 15, according to the New Hampshire Secretary of State's Office, ***Kennedy reserved the trade name*** POP UP PORTSMOUTH. Her Business ID is 846526, the principal office address she gave is 41 Pickering Ave, Portsmouth, NH, 03801, and her notification email is esthersmarina@gmail.com.

Pop Up Portsmouth was slated to occur on city property and had been supported with city funding. 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," and violates section 1.802 A. By impeding the efforts of the working group to legally form as a nonprofit, she jeopardized the funding and the project and undermined a unanimous city council vote and city sanctioned project.

Additionally, during the same July 13, City Council meeting, at the 1:57:05 mark, Kennedy commented on the CARES act funds and Portsmouth businesses. She stated, "Does my business need help? No, I'm doing pretty good." This is an important comment. She used her business email on the official trade name registration form, picture attached. As a business owner by her own admission, she created a conflict of interest when she claimed the trade name and impeded the progress of a city-sanctioned competing business venture. This is "in conflict with the proper discharge of her official duties, because she took steps that are in direct conflict with a city-sanctioned business venture that she herself supported in a unanimous council vote.

I am also filing this ethics complaint for violating Portsmouth's CONFLICTS OF INTEREST H. against City Councilor Esther Kennedy which reads: "Investments in Conflict with Official Duties: Any officer or employee, who holds any investment direct or indirect in any financial, business, commercial or other private entity which creates a conflict with his/her official duties shall publicly disclose on the official record the nature and extent of such interest."

Kennedy did not "disclose on the official record" that she holds a 'direct private entity' (the trade name of Pop Up Portsmouth) which is a city-sanctioned competing business venture and creates a 'conflict with her official duties,' nor did she "publicly disclose on the official record the nature and extent of such interest."

Further, on January 6, 2020, Kennedy took an oath of office to "Faithfully and *impartially* discharge and perform all the duties incumbent upon her as a city councilor." Her irreparable actions against a singular group of community volunteers were not *impartial*, and not commensurate with the oath she swore to uphold.

The aforementioned individual has therefore violated Portsmouth's CONFLICTS OF INTEREST Ordinance and that is the basis for this ethics complaint against her.

In event that the Board of Ethics determines that councilor Kennedy has engaged in an act that is prohibited by the ethics ordinance I am seeking a remedy in accordance with:
Section 1.805: enforcement, paragraph A. Sanctions. 1.a. Vote for removal of counselor Kennedy from the city council pursuant to the city charter as amended.

Sincerely,

Nancy Pearson

Nancy Pearson 7/3/2020

Nancy Pearson stood before me and signed on this 3rd day of August, 2020.

Kimberli Kienia
Notary Public
8/3/2020

KIMBERLI KIENIA
★ NOTARY PUBLIC - NEW HAMPSHIRE ★
My Commission Expires October 31, 2023

CITY OF PORTSMOUTH
Legal Department
Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire
(603) 431-2000

September 2, 2020

Nancy Pearson
104-112 Lincoln Avenue #1
Portsmouth, NH 03801

Esther Kennedy
41 Pickering Avenue
Portsmouth, NH 03801

RE: Ethics Complaints of August 3, 2020

Dear Ms. Pearson and Councilor Kennedy:

This will advise that we have met to review the two ethics complaints filed by Ms. Pearson against Ms. Kennedy. Our role in conducting this review was not to determine whether any ethics violations had actually occurred, but rather to determine pursuant to Section 1.804 C of the City's Ethics Ordinance whether or not the complaints are "with or without substance". The purpose, under the ordinance, of our limited and threshold review is to prevent complaints which have, in our judgement, little possibility of being proven to be founded from occupying the time and energy of the City's Board of Ethics.

With our limited role in mind, we have reviewed the two complaints, both dated August 3, 2020, in detail and compared the allegations which they contained to the criteria established in the City's Code of Ethics. The test which we applied was to determine whether or not if all of the facts alleged in the complaints were proven to be true, there would be a reasonable possibility of a Code of Ethics violation to be found by the Board of Ethics. Using that test, we have determined that one aspect of one complaint should move forward to the Board of Ethics for further inquiry. All remaining allegations of each complaint we have determined could not reasonably support a finding of an ethics violation on the part of Ms. Kennedy.

The allegation which we believe calls for inquiry by the Board of Ethics is the allegation contained in the fifth paragraph of the first complaint filed on August 3, 2020 by Ms. Pearson. Specifically, it is alleged 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.'" This is said to be in violation of Section 1.802 A. In essence, it appears that the Board of Ethics could possibly find that by registering the tradename, Councilor Kennedy engaged in a transaction which sought to defeat a legislative goal established by the Portsmouth City Council. That is a decision the Board of Ethics must make, not us.

It will be the work of the Board of Ethics to clarify whether the facts which are alleged to support that claim are accurate and whether, if so, Councilor Kennedy engaged in a transaction in conflict of interest with her duties as a City Councilor in violation of the Code of Ethics.

We have reviewed all of the remaining allegations contained in the two complaint letters, and have concluded that even if all true the factual allegations could not make out the ethical violations alleged in the complaints. Therefore, we have determined not to move those ethical complaints forward so that the Board of Ethics will not be required to decide them. It is our view that the facts alleged in support of these remaining allegations, strong as those allegations may be, nonetheless fall within the bounds of allowable political and legislative activities.

In accordance with the requirements of Section 1.804 C (I) of the Code of Ethics, the single complaint as described above is forwarded to the City's Board of Ethics and the remaining claims are dismissed.

Sincerely,

James Splaine
Assistant Mayor

Robert P. Sullivan
City Attorney

RPS/smr
cc: Board of Ethics
Mayor and City Council
Karen Conard, City Manager