

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss.

CITY OF PORTSMOUTH

ETHICS COMMITTEE

In re Complaint against Esther Kennedy

TIME LINE

February 10, 2020

President Donald Trump announces at a rally in Manchester that the coronavirus is “under control” and that “by April, when it gets a little warmer, it will miraculously go away.”

Late February, 2020

The public and, particularly, the medical profession and the country’s public officials begin to realize that the coronavirus is a real problem. By March 4, 2020, the number of reported coronavirus cases and deaths will have grown from zero on January 20th to 153 confirmed U.S. cases and 11 deaths. By March 29th, it will have grown to 140,886 confirmed cases and 2,467 deaths.

March 16th

The Portsmouth City Council holds its last live, in-person City Council meeting in the City Council chamber. City councilors are not seated in their usual seats on the dais; rather they are seated on the Council chamber floor, spaced at least 3' apart. All future Council meetings will be by Zoom.

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Mayor Becksted and Councilors Esther Kennedy, Paige Trace, and Petra Huda have a post-meeting get-together at the Clipper Tavern to unwind with some food and a few drinks. It will be the last time that they do so, as the

Clipper closes the next day because of the pandemic, pursuant to Governor Sununu's emergency order.

mid-May, 2020

Several Portsmouth restaurants and other business which have been forced to close because of the pandemic announce that they will not be reopening, due to financial distress. As the surviving businesses continue to howl in pain over the financial pressure that they have been feeling as a result of having had to be closed for two months, talk begins concerning the possibility of using city taxpayer funds to give those businesses some relief. Meanwhile, the CARES Act has been passed by Congress and signed into law on March 27, 2020.

May 18, 2020

Mayor Becksted appoints a 19-member Citizen Response Task Force whose mission is to, among other things, make recommendations for ways of finding financial relief for those businesses which have been most adversely affected by the pandemic.

June 15th

The City Council votes unanimously to grant the Task Force \$100,000. Esther Kennedy wholeheartedly supports the vote and proposes an amendment to the original motion, made by Councilor Splaine, to stipulate that the \$100,000 come from the CARES Act, in order to reduce the burden on the Portsmouth taxpayers.

The CARES Act does not permit its funds to be given to any entity, nonprofit or otherwise, that was formed after March 1, 2020, and so the arrangement approved by the City Council calls for the funds to be given to an established nonprofit organization, the Seacoast Rep, to serve as a "pass-through" for the funds to be channeled to the eventual nonprofit entity that is to be created (namely, Pop Up Portsmouth). As long as the Seacoast Rep or another nonprofit entity serves as a "pass-through," the arrangement is perfectly legal.

June 17th

By chance, Councilor Kennedy watches an interview given by Kathleen Cavalaro, one of the organizers of the group that eventually creates the entity Pop Up Portsmouth, on Boston NBC Channel 10 News. Councilor Kennedy, who has extensive experience with federal grants and the handling of federal funds by virtue of her position of employment, becomes a bit unsettled by one of Cavalaro's remarks. Cavalaro says that conducting the proposed recreational and cultural events at that venue (which at that point was still planned to be the top two floors of the Foundry Garage, and was later switched to the Bridge Street lot) would result in an injection of \$40,000 to \$50,000 "just for our organization alone". Councilor Kennedy begins to wonder how the organizers are intending to handle the revenue that is to be generated using the \$100,000 grant, for the only organization with which Cavalaro was then associated was the Seacoast Rep, and the only other entity mentioned in the Channel 10 news story is the Black Trumpet. Accordingly, Councilor Kennedy begins to wonder what "organization" Cavalaro is referring to. The purpose of the \$100,000 appropriation which had been voted on only two days earlier, of course, was not to benefit just two entities, but to provide stimulus money for as many local businesses as possible.

June 22nd

Councilor Kennedy publicly expresses her concerns at the City Council meeting of this date, specifically referencing the Channel 10 news story. She also reports that a number of her constituents have expressed the same concerns.

June 24th

The GoFundMe website reports that the Task Force has voted to give matching funds of up to \$50,000 to an as-yet-unnamed nonprofit entity. The nonprofit entity has to raise the other \$50,000.

July 2nd

The GoFundMe website announces: "We Got Our Match from The City." It also says, "If you

are able to make a Tax-Deductible Donation Please send me an email and I can help facilitate that." As of this date, no such nonprofit entity mandating tax deductible donations has yet been formed and, ultimately, would not be for almost another three weeks. Ergo, the organizers were soliciting these funds illegally.

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By this time, Councilor Kennedy has received informal reports that the Seacoast Rep has decided to cancel its sponsorship of the undertaking, reportedly because of the financial commitment that it was unwilling to make. (And indeed, this eventually happens. The Seacoast Rep ultimately divorces itself from the project and ceases to be a "pass-through" for CARES Act funds.) GoFundMe was collecting a lot of funds that Seacoast Rep didn't want to be responsible for, and the cost of insurance was an issue.

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Councilor Kennedy telephones City Manager Karen Conard and, while discussing other topics as well, raises her concern that the City is using federal funds for a nonprofit entity that has not yet been formed. In addition, she reports citizen concerns that the new group that is calling itself Pop Up Portsmouth is planning to use the Bridge Street lot for food trucks and a beer garden, to which some citizens take exception. On the issue of the nonprofit entity not yet having been formed, City Manager Conard replies that she is working on it. (Councilor Kennedy never hears anything further from City Manager Conard concerning the matter.)

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On this same date, Councilor Huda sends City Manager Conard an e-mail message in which, among other concerns, the lack of adequate planning for the Pop Up project and what appeared to be the waste of two weeks of city staff time due to the fact that a basic item--insurance--was overlooked, killing the original project. (By this time, the decision has been

made to move the project from the Foundry Garage to the Bridge Street lot, though not with City Council consultation.)

July 11

A Facebook post published by Kathy Cavalaro is brought to Councilor Kennedy's attention, in which the former announces that "we were able to raise enough funds to match the City of Portsmouth's matching challenge of \$50K" but says that additional funds are needed and solicits additional funds. Cavalaro also says--falsely-- that "Pop Up Portsmouth is now a non-profit" and that "we've now created a working non-profit organization that will always be here to help our local businesses in our community." In reality, no such nonprofit entity has yet been formed.

In that same Facebook posting, Cavalaro states: "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 causes Councilor Kennedy extreme unease, for without an established nonprofit entity formed prior to March 1, 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 this time, not only Councilor Kennedy, but also several other other city councilors--Trace, Huda, and Mayor Becksted--are becoming concerned with the fact that as far as anyone knew, there is still no nonprofit entity formed to receive the 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. The complainant Nancy Pearson's own ethics complaint states, "The Seacoast Repertory Theater has changed the way that it was representing its role regarding the Pop-up project." Just what did this mean?

July 12th

Councilor Kennedy, with some input from Councilor Paige Trace, reviews the entire situation and does some online investigation. Visiting Pop Up Portsmouth's website, she finds that Pop Up Portsmouth is still claiming (falsely) to be a nonprofit entity. A visit to the New Hampshire Secretary of State's website confirms that this is not so. From the information on Pop Up Portsmouth's website, she also discovers that of the 15 or so businesses whom Pop Up Portsmouth has recruited to sell their wares in the new Bridge Street venue, only 2-3 of them are Portsmouth businesses. All the rest of them are businesses from other towns.

July 13th

The Portsmouth City Council holds one of its regular monthly meetings. The Citizen Response Task Force, in the persons of its co-chairmen, James Petersen and Mark Stebbins, makes a presentation and gives a lengthy status report, and Petersen and Stebbin field questions from the city councilors. Councilors Kennedy, Trace, and Mayor Becksted all pose questions concerning Pop Up Portsmouth, but they do not always get satisfactory answers.

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Councilor Kennedy, still trying to get to the bottom of the matter of whether the newly-named "Pop Up Portsmouth" is a separate legal entity and, if so, whether it is properly registered as a nonprofit and therefore entitled to solicit and receive donations, asks Messrs. Petersen and Stebbins whether it is a "subcommittee of a subcommittee" of the Task Force. (If it is a subcommittee of the Task Force or other sub-unit of the City, then it can legally solicit and receive

donations and can legally receive federal funds pursuant to the CARES Act. If it is neither a sub-unit of the City nor a duly formed nonprofit entity, then it is in clear violation of law by soliciting and accepting donations while representing itself to be a nonprofit entity. Further, having been formed after March 1, 2020 it cannot receive CARES Act funds unless it receives them through a "pass-through" such as the Seacoast Rep or the City.) In response to her query, Councilor Kennedy gets an ambiguous answer.

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Councilor Trace notes the absence of any published meeting minutes of the new "nonprofit groups" and complains that for that reason she cannot monitor the new group's activities or determine what it is doing. Petersen blames this circumstance on the fact that "everything has been moving so fast" and that, for that reason, there is sometimes a lack of attention to detail. "It's a little messy," he says. In the course of answering her questions, Petersen, who is obviously not well-informed concerning the matter, directly represents that "they're forming as a separate nonprofit entity" and that "the nonprofit has officers and a board of directors." His representations are totally inaccurate. As of this date, no nonprofit entity has yet been formed.

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Mayor Becksted emphatically stresses the fact that federal CARES Act money is at issue and that it is crucial for the City to dot all its i's and cross all its t's. "This is CARES Act money, and we're going to have to account for it." He emphasizes that the CARES Act money is being granted for a very specific purpose and that it is crucial that the City comply with all of the rules. "It can't be 'messy'."

July 15th

Councilor Kennedy, still skeptical of whether she is being told the truth about Pop Up Portsmouth's legal status, renews her online investi-

gation to see if anything has changed since her prior investigation on July 12th and to determine whether the facts that had been related to herself and the rest of the city councilors on July 13th had been accurate. She finds that no entity named "Pop Up Portsmouth" has ever been registered as a nonprofit entity, and so she purchases the name.

July 20th

Josh Denton, the nominal president of the group that is calling itself "Pop Up Portsmouth," attempts to open a bank account in the name of that entity and deposit the donations that it has received, and he discovers that the name "Pop Up Portsmouth" has already been registered to someone else (namely, Esther Kennedy).

Denton, despite being a lawyer, does not know that you can't open a bank account in the name of a company, particularly a nonprofit, before that company has actually been created by the filing of the appropriate documentation with the Office of the Secretary of State. Further, Denton and the other leaders of Pop Up Portsmouth have not yet obtained a nonprofit EIN number (Employer's Identification Number) from the I.R.S., a simple and ministerial task that can be accomplished in minutes. The bank, however, does its due diligence and discovers that a company named Pop Up Portsmouth is already registered to Ms. Kennedy. As a result, it refuses to open the account.

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Councilor Kennedy receives telephone calls from City Attorney Bob Sullivan, Councilor Deaglan McEachern, and Kathy Cavalaro, and a personal visit from Councilor John Tabor. She freely explains to each of them what she did and why she did it, pointing out that Pop Up Portsmouth was clearly acting in violation of law by soliciting funds while falsely claiming to be a nonprofit.

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In the telephone conversation with Cavalaro, Ms. Kennedy offers to turn over the name and

registration of Pop Up Portsmouth to the organizers free of charge, not even asking to be reimbursed for the \$50.00 that she spent to purchase it. However, she imposes three conditions: (1) The organizers publicly apologize for misrepresenting themselves to be a nonprofit entity when they solicited donations. (2) The organization draft appropriate corporate by-laws which provide that the Bridge Street lot is to be used for Portsmouth businesses. (3) The organization otherwise comply with all state and federal laws, including filing with the State of all appropriate paperwork to become a nonprofit entity. Ms. Kennedy even offers to pay the filing fee out of her own pocket. Cavalaro becomes angry, gets into an argument, and hangs up the phone on Ms. Kennedy. The latter's offer is rejected. Pop Up Portsmouth subsequently registers with the State under the name "Pop Up NH".

July 21

A meeting of the Pop Up subcommittee of the Citizen Response Task Force is conducted, presided over by Russ Grazier. The issue of the recruitment of predominantly out-of-town businesses to service the Bridge Street lot events comes up and becomes a point of contention. Only 3 of the 15 businesses that are slated to participate in the Bridge Street project are Portsmouth businesses. Denton and Cavalaro complain bitterly that the 12 out-of-town businesses whom they have recruited have already made commitments to the Bridge Street project and have already purchased inventory in anticipation thereof. However, Grazier and Valerie Rochon, committee delegate from the Portsmouth Chamber Collaborative, point out that the express purpose of the appropriation which had been granted by the City Council, using both CARES Act funds and Portsmouth taxpayer money, was to support Portsmouth businesses, not outsiders. Denton and Cavalaro are overruled.

August 3rd

Nancy Pearson files two ethical complaints against Esther Kennedy, falsely claiming that Ms. Kennedy intended to profit personally and financially from the purchase of the Pop Up name from the Secretary of State.



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