

**Report of the Board of Ethics
of the City of Portsmouth**

**In the matter of the complaint
Filed by Ms. Nancy Pearson
Against City Councilor Esther Kennedy**

Table of Contents

1. Letter dated September 2, 2020 from Assistant Mayor James Splaine and City Attorney Robert Sullivan forwarding the complaint of Ms. Pearson to the Board of Ethics.
2. References to internet resources relevant to the actions of the Board of Ethics.
3. Verbatim transcript of the Board of Ethics deliberations regarding the ethics complaint.
4. Findings of the Ethics Board.
5. Code of Ethics.



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

**Resources to Internet Sources Relevant to
the Actions of the Board of Ethics**

City's YouTube Channel – links to Ethics Board Hearings

September 16, 2020

<https://www.youtube.com/watch?v=mxKZc373cwo>

September 21, 2020

<https://www.youtube.com/watch?v=i03hJznIciY>

September 23, 2020

<https://www.youtube.com/watch?v=4ATeUafKKBE>

Link for BOE Members' Records

Records of the Members of the Board of Ethics

<https://www.cityofportsmouth.com/legal/board-ethics>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CITY OF PORTSMOUTH

NEW HAMPSHIRE

BOARD OF ETHICS

**BOARD OF ETHICS DELIBERATIONS
OF ETHICS COMPLAINT BY NANCY PEARSON
AGAINST COUNCILOR ESTHER KENNEDY**

APPEARANCES:

Ethics Board Members:

John K. Tabor, Chair, City Councilor

Richard Gamester, Fire Commissioner

Thomas Hart, Police Commissioner

Ann Walker, School Board Representative

Robert P. Sullivan, City Attorney

HEARING DATE: September 23, 2020

TRANSCRIBED BY: Synthia M. Ravell

1 **[Excerpt of hearing deliberations beginning at 1:19:43]**

2 TABOR: Is there a motion to begin our deliberations?

3 HART: Yes, Chair, I would like to make a motion. I move
4 that the Board of Ethics finds that Councilor Esther Kennedy
5 was in violation of 1.802 A of the Code of Ethics, and this
6 determination before forwarded to the City Council for further
7 action, and then at this point leave it open for discussion.

8 WALKER: Second the motion.

9 TABOR: Okay. Board member Hart, would you like to
10 speak to your motion?

11 HART: In the way I looked at this, from my own
12 experiences, I looked at this as, I guess you can give an
13 example, I know this isn't criminal but the easiest way to
14 explain this how I looked at this and came to this conclusion is
15 if someone had broke into someone's house at night, if they
16 didn't belong there and they stole something. So, the facts of
17 that would be you determine that the person broke into a
18 house and didn't have permission to be there, committed a
19 crime, it was at night, and then you take those circumstances
20 and find someone guilty of that offense. You kind of dissect
21 the different features of that charge. And how I did this is
22 kind of the same way; exactly the same way, as a matter of
23 fact. No officer, which would be the City Councilor, shall

1 engage in any business or transaction, and you can take that
2 either way, business or transaction, that Councilor Kennedy
3 went online to the State of New Hampshire and acquired this
4 Pop Up name, so whether that was business or transaction, I
5 think it is both, and then I went on to show in a financial or
6 private interest or direct interest, and that I would say that
7 used her own money to acquire that name, and then would
8 have been improper discharge of his or her official duties, and I
9 think at this point in acquiring this name there was a 9-0 vote
10 by the City Council to move forward with this Pop Up situation
11 and venue and set up everything through the City Council, so I
12 think at that point it was under the direction of the City
13 Council and kind of an overt act of holding onto this name with
14 demands, it kind of put me over the top of more than her own
15 duties as a City Councilor asking for an apology, and asking
16 for by-laws, and then after that she would give up that name
17 to this venue that was trying to acquire this name. So, that's
18 just a scenario of how I looked at this openly through both
19 sides, and it wasn't easy. It's not a comfortable situation, but
20 we're set here to deliberate on this, and this is how I did it, and
21 this is my experience as a law enforcement officer. Typically, I
22 testify giving the evidence to a case, this was actually the first
23 time I've sat on a Board like this to deliberate on such an

1 event, and this is my conclusion, this is what I came up with.

2 TABOR: Thank you, Commissioner. Yes, Board Member
3 Gamester; you're on mute, Dickie. Still on mute. Now you're
4 good.

5 GAMESTER: All right. I kind of approached this in a
6 different way. I spent some time interrogating, or, excuse me,
7 asking questions of Esther and I found her to be a very honest
8 witness with her answers and I would just like to go over those
9 so that they can be part of the record. And I asked her was
10 she, did she ever contact the Legal Department? And her
11 answer was no. Did she ever, did she talk to the City
12 Manager? She said yes, but I didn't like her responses. I have
13 no idea what the responses are. Did you ever call the Task
14 Force or the co-Chairs of the Task Force? The answer was no.
15 Did you ever call the Pop Up Chairman, which I think was
16 Russ Grazier? The answer was no. Did you ever discuss with
17 the entire Council, either in non-public or as an agenda item,
18 to make them aware of what you were fearing was a problem
19 going on in the background? She said no. In a heartbeat race
20 here to stop things, did you act or reach out to the Attorney
21 General's Office or the Secretary of State to put a stop to
22 something? The answer was no. And I don't think, and I'm
23 going to, and I think the answer to this was no, but she was

1 never told by any of the Council members, she never told any
2 of the Council members that it was her intent to register this
3 tradename and she was never asked by the City Council or
4 City staff to intervene on behalf of the City. I feel that all
5 those bring me to the point, the one point that I think is
6 extremely serious, not serious but extremely important, is the
7 moment that Esther got online and/or telephone, I'm not sure
8 how she did that, and the moment she purchased and
9 registered the tradename was the time that she, that it became
10 in conflict with the proper discharge of her official duties.
11 Until then, she had never done anything that wasn't, she was
12 asking the right questions in the right places, but didn't go far
13 enough. But the fact that she intervened in the process there,
14 purchased something, became a party to the entire program,
15 that's when she fell into the other side of the duty line. And
16 then I found it very baffling that Esther didn't tell anyone of
17 her actions and it all had to come out in the paper, social
18 media, however, that when they went to get a checking
19 account that the name had been used by somebody else. I was
20 baffled by the whole thing. I am surprised at it, with it.
21 Esther's usually very good at doing things. I think this one
22 was a, fell off the cart routine for a second, but she did, she did
23 violate the ethics as stated by Mr. Hart and now myself.

1 Thank you.

2 TABOR: Yes, Board member Walker.

3 WALKER: I thought about this very carefully and I knew
4 so little about non-profits and all the different aspects of how
5 you deal with them. So, this was a very slow learning process
6 for me, and I found that when Councilor Kennedy registered
7 the name Pop Up Portsmouth before the Task Force had a
8 chance to complete registering it, this was actually slowing
9 down their efforts to be helping the Portsmouth businesses.
10 And so, when she conducted the transaction with the direct
11 interest in the outcome, this really was in conflict with her
12 official duties as a City Councilor, and I'm really surprised at
13 that, but that's my finding.

14 TABOR: Thank you, Board member Walker. I, we've
15 heard a lot of testimony. I've also worked with Councilor
16 Kennedy for more than a decade, going back to Portsmouth
17 Listens, and wanted to give her all the benefit of the doubt in
18 this, but we go back to the language of the ordinance; shall not
19 engage in a transaction. From her own testimony, we know
20 that she bought the tradename for \$50 of her own money, so
21 that was something she had a direct, private interest in. And
22 we heard testimony that she has done this with previous
23 tradenames in the past, but we're just talking about this

1 specific instance and what that, the effect that had on the Pop
2 Up effort was. And that \$50 private purchase, is that in
3 conflict with her duties? And we all, as the City Council, made
4 a vote on June 15th 9 to nothing to implement the
5 recommendations of the Citizens Response Task Force and get
6 the Pop Up going, and the Pop Up was going to provide a
7 venue for theater groups, arts groups, entertainment, and a
8 way to help restaurants survive. When we voted 9 to nothing,
9 and Councilor Kennedy voted too, that was the policy of the
10 City to make that happen, and there was discussion at the
11 time to make that happen as fast as we could. Martha Fuller
12 Clark at one point said we don't want to lose another weekend.
13 So, the transaction occurred and I think what concerned me
14 the most and tipped my point of view was the phone call of
15 July 20th and the three demands, and Councilor Kennedy has
16 been transparent and open about her demands but let's think
17 about the effects of them. She demanded that the Pop Up
18 change its non-profit by-laws. That was not a demand that the
19 City Council made. That was not a demand that the Citizens
20 Response Task Force or the Subcommittee on the Pop Up
21 made who had, to whom we delegated oversight as a City
22 Council. So, she was interposing herself. But more important,
23 she insisted that the Pop Up, which had raised \$90,000,

1 apologize to all their donors. And she wanted them to say
2 what they did was illegal. Now, I can't imagine anything that
3 would poison a well for a non-profit with its donors more than
4 that. And then, finally, we learn from the testimony and
5 watching the meetings that this did immediately grind
6 everything to a halt about the Pop Up and caused something of
7 a crisis. So, I don't think those actions are supportive of the
8 City Council's vote. I don't think, I think they in effect
9 undermine the legislative intent of the Council. And there
10 were many ways, in our discussions and questioning of
11 Councilor Kennedy, as Board member Gamester mentions,
12 many other ways that her concerns could have been addressed.
13 We had lots of testimony about the nature of the Pop Up
14 becoming a non-profit. My own findings are that it was in
15 process and I was especially cognizant that the fiscal agency
16 relationship with the Seacoast Rep, created by a Board vote,
17 was never dissolved and, therefore, I don't believe the donors'
18 money was collected illegally and I believe that it was safely
19 kept at all times. So, regretfully I also believe that this was a
20 violation of the Code of Ethics and would vote that way. Other
21 comments from the rest of our members?

22 HART: No, that would just be my motion.

23 TABOR: Okay.

1 GAMESTER: Move the question, please.

2 TABOR: Alright. Roll call vote, please. Board member
3 Walker?

4 WALKER: Yes.

5 TABOR: Board member Gamester?

6 GAMESTER: Yes.

7 TABOR: Board member Hart?

8 HART: Yes.

9 TABOR: And the Chair votes yes. I think our business is
10 concluded. ...

11

12 **[Deliberations concluded at 1:34:57]**

13

14

15

16

17

18

19

20

21

22

23

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

I, Synthia M. Ravell, hereby certify that the foregoing pages, numbered 2 through 9, are a true and accurate transcription of the noted excerpt of the audio file of the Board of Ethics Hearings Meeting of September 23, 2020.

Dated at _____, New Hampshire, this _____ day of _____, 2020.

Synthia M. Ravell

STATE OF NEW HAMPSHIRE

COUNTY OF _____

Subscribed and sworn to before me this _____ day of _____, 2020.

Notary Public

My Commission Expires:

Findings of the Ethics Board

The board of ethics was asked to determine if Councilor Esther Kennedy “by registering the tradename (Pop Up Portsmouth), engaged in a transaction which sought to defeat a legislative goal established by the ... City Council,” and therefore acted in conflict with her duties as councilor. (See September 2 letter)

We found that

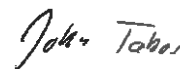
1. Councilor Kennedy engaged in a transaction with a personal interest
 - a. \$50 of her own money
 - b. At the point she purchased the Pop Up Portsmouth tradename, she acted in conflict with her duties as a councilor
2. What was the conflict?
 - a. Tom Hart: the overt act of holding on to the name with demands
 - b. Dickie Gamester: Registering the tradename was in conflict – she intervened in the process
 - c. Ann Walker: She slowed down their efforts to help businesses with the Pop Up. She concluded a transaction with a direct interest in the outcome.
 - d. John Tabor: her demands were not from the city council, were not supportive of the city council vote and harmful to the Pop up
3. She could have addressed her concerns in other more productive ways: by going to the city attorney, the Task Force, the Pop Up board of directors, the mayor, the council
 - a. She deliberately did not tell others of her intent to buy the tradename
4. The board also heard testimony that the Pop Up was not illegal, in conflict with Councilor Kennedy’s version of events, particularly since the fiscal agent relationship with Seacoast Rep was never terminated.

Process

The board aimed to have a full and fair review of the case. First, the board set a rule that their decision would be based solely on the oral and written testimony from the hearings. The night of September 16 was devoted to the complainant Nancy Pearson, and Councilor Kennedy’s side was given 30 minutes for cross examination. The night of September 21 was devoted to Councilor Kennedy’s defense, with 30 minutes cross examination.

The board deliberated September 23rd and voted 4-0 to find a violation of Section 1.802A of the city ethics ordinance occurred. Each member stated his or her reasons (see Transcript). Then, in the interest of transparency, the board voted that all minutes and documents, including emails received by each member, should be made public on the city’s website, except an affidavit from Jerry Zelin deemed not relevant. This vote was also 4-0. These should be available October 15 or sooner.

John Tabor, Chair and City Council Representative



Dickie Gamester, Fire Commission Representative

Tom Hart, Police Commission Representative

Ann Walker, School Board Representative

Robert Sullivan, City Attorney, ex-officio

ARTICLE VIII: CODE OF ETHICS**Section 1.801: DEFINITIONS**

For purpose of this Article, the following terms shall be defined in the following manner:

- A. **Officer:** The term "Officer" shall be defined to include every member of the City Council, School Board, Police Commission, Fire Commission, each member of every land use regulatory board, i.e. the Board of Adjustment, Planning Board, Historic District Commission, Conservation Commission, Technical Advisory Committee, Traffic Safety Committee, Building Code Board of Appeals, Recreation Board, Planning and Development Council, and Economic Development Commission, every department head as that term is used in the Administrative Code, Chief of Police, Fire Chief, Superintendent of Schools, the Trustees of the Trust Funds and members of the Housing Authority.
- B. **Employee:** The term "Employee" shall include all employees of the City including the Police, School and Fire Departments whose salary is paid in whole or in part from the City Treasury.
- C. **Governing Body:** The term "Governing Body" shall mean the City Council, School Board, Police Commission, and Fire Commission.
- D. **Official Duties:** The term "Official Duties" shall mean the following:
 - 1. In the case of members of the City Council, School Board, Fire Commission, Police Commission and the City Manager, those duties and responsibilities set forth in the City Charter and/or established by State law.
 - 2. In the case of members of Land Use Regulatory Boards, the Trustees of the Trust Fund and the Portsmouth Housing Authority, those duties and responsibilities set forth in the legislation that established each board and/or outlines the duties and responsibilities of each board.
 - 3. In the case of the Chief of Police, the Superintendent of Schools, the Fire Chief, and all employees, those duties and responsibilities set forth in the respective job description for each party or employee.

Section 1.802: CONFLICTS OF INTEREST

- A. 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.

- B. **Representing Private Interests Before City Agencies:** No Officer or employee shall appear in behalf of private interests before any governing body or land use regulatory board of which the officer or employee is a member or membership on which is subject to approval by the officer or employee.
Officers and employees, however, may appear without compensation in behalf of constituents or in the performance of public or civic obligations. This section shall not prohibit appearances upon matters only incidentally requiring official action which do not develop into a substantial part of the employment, provided, that the retainer is not for the purpose of appearing before the governing body or land use regulatory board.
- C. **Representing Private Interests Before Courts:** No officer or employee shall represent private interests in any action or proceeding against the interests of the land use regulatory board or governing body of which the officer or employee is a member, or membership on which is subject to approval by the officer or employee in any litigation to which the City is a party.
- D. **Disclosures of Interest in Legislation:** A Councilor who has a direct or indirect financial or other private interest in any proposed legislation shall publicly disclose, on the official records of the Council, the nature and extent of such interest.
- E. **Disclosures by Officer or Employee of Interest in Legislation:** An officer or employee who has a direct or indirect financial interest or other private interest in any legislation and who participates in discussion before or gives official opinion to the Council, shall publicly disclose on the official record the nature and extent of such interest.
- F. **Gifts and Favors:** No officer or employee shall accept any gift, over \$100.00, whether in the form of service, loan, thing or promise, any other form from any person, firm or corporation which to his/or her knowledge is interested directly or indirectly in any manner whatsoever, in business dealings with the City. This provision shall not apply to campaign contributions of \$100.00 or less.
- G. **Disclosures of Confidential Information:** No 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.
- H. **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.
- I. **Incompatible Employment:** No officer or employee shall engage in or accept private employment or render or seek services or goods for private interests when such employment or service creates a conflict with his/her official duties.

Section 1.803

Any violation of any provisions of this ordinance shall constitute cause for fine, suspension or removal from office or employment.

Section 1.804: BOARD OF ETHICS

- A. There is hereby created and established a method for appointing a Board of Ethics. This Board shall consist of five persons: one member each selected by lot from the City Council, School Board, Police Commission and Fire Commission and the City Attorney (ex officio) or such other legal counsel (ex officio) that the Board should decide. The Board member shall be drawn at the first meeting of the calendar year of each of the governing bodies.

The members of the Board shall elect a chairperson. They shall adopt such rules for the conduct of their business as they see fit and they shall have the power to draw upon the various City departments for reports and information and stenographic and clerical help. They shall have all subpoena powers as may be available to them under State law.

- B. **Advisory Opinions:** Upon the written request of the Officer or employee concerned, the Board shall render advisory opinions based upon the provisions of this Code. The Board shall file its advisory opinions with the City Clerk but may delete the name of the officer or employee involved.
- C. **Hearings and Determinations:** Any individual having information that an officer or employee as defined in Section 1:801, other than the City Manager or the City Attorney, is engaged in improper activities or has a conflict of interest may present his or her complaint to the City Attorney.
1. Said complaint shall be in writing, under oath, specific and to the point. The City Attorney shall review the written complaint with the Mayor and if either the Mayor or the City Attorney feels that the complaint is of substance, then the Mayor shall refer the matter to the Board.
 2. If both the Mayor and City Attorney believe that the complaint is without substance, the person making the complaint and the subject of the complaint shall be notified in writing of that fact.
 3. The Board shall hold a hearing which may be public or private at the discretion of the Board and at which the accused party shall be entitled to be represented by Counsel at his or her own expense to examine the party making the complaint, to summon witnesses and to present evidence on his or her behalf. If the Board finds that the individual is guilty as charged in the complaint, the whole matter shall be referred to the appropriate governing body for enforcement as set forth in Section 1:805.

4. Complaints against the City Manager and/or City Attorney for violations of this Ordinance shall be in writing, under oath, specific and to the point, and shall be referred directly to the Mayor or Assistant Mayor. If either the Mayor or Assistant Mayor believes that the complaint is of substance, then the complaint shall be referred to the Board for a hearing as set forth in paragraph C.3 above. If the City Attorney and the Assistant Mayor believe that the complaint is not of substance, then the person making the complaint and the Mayor shall be notified of that decision.
5. Complaints against the Mayor shall be filed with the City Attorney who shall review them with the Assistant Mayor. If either the City Attorney or the Assistant Mayor believes that the complaint is of substance, then the complaint shall be referred to the Board for a hearing as set forth in paragraph C.3 above. If the City Attorney and the Assistant Mayor believe that the complaint is not of substance then the person making the complaint and the Mayor shall be notified of that decision.
6. All members of the City Council (including the Mayor), School Board, Police Commission and Fire Commission are eligible to serve and must serve on the board when requested to do so except, however, that any person that has been charged in a complaint shall be barred from serving on that particular board.
7. All complaints shall be disposed of or forwarded to the Board by the City Attorney and/or the Mayor and/or the Assistant Mayor within thirty days after receipt.
8. The Board shall have thirty days to investigate and hold meetings and to report to the appropriate governing body as a whole if their findings warrant further action.
9. The statements of the findings of the Board shall be issued upon the request of any person charged.

Section 1.805: ENFORCEMENT

- A. Sanctions: In the event that the Board of Ethics determines that any officer or employee subject to its control, has engaged in any act prohibited by this ordinance or failed to make a mandated disclosure, the governing body shall take any one of the following steps:
 1. In the case of the Governing body members:
 - a. Vote for removal pursuant to the City Charter as amended
 - b. Vote to publicly censure the offending member
 - c. Vote to place the matter on file
 - d. Vote for innocence of any wrong doing

2. In the case of all officers and employees the governing body, consistent with the Merit System and any applicable bargaining agreements, shall:

- a. Vote for removal
- b. Vote for dismissal
- c. Vote for suspension for a definite period
- d. Vote for the censuring
- e. Vote to place the matter on file
- f. Vote for innocence of any wrongdoing.

B. Criminal Sanctions: In addition to the civil sanctions imposed by this ordinance, violation of any provision of this ordinance shall constitute a criminal offense and the City Council may authorize the City Attorney or any other attorney approved by it to prosecute such a violation in the Portsmouth District Court.

The penalty for violation of any provision of this Ordinance upon conviction in the Portsmouth District Court shall be \$1,000 for each offense.

(Adopted In Its Entirety 4/4/88)