

## CITY COUNCIL SPECIAL MEETING MINUTES

MUNICIPAL COMPLEX  
DATE: MONDAY, OCTOBER 26, 2020

PORTSMOUTH, NH  
TIME: 6:30 PM

Remote Meeting via Zoom Conference Call

### **I. CALL TO ORDER**

Mayor Becksted called the meeting to order at 6:31 p.m. and read the following:

Per NH RSA 91-A:2 III (b) the Chair has declared COVID-19 Outbreak an emergency and has waived the requirement that a quorum be physically present at the meeting pursuant to the Governor's Executive Order 2020-04, Section 8, as extended by Executive Order 2020-20, and Emergency Order #12, Section 3. Members will be participating remotely and will identify their location and any person present with them at that location. All votes will be by roll call.

### **II. ROLL CALL**

Present: Mayor Becksted, Assistant Mayor Splaine, Councilors McEachern, Whelan, Lazenby, Kennedy, Huda, Tabor and Trace.

Also Present: City Manager Karen Conard, City Attorney Robert Sullivan, and Legal Secretary Marian Steimke.

### **III. INVOCATION**

Mayor Becksted asked for a moment of silence during these uncertain times that everyone continue to stay safe and well.

### **IV. PLEDGE OF ALLEGIANCE**

Mayor Becksted led in the Pledge of Allegiance to the Flag.

### **V. BOARD OF ETHICS REPORT**

Mayor Becksted referenced the report and asked if anyone felt they were under obligation to recuse themselves from this matter to please speak. He added they would get the matter resolved that night.

Mayor Becksted asked Councilor Tabor to give a summary of the Board of Ethics report. The Mayor then said he would ask Councilor Kennedy to speak.

Councilor Tabor spoke about the letters he and Councilor Lazenby received from Councilor Kennedy's attorney, Duncan McCallum demanding recusal. Councilor Tabor described his letter and said he would not recuse.

Councilor Tabor continued with his summary. He said the Ethics Board was asked to determine if Councilor Kennedy, by registering the tradename Popup 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 a Councilor – i.e., did she undermine the efforts of the Council.

Councilor Tabor listed the members of the Board of Ethics: Commissioner Tom Hart, Commissioner Richard Gamester, Member Ann Walker and himself as Chair. He spoke about the three meetings that the Board held, with one night for each of Nancy Pearson and Councilor Kennedy to speak, with cross examination of each and the third night for final statements and deliberation. The Board voted 4-0 to find a violation existed in Councilor Kennedy's actions. He summarized the four specific findings that the Board found:

- 1) Councilor Kennedy had a direct interest in the outcome;
- 2) Identification of the conflicts;
- 3) The Board found she could have addressed her concerns in more productive ways and deliberately did not tell others; and
- 4) The testimony that the Pop Up was not illegal.

Councilor Tabor said Councilor Kennedy maintained she was not able to speak to the Task Force. Councilor Tabor asked City Attorney Sullivan if the City's Nonintervention Clause of the City Charter would have prevented Councilor Kennedy from speaking to the Task Force.

City Attorney Sullivan said the Nonintervention Clause is intended to keep politics out of the day to day operation of the City government installing a barrier between the elected officials and the City staff. This really means that Councilors cannot talk to people that work for the City Manager without the City Manager's approval. City Attorney Sullivan verified that the Task Force does not work for the City Manager.

**Councilor Tabor moved that the Council accept the report and findings of the Board of Ethics as part of the process under the Ethics Ordinance so that the Council can move on to determine which action to take as a Council. Councilor Lazenby seconded the motion.**

**On a roll call vote 6-3, the motion *failed*. Assistant Mayor Splaine, Councilors Whelan, Kennedy, Huda, Trace and Mayor Becksted voted opposed. Councilors McEachern, Lazenby and Tabor voted in favor.**

Mayor Becksted gave an opportunity for the accused to speak to her fellow Councilors.

Councilor Kennedy shared a screen. She said she wanted to give the rationale of why she did what she did and to give the outcomes of what she did. She spoke about her knowledge of using federal funds, and CARES act money. She spoke about the chronology of events including the formation of the entity.

Councilor Kennedy spoke of her concerns. She said the City was providing services to a non-entity. She discussed the Seacoast Repertory Theatre as fiscal sponsor and her concerns about proper insurance. She was also concerned that 12 out of 15 businesses were not Portsmouth-based businesses. She believed it was her duty to protect City funds. She said the pop-up group found out on July 19<sup>th</sup> about her registration of the name Popup Portsmouth and one day later by July 20<sup>th</sup> they formed Popup NH. The Councilor said she had brought up her concerns with the City Manager and with other Councilors.

Mayor Becksted asked if anyone else had anything to say.

**Councilor Lazenby moved to accept the report of the Board of Ethics and to censure Councilor Kennedy for violating Section 1.802A of the City Code of Ethics. Councilor McEachern seconded.**

Discussion on motion:

Councilor Lazenby asked for clarification from City Attorney Sullivan regarding the standards for recusal and if it was correct there is no provision in the City Ordinance for the City Council to make a decision on recusal. For example, with Councilor Kennedy being the subject of the violation, there is no provision that gives City Council the power over Councilor Kennedy's decision to not recuse herself, essentially giving her the opportunity to be her own jury. Is that correct, he asked. City Attorney Sullivan answered that was correct.

Councilor Lazenby asked for further clarification regarding Mayor Becksted's recusal earlier in the process due to having family that worked for Councilor Kennedy, and not recusing himself at this point in the process – that it is up to him and not something that the Council has any influence over, is that correct? City Attorney Sullivan answered that was correct.

Councilor Lazenby commented that the appeal which Councilor Kennedy just presented was unexpected, as the prior appeal occurred under oath with an opportunity for response. He added that Councilor Kennedy did not speak to the actions she took that were the subject of the complaint and the hearing. Councilor Lazenby discussed the process that began with an ethics complaint being filed. He said Councilor Kennedy intervened on her own to take action, and it was the reason they were there that night.

Councilor Lazenby said the Council did not hear about the steps that were the subject of the Board of Ethics hearing. He added that the Council was there now to review what went on and figure out what to do about it. He said in thinking about what was best for the City we must respect the process in the ordinance. He said the Board of Ethics found one of our officers acted in a way that was in violation of our code. He spoke about the responsibility of the Council, the volunteers of Popup doing their best and cooperating, and in viewing the video he thought the system had been working fine. He said the Council has a role in setting a precedent, as this would be referred to in the future. He believed a consequence that fits the offence would be appropriate. He spoke about the options for action as dictated by the City ordinance, where innocence of wrongdoing was not appropriate since the Board of Ethics unanimously found Councilor Kennedy in violation. Removal from office would not fit the offence either. The Council should acknowledge the significance of the action via censure, he said.

Lastly, Councilor Lazenby spoke of the threat of litigation he received via letter from Duncan MacCallum, attorney for Councilor Kennedy. He was disappointed in that attempt by Councilor Kennedy and her attorney to coerce him and Councilor Tabor to recuse themselves from the process, he said. This, Councilor Lazenby said, should be addressed by the Council and he hopes it will be. For that night, however, the Council must determine sanctions for the violation, and he repeated censure would be the appropriate action for the Council to take.

Councilor Huda said she disagreed with the Ethics Board decision, and she does not want to accept the report. She said the Board of Ethics put little effort into verification and validation of data and statements by Ms. Pearson. She spoke about the events that were of concern to her including Popup not being an entity and contradictions she heard during testimony. She said this should have been reported to the Secretary of State and to the IRS, but said Councilor Kennedy did the nice method and gave Popup a chance to actually file. Councilor Huda referred to the report she submitted. She does not think that Councilor Kennedy should be punished for bringing the facts to light. She does not think that Councilor Kennedy benefited financially by this action and said Councilor Kennedy saved the City from liability.

Councilor Huda offered an Amendment to Councilor Lazenby's motion: she would move to find Councilor Kennedy innocent of any wrongdoing and exonerate her of all of this.

Assistant Mayor Splaine suggested to first vote on the motion made by Councilor Lazenby and then have a standalone motion, and Councilor Huda agreed.

Mayor Becksted stated that the motion seeks to approve and accept the findings. He asked City Attorney Sullivan if Council can go back into a motion since that was just voted down. City Attorney Sullivan answered that the Mayor would rule that part of the motion out of order.

**Councilor Lazenby revised his motion and moved to censure Councilor Kennedy for violating Section 1.802A of the City Code of Ethics. Councilor McEachern seconded.**

Discussion on Revised Motion:

Councilor Whelan asked how the Council could implement any action if they were not accepting the report of the Ethics Board. City Attorney Sullivan said there is no requirement in the Ordinance that the Council must accept the findings of the Board of Ethics. The Board made the findings, they are of record and the report exists. The Council can offer its viewpoint of those findings by voting. That is not the telling action that has to happen. The Council must pick one of the options out of the Ordinance. Councilor Lazenby offered one of the options out of the Ordinance via motion, he said.

Mayor Becksted asked what a censure means. City Attorney Sullivan said if the Council should vote to censure Councilor Kennedy, it would amount to a public statement saying the Council believes she has violated the Code of Ethics, and it is a criticism of her conduct. Essentially she would be guilty simply by the Council voting on a sanction.

Councilor McEachern was disappointed the Council did not accept the work of other elected officials. He's frustrated that Councilor Kennedy acted independently and this was discussed on social media. This has created a partisan atmosphere between new and old Council. He spoke of how hard the Popup volunteers worked to get running. While they faced challenges, he cannot accept that two wrongs make a right. Councilor Kennedy chose to remedy the situation through her own ways. He supports the Board of Ethics conclusion. He said it is Council's job to act in public and to represent the City of Portsmouth transparently. We must act as the best of our City because we represent it. When we err, we must admit so. We must vote to censure Councilor Kennedy's actions.

Councilor Tabor summarized the subtleties the Board of Ethics had considered. The Rep (Seacoast Repertory Theatre) was the fiscal sponsor and was the custodian of the donations. The Popup filed on July 2<sup>nd</sup> via LegalZoom to create the entity. There was a hold up with the previous 2015 use of the popup name, and this delayed their use of that name. Councilor Tabor stated it was an important distinction that Councilor Kennedy acted on her own. He added the Board of Ethics only needed Councilor Kennedy's own testimony to determine their conclusion. He believes Councilor Kennedy was advocating for the taxpayers, but the Board of Ethics found there were serious mistakes that undermined operation of Council. One Councilor cannot just go around the Council or a committee like the Task Force – to which the Council had given oversight responsibilities – and act as a lone wolf. The people that elect us expect us to work together and not act as a lone wolf. He provided the examples of what if someone decided to act independently and work around the McIntyre Subcommittee or City staff regarding the Boyle litigation. Censure would be appropriate if this were to happen, he stated. Councilor Tabor read the definition of censure as being "the official expression of disapproval" and that is all – so he supports the motion. He added another finding of the Ethics Board: could Councilor Kennedy have gone to City Attorney Sullivan, to Mayor Becksted to ask for a special meeting or could she have gone to the Council.

Assistant Mayor Splaine thanked Councilor Kennedy for what she did. He disagreed with Councilor Tabor on this point: The Assistant Mayor said there should never be an attitude to just go along if you disagree. He respects the work of the Board of Ethics, he watched all the meetings and read all the testimony. He very much respects the City Attorney and said they spoke for five hours weeks before to discuss the initial complaints to determine if they had merit to go on to the Board of Ethics. They found that a transaction had occurred, not that a violation had occurred. He spoke about the history of Ethics Boards and said it was important to go forward with the complaint to have the conversation and not seem to contribute to a cover-up. He added the Council should revisit the Conflict of Interest Code because it didn't make sense. Assistant Mayor Splaine said Councilor Kennedy did not benefit in any way from this. He talked about the times in his experience where he blew the whistle and the repercussions of each. He said he does not think Councilor Kennedy should be punished for this action, since there was no wrongdoing.

Mayor Becksted said he appreciated Assistant Mayor Splaine's views. The Mayor said he had many conversations with City Attorney Sullivan. The Mayor said he did not like the ethics process and added it was hard for him to sanction someone because he didn't see what the violation was. He referred to the statement made by the Popup group: due to the delay, Councilor Kennedy cost the organization \$25,000. The Mayor wondered how would that be possible. What we are all going through is no easy task. He wants this Council to fix the process and after this is done, continue to move forward with the best interest of the City, working together and using this as a lesson. He does not feel that Councilor Kennedy committed any ethics violation.

Councilor Lazenby said if we were to be looking at Councilor Kennedy's action as whistle blowing, it would have been good to see a video of her speaking to the Council to bring up her concerns, but it didn't happen. Councilor Lazenby said he brought up his concerns in the past about the new garage to the entire Council. This should have been an open discussion. Instead Councilor Kennedy did not blow the whistle, she took independent action without Council support, which was not whistle blowing. He agrees that the Council should look at the ethics review process. There will be a chilling effect on people being willing to raise their hand to say a Councilor did something that must be reviewed. Nancy Pearson was a whistle blower, she was put through the gauntlet and now it is looking like the Council will ignore the process. This is very disappointing.

Assistant Mayor Splaine said we are citizens first when we are elected as Councilors. We should be willing to stand up and speak out when we see something wrong.

Councilor McEachern said the Ethics Board looked at Councilor Kennedy's actions. She could have called the Popup group and said if you don't register this by tomorrow I'm going to register this name. Or she could have told any one of the Councilors. He said he did not see this as being a whistle blower. It placed her as an individual in a position to make demands. He is disappointed the Council will not accept the Ethics Board report.

Councilor Tabor said to keep the record straight, the Popup folks walked back the \$25,000 loss statement. He agreed with Councilor McEachern that it was in the way this action were taken. Volunteers were denied a fair chance to reply about the incorporation concern – there was no fair way to answer the charge. The volunteers were taken by surprise, and there were no efforts to use the arms of City government to get this addressed. Councilor Tabor does not want this to be the way that business is conducted. He agrees the Council are citizens first and understands Councilor Kennedy's intent, but it was done in a way that was unfair to the folks organizing the popup. Popup accomplished its goals and it generated revenue. He said it was unfortunate how it was done – the folks that pitched in and did their best never had a chance to reply to the accusation until they were threatened.

Councilor Huda responded saying the crux is: was this legal. Were we dealing with an entity. Getting a tradename is not a lengthy process. The Popup group had a month or longer to register. Popup needed to follow the law like everyone else. That is getting lost here, she said. We need to look at what was really happening. But everyone has to obey the law. To Councilor Tabor, Councilor Huda said even when the opinion of a tax lawyer was given, she's not sure he's clear on the difference between fiscal sponsorship and fiscal agency.

Councilor McEachern said to Councilor Huda: he understands her issue comes from legality of the actions taken by Popup NH, but it did not excuse Councilor Kennedy's actions and the actions she took outside the Council when a phone call to the organization could have solved this.

Councilor Tabor asked if Councilor Kennedy must be recused from this vote and City Attorney Sullivan answered that Councilor Kennedy determines if she votes or not.

*[Revised motion repeated here: **Councilor Lazenby revised his motion and moved to censure Councilor Kennedy for violating Section 1.802A of the City Code of Ethics. Councilor McEachern seconded.]***

**On a roll call vote 6-3, the motion failed. Assistant Mayor Splaine, Councilors Whelan, Kennedy, Huda, Trace and Mayor Becksted voted opposed. Councilors McEachern, Lazenby and Tabor voted in favor.**

**Councilor Huda moved to find Councilor Kennedy innocent of all wrongdoing and exonerate her of all charges. Seconded by Councilor Trace.**

#### Discussion of Motion:

Councilor Trace talked about the process and that Councilor Kennedy was denied a fair trial. The Councilor has the right to face her accuser and was not given that opportunity. This created an environment that was not overseen properly. For example, Ms. Pearson was not sworn in for 90% of her testimony. Councilor Trace thanked the Board of Ethics for the hours they put in, she thinks they did their best, but she believed there was misinformation that was not clarified. She referenced her two page letter and talked about the Zelin Affidavit that the Ethics Board voted to be irrelevant and which should have been posted on the City website. She said it was troubling that the Board of Ethics censured that document. Councilor Trace read the last two paragraphs of her letter in which she said Councilor Kennedy did not do anything wrong and did not delay the start of the Popup, but instead acted as a whistle blower. She said the Board of Ethics process was flawed including two violations of the 1<sup>st</sup> and 14<sup>th</sup> Amendments of the US Constitution. Councilor Trace added she was thrilled with the use of Bridge Street but she agrees with Assistant Mayor Splaine that the ethics procedures need to be completely revamped in the future. She believes Councilor Kennedy is innocent.

Councilor Whelan said the complaint never should have reached the Board of Ethics. It should have been quashed by City Attorney Sullivan and Assistant Mayor Splaine, he said. He added the code was originally written to address people benefiting from violations. We have better things to do with our time, and we need a total rewrite of this ethics law, he said. Councilor Whelan said he reads but does not post on Facebook, as he finds it very destructive in our community. This effort for popup should have been celebrated by everyone – it should not have been divisive. He will vote to support Councilor Kennedy and her efforts and not to damage her – there has been enough damage already to both the accused and to the accuser. It is time to stop, he said.

Assistant Mayor Splaine said the City would have been covering up something if we didn't give Councilor Kennedy a chance to discuss what she did and why. He said the five hours of meetings with the City Attorney were very productive and the Assistant Mayor said he learned a lot from City Attorney Sullivan,

who he said has a brilliant legal mind. He said they wrestled with the issue of “transaction” in the Ethics Ordinance and it underscores the value of revisiting the ordinance. The Code of Ethics needs to be made better. We needed to undertake this process so that citizens feel they can make a complaint, but we need to revisit the code to make something better out of it.

Councilor Lazenby said he was disappointed. The ordinance we have is the ordinance we have, he said and added the City has been following this process in good faith. The Board of Ethics reached a unanimous conclusion, and part of that conclusion was that Councilor Kennedy had different options, and that the ends don’t justify the means. This action will unfortunately set a precedent that the ends do justify the means, which was disappointing, he said. We should be following a clear simple path.

Councilor Tabor referenced the Zelin affidavit. In tackling the issue of whether to include this document the Ethics Board had to decide what relevant testimony was and was this affidavit relevant to whether the Councilor acted in a way that undermined the intent of the Council. The Board found that the affidavit had nothing to do with that question. It was vigorously denied by two parties that were named in it, and it was all based on one unnamed source that refused to be attributed. That is a dangerous path to go down with something that is not relevant.

Councilor Trace said to Councilor Tabor, that as Chair, it would have been better if you had given Councilor Kennedy the chance to explain to the Board the reason she felt the affidavit was appropriate for her. Councilor Tabor responded that her attorney did so.

Councilor McEachern said he was disappointed the Council was going down the path of finding Councilor Kennedy innocent of all wrongdoing. He added he was also disappointed the Council didn’t see Councilor Kennedy’s actions as a transgression. If the Council had done the right thing and censured the act, not the individual, we would be moving forward as a Council in a much better way than now. He said with public office you take all the arrows, but you get none of the credit, but you move forward. He does not want to set an example that if I don’t like the rules they can be disregarded. He said we should have met this head on as a Council and worries about their ability to move on now.

*[Motion repeated here: **Motion by Councilor Huda to find Councilor Kennedy innocent of all wrongdoing and exonerate her of all charges. Seconded by Councilor Trace.**]*

**On a roll call vote 6-3, the motion passed. Assistant Mayor Splaine, Councilors Whelan, Kennedy, Huda, Trace and Mayor Becksted voted in favor. Councilors McEachern, Lazenby and Tabor voted opposed.**

## **VI. ADJOURNMENT**

**At 8:38 p.m., Councilor Huda moved to adjourn, seconded by Councilor Whelan and voted. On a unanimous roll call 9-0, motion passed.**

Respectfully submitted by:  
Marian Steimke, Legal Secretary