

# NEBRASKA MUNICIPAL REVIEW

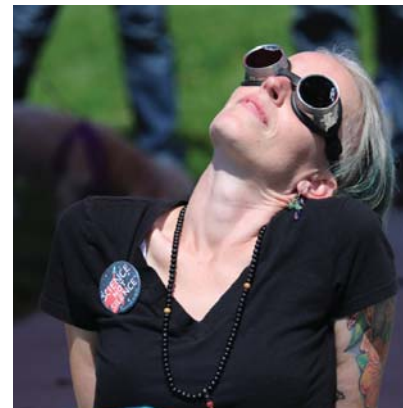
■ Dedicated city staff, collaboration key to success in bringing poultry processing plant to Fremont

■ Sidney celebrates 150th anniversary

■ Attractions, services make South Sioux City a growing, vibrant community

SEPTEMBER 2017

## *Nebraska communities embrace thrilling solar eclipse*



*A total solar eclipse Aug. 21 that moved across the United States like a sash left Nebraskans and those in its path in awe. For a brief time, we were drawn together to enjoy one of nature's finest displays.*

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September 2017

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*Top left: Total solar eclipse. Photo by © Thinkstock.com.*

*Top right: Photo of Columbus City Clerk Janelle Kline and her family watching the eclipse at a campground by Callaway and Arnold. Photo submitted courtesy of Kline.*

*Bottom left: Students in Sidney viewing solar eclipse. Photo by Lori Borchert, Sidney Bookkeeper/Webmaster.*

*Bottom right: Woman viewing eclipse in Broken Bow. Photo by Broken Bow Chamber of Commerce. Photo submitted courtesy of Brent Clark, City Administrator, Broken Bow.*

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## CALENDAR

Utilities/Public Works Section Annual Conference .....Jan. 17-19, 2018, Cornhusker Marriott Hotel, Lincoln  
Midwinter Conference.....Feb. 26-27, 2018, Cornhusker Marriott Hotel, Lincoln

## Municipal Legal Calendar

(All statute citations to Revised Statutes of Nebraska)

### SEPTEMBER 2017

#### CITIES OF THE FIRST CLASS

Within 10 days following meeting or before next meeting (whichever is sooner) .....	Clerk to have minutes available for public inspection. (84-1413)
Within 15 days of Passage.....	Clerk publishes ordinances passed. (16-405)
Within 30 days of Council meeting .....	Clerk publishes official proceedings of meeting, including claims. (19-1102)
On or before September 1 .....	City Council determines final allocation of levy authority for its subdivisions (77-3443)
On or before September 20.....	File adopted annual or biennial budget statement with County Clerk and State Auditor's Office. (13-508)
Within 20 days after end of month.....	Treasurer files monthly financial report. (16-318)
Last Day.....	End of Fiscal Year (16-701)
* * .....	Clerk must prepare agenda prior to next Council meeting. (84-1411)

#### CITIES OF THE SECOND CLASS

Within 10 days following meeting or before next meeting (whichever is sooner) .....	Clerk to have minutes available for public inspection. (84-1413)
Within 15 days of Passage.....	Clerk publishes ordinances passed. (17-613)
Within 30 days following Council meeting .....	Clerk publishes official proceedings of meeting, including claims. (19-1102)
On or before September 1 .....	City Council determines final allocation of levy authority for its subdivisions (77-3443)
On or before September 20.....	File adopted annual or biennial budget statement with County Clerk and State Auditor's Office. (13-508)
Within 20 days after end of month.....	Treasurer files monthly financial report. (17-606)
Last Day.....	End of Fiscal Year (17-701)
* * .....	Clerk must prepare agenda prior to next Council meeting. (84-1411)

#### VILLAGES

Within 10 days following meeting or before next meeting (whichever is sooner) .....	Clerk to have minutes available for public inspection. (84-1413)
Within 15 days of Passage.....	Clerk publishes ordinances passed. (17-613)
Within 30 days following Trustees' meeting.....	Clerk publishes official proceedings of meeting, including claims.(19-1102)
On or before September 1 .....	Village Board determines final allocation of levy authority for its subdivisions (77-3443)
On or before September 20.....	File adopted annual or biennial budget statement with County Clerk and State Auditor's Office. (13-508)
Within 20 days after end of month.....	Treasurer files monthly financial report. (17-606)
Last Day.....	End of Fiscal Year (17-701)
* * .....	Clerk must prepare agenda prior to next Council meeting. (84-1411)

**Nebraska Municipal Review Editor and Advertising Sales: Lynn Marienau, 402-476-2829 or lynn@lonm.org**

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## U.S. Supreme Court hopefully will consider a recent South Dakota case involving collection of state and local sales tax that is already owed, but not being collected by most online retailers!

BY L. LYNN REX, EXECUTIVE DIRECTOR, LNM

**A**s hoped and predicted, the South Dakota Supreme Court on Sept. 14, 2017, ruled that a state law requiring out-of-state retailers to collect state and local sales tax is unconstitutional. South Dakota will ask the U.S. Supreme Court to hold that the state law is constitutional, by overriding the precedent the U.S. Supreme Court established in its 1992 ruling in *Quill Corp. v. North Dakota*.

The South Dakota Legislature passed a law to structure this test case to present this critically important issue to the U.S. Supreme Court. Congress has been unwilling to address the issue and many state legislatures have been reluctant to act until the U.S. Supreme Court reconsidered its 1992 ruling in *Quill*. In *Quill*, the U.S. Supreme Court ruled that states cannot require retailers (remote sellers) to collect sales tax if there is no “physical presence” in the state. **The *Quill* decision has resulted in out-of-state online retailers having an unfair competitive advantage over local “brick and mortar” retailers who pay property taxes, sales taxes, income taxes and significantly contribute to their respective communities.** As South Dakota Attorney General Marty Jackley stated, the U.S. Supreme Court should reconsider its 1992 ruling in *Quill* “in light of the extraordinary growth of the internet and the exponential technological advances that have been made in the last quarter century.”

As of Jan. 27, 2017, a total of 35 bills have been introduced in 17 states (including Nebraska) to promote broader collection of state and local sales taxes, which are already legally due and payable. It has been estimated that states lost more than \$26 billion of revenue in 2015 alone. Amazon has agreed to voluntarily collect state and local option sales tax on the products it sells, but the overwhelming majority of online retailers do not do so. **Amazon’s decision to voluntarily collect state and local option sales tax on products it sells will result in more than \$11 million annually for**

**the state alone. Passage of LB 44, introduced by Syracuse Sen. Dan Watermeier in the 2017 session, would have increased revenue for the State of Nebraska by an additional \$30-\$40 million annually; the local option sales tax revenue collected would be in addition to the \$11 million and \$30-\$40 million annually collected for the state. Nebraska State Tax Commissioner Tony Fulton announced in August that Nebraska is one of 17 states willing to make a deal with companies that sell their products through Amazon’s marketplace. The Multistate Tax Commission is offering a special, limited “voluntary disclosure initiative” from August 2017 to October 2017 to encourage companies to voluntarily collect sales taxes in the future by waiving any previous sales tax liability the companies may have.**

LB 44 is on Select File with an amendment pending by Sen. Watermeier to address concerns raised by Nebraska’s Attorney General. The League will continue working closely with Sen. Watermeier, the Nebraska Retail Federation and many other statewide organizations to pass LB 44 in the 2018 legislative session.

Before being confirmed to the U.S. Supreme Court, Judge Gorsuch, in *Direct Marketing Association v. Brohl*, implied that the U.S. Supreme Court should overturn the *Quill* case to enable state and local governments to collect sales tax from remote sellers. As a member of the U.S. Supreme Court, Judge Gorsuch may well be the deciding vote to overturn the *Quill* case.

Four of the nine U.S. Supreme Court justices hopefully will agree to take jurisdiction of the South Dakota case; if so, a decision could be rendered by the U.S. Supreme Court sometime in June 2018. Thanks to the National League of Cities and the State and Local Legal Center for keeping state and municipal leagues informed of the issues and progress on this important case. ■



## Helping Nebraska grow through Workforce Innovation

BY GOV. PETE RICKETTS



Nebraska's talented workforce and great job opportunities are two pillars that have helped make our state the best place in the world to live, work and raise a family. While Nebraska has boasted low unemployment relative to other states in recent years, our state hit a new landmark this summer. In July, Nebraska posted its lowest unemployment rate since 2000 at 2.8 percent, the fourth best unemployment rate in the nation.

While our state's unemployment is at the lowest point in almost two decades, many Nebraskans are still looking for new opportunities. Whether it's someone looking to reenter the workforce or someone looking for a job that better fits his or her skills, Nebraska's low unemployment rate means there are lots of open opportunities that job creators are looking to fill.

One way in which we're helping to connect Nebraskans to these opportunities is our innovative reemployment program, NEres. Participation in NEres is not only required for anyone receiving unemployment benefits, but it's also open to Nebraskans looking for new employment opportunities. Through NEres, unemployed Nebraskans are given personalized help in their job searches, often with amazing results. Nebraskans who are enrolled are better able to identify their goals and get back to work more quickly.

David is one of many individuals who has been helped by NEres. David worked in a grant-funded position, which was eliminated after the grant expired in 2016. After enrolling in some sessions with his job coach, David secured a position as an information technology specialist for a local community college.

In addition to NEres, my administration has launched other innovative workforce initiatives to connect Nebraskans to new employment opportunities. Our Department of Labor (DOL) is partners with Health and Human

Services to help Nebraska's families receiving SNAP (Supplemental Nutrition Assistance Program) benefits find better job opportunities. The SNAP reemployment program provides résumé writing support, sessions on how to search for a job and job interview coaching among other opportunities.

Both of these programs are not only connecting Nebraskans to better opportunities, but they also are helping Nebraska's job creators identify the talent they need. It can be difficult to find a qualified candidate, especially in a low unemployment climate like Nebraska's. These programs make it easier for businesses to find individuals who will contribute to their success.

Innovative programs like these are helping solidify Nebraska's ranking as a great place to do business. *Forbes Magazine* ranks Nebraska as the third best state in the United States for business. The workforce is a key part of any business climate and an area we must continue to work on to maintain this ranking, which has made our state an attractive place for investment by nationally-recognized brands as well as startups.

In recent weeks, 25 Nebraska companies were recognized by *Inc. Magazine* as some of the fastest growing in the nation. Startups like Hudl and Spreetail are now hubs for high-tech employment. These companies invite young talent from across the nation and provide opportunities for our university graduates here at home.

Whether you're seeking employment, searching for talent or looking to grow a new or established business, Nebraska is the best place in the world to grow your career or company. My team continues to develop strategies to support growth opportunities for Nebraska's workforce and job creators. ■



## Seventh Circuit rules in favor of municipality on overtime pay claim for BlackBerry usage

BY JERRY L. PIGSLEY, WOODS & AITKEN LLP,  
LONM LABOR AND EMPLOYMENT LAW COUNSEL

The U.S. Court of Appeals for the Seventh Circuit recently affirmed a judgment of the district court in favor of the City of Chicago regarding a Fair Labor Standards Act (FLSA) collective action. *Allen v. City of Chicago*, Case No. 16-1029 (7th Cir., Aug. 3, 2017).

### BACKGROUND

Current and former members of the Chicago Police Department Bureau of Organized Crime (city) claimed that the city did not compensate them for work they did off duty on their mobile electronic devices (BlackBerrys). The district court judge found the city did not prevent the employees from requesting payment for such non-scheduled overtime work and did not know that employees were not being paid for it.

### STANDARDS

The appellate court set forth the following standards that apply when an employer asserts that it did not know of the overtime work for which employees claim they were not paid.

The FLSA defines “employ” broadly, as “to suffer or permit to work.” This broad definition “helps prevent evasion by employers who might seek to issue formal written policies limiting overtime that are widely violated or

*It is important to have a written policy on the municipality’s process for compensating off-duty work performed using such devices, which may be owned by the municipality or by the employee.*

who might deliberately close their eyes to overtime work their employees are doing.” Accordingly, municipalities must pay for all work they know about, even if they did not ask for the work, even if they did not want the work done and even if they had a rule against doing the work. According to the circuit court, if the municipality “does not want to pay overtime, its management ‘exercise its control and see that the work is not performed.’” The appellate court recognized this strict rule has a limit. “It ‘stops short of requiring the employer to pay for work it did not know about, and had no reason to know about.’”

### DILIGENCE

The court stated the municipality can exercise diligence by establishing a reasonable process for an employee to report uncompensated work time. For example, giving employees a rea-

sonable time to record their overtime work. The court cautioned that a municipality’s formal policy or process for reporting overtime will not protect the municipality if the municipality prevents or discourages accurate reporting and practice. For example, telling employees that they should not record their overtime hours and that the municipality will not pay overtime. Another more subtle example: employees’ jobs demand long and irregular hours, but their supervisors insist that all work be completed within certain defined time limits.

### CITY NOT LIABLE

The City of Chicago was able to show the court that many of its employees were paid overtime and many did not submit “time due slips” to their supervisors for off-duty work done on the BlackBerrys. But the court found

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the supervisors did not know or have reason to know that the employees were not submitting slips and therefore were not being paid for that work. The court found the employees never told their supervisors that they were not being paid for such work.

The court found no one ever told the employees not to submit slips for the work, nor was anyone ever reprimanded or disciplined for submitting time slips. Accordingly, the court found the employees had not shown that the city maintained an unwritten policy to deny them compensation for off-duty BlackBerry work.

## **GUIDANCE**

This decision provides helpful guidance to municipalities on the potential overtime pay issue for your non-

exempt employees associated with their smart phone or other electronic device usage outside regular working hours on work-related matters. It is important to have a written policy on the municipality's process for compensating off-duty work performed using such devices, which may be owned by the municipality or by the employee. The policy should not tolerate any effort to discourage employees from reporting overtime for management approval. ■

*Editor's Note: This article is not intended to provide legal advice to our readers. Rather, this article is intended to alert our readers to new and developing issues and to provide some common sense answers to complex legal questions. Readers are urged to consult their own legal counsel or the author of this article if the reader wishes to obtain a specific legal opinion regarding how*

*these legal standards may apply to their particular circumstances. The author of this article, Jerry L. Pigsley, can be contacted at (402) 437-8500, [jpigsley@woodsaitken.com](mailto:jpigsley@woodsaitken.com), or at Woods & Aitken LLP, 301 S. 13th Street, Suite 500, Lincoln, NE 68508-2578.*



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# Dedicated city staff, collaboration key to success in bringing Costco poultry processing plant to Fremont

■ **BY LYNN MARIENAU**  
COMMUNICATIONS DIRECTOR  
LNM ■

On a cloudy summer day in August, heavy equipment worked steadily on 414 acres of land in Fremont, known as Hills Farm, to prepare it for a \$300 million poultry processing plant, hatchery and feed mill facility for Costco. Expected to open in April 2019, the facility will have an overall economic impact of \$1.2 billion annually and create about 800 new jobs. When completed, the Costco site will be the City of

Fremont's largest customer for water, sewer, electric and gas services.

Dedicated city staff, collaboration with other local government entities and the involvement of key organizations such as the Greater Fremont Development Council, the Greater Omaha Economic Development Partnership and the Nebraska Departments of Agriculture, Economic Development and Transportation were vital to the success of the project.

Fremont Mayor Scott Getzschman, who has been immersed in dozens of meetings, public hearings and intense work involving the project,

said Nebraska's central location and abundance of corn and soybeans to feed the chickens works well for Costco, whereas in other areas, the company would have to transport the feed by rail. Costco also wanted a state that was new to poultry production to teach producers the company's best practices rather than having to break old patterns.

"They are just extremely excited about being located in eastern Nebraska and the impact it will have," Mayor Getzschman said, adding that "\$1.2 billion annually is a big kick to

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*Groundbreaking ceremony in June. From left: Lincoln Premium Poultry Executive Bill Crider, former state Sen. David Schnoor; Fremont Business Improvement District 1 Board Member Bob Missel; Costco Vice President of Real Estate Jackie Frank; Senior Vice President of the Greater Omaha Economic Development Partnership; Randy Thelen, Nebraska Department of Agriculture Director Greg Ibach; Nebraska Department of Economic Development Director Courtney Dentlinger; Gov. Pete Ricketts; Costco Director of Strategic Planning and Development Jonathan Luz; Mayor Scott Getzschman; Keep Fremont Beautiful Board Member Scott Schaller; Greater Fremont Development Council Executive Director Cecilia Harry; Fremont Chamber of Commerce Chairperson Bill Vobejda, State Sen. Lynne Walz; and, Lincoln Premium Poultry Project Manager Walt Shafer. Photos provided by Jessica Kolterman, External Affairs, Lincoln Premium Poultry.*



*Continued from page 8*

the state's economy."

It might have gone differently. In April 2015, during what city officials described as a 10-minute inspection, the Fremont site was dismissed (before city officials even knew the identity of the company) because it was in a floodplain. A year later, after village officials removed nearby Nickerson from consideration, the company looked anew at Fremont. An engineering firm's study in the meantime had indicated that the site could be elevated and raised out of the floodplain, relieving the company's initial concern.

### **Funding elevation**

To help fund elevation of the site, the city annexed the site and had a blight and substandard study completed so that the project was eligible for tax increment financing and LB 840 funds. During this time, various meetings were convened, including planning and zoning commission and a Sanitary and Improvement District (SID). Weekly meetings also were held by what came to be known as "Team Nebraska." The team was comprised of representatives from city, state and county government, community leaders from economic development and local chambers and A-FAN (Alliance for the Future of Agriculture in Nebraska). The team met for several weeks to work on the project, known by its code name of "Rawhide," which city officials said had no connection to nearby Rawhide Creek. (Company officials could not divulge their identity initially.)

They worked on problems as they arose and reached out to citizens. The



*From left: Fremont Wastewater Treatment Plant Superintendent Keith Kontor; Fremont Department of Utilities Assistant General Manager Troy Schaben; Fremont Director of Planning Troy Anderson; Fremont Director of Electrical Engineering Al Kaspar; Mayor Scott Getzschman; and, Fremont City Administrator Brian Newton. Staff photo.*

goal was to inform, educate and build support for the project against a backdrop of what was later determined to be a small, but vocal minority who opposed it.

Barb Pierce, Director of Existing Business, Greater Fremont Development Council (GFDC), said different organizations and governmental bodies adopted resolutions supporting the processing facility, including Nebraska Farm Bureau organizations in seven surrounding counties, the Fremont Area Young Professionals and the Greater Wahoo Development Foundation.

### **Maintained email list**

Pierce said the GFDC maintained a large email list of supporters who were contacted regularly and provided with information, if requested.

"The company could see we were collaborating," Pierce said. "There were very committed people from each of the public entities. That is what made

this so successful."

Jessica Kolterman, External Affairs, Lincoln Premium Poultry, which will be operating the plant for Costco, said the city and project supporters had to engage with citizens to highlight what the project would do for the local economy. At that time, Kolterman worked for the Nebraska Department of Agriculture to promote the project's estimated \$1.2 billion financial impact, which represents about 1 percent of the state's overall economy.

### **Raised environmental concerns**

Opponents raised environmental concerns about pollution, particularly water pollution. Those concerns extended to the City of Lincoln, where some residents were concerned that Lincoln's well fields could potentially have been affected by the Fremont plant. Mayor Getzschman and Brian Newton, Fremont City Administrator, said Fremont city officials visited with

*Continued on page 10*

# Dedicated city staff, collaboration key to success in bringing Costco poultry processing plant to Fremont

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Lincoln city officials at least twice to address their concerns.

Costco and Lincoln Poultry will receive permits from the Nebraska Department of Environmental Quality (DEQ) and company officials have met with the U.S. Fish and Wildlife Service and the Nebraska Game and Parks Commission, which Kolterman said have acknowledged the company's appropriate due diligence concerning the facility's environmental impact. The plant will have what is termed a closed-loop system for wastewater disposal, which means that all wastewater from the plant will be collected and pre-treated before moving into the city's processing facility, where it will be treated again. The system meets or exceeds DEQ and City of Fremont wastewater requirements. In addition, Newton said, Fremont ratepayers will benefit from lower rates and improved infrastructure.

## State permits required

Kolterman said Costco and Lincoln Premium Poultry are requiring chicken farmers to apply for a state environmental operating permit through DEQ, that isn't required by law, to ensure the highest level of accountability for environmentally sound practices. Chicken farmers also must comply with other requirements concerning nutrition and litter disposal.

A list of 260 farmers, who said they would be interested in raising chickens, has given Costco confidence in the grower base in the area once the plant is fully operational, she said, adding that the site is expected to produce 2 million chickens per week that will be sold at Costco stores.

Kolterman said project proponents

conducted a traditional campaign that included going door-to-door to visit with residents, yard signs and a speakers' circuit. They also attended service organization meetings, such as the Rotary Club and the Chamber of Commerce.

The Mayor, Newton and Kolterman said the project went through about 30 public approval hearings in Fremont before a variety of public entities, including the Fremont City Council, Dodge County Board, Fremont Board of Public Works and the LB 840 committees. Their efforts paid off because during three months from April-June 2016, the public opinion shifted in favor of the facility, Kolterman said.

## City investments

According to Newton, the city has invested about \$1 million in LB 840 funds, \$350,000 in economic enhancement money and \$18 million in Tax Increment Financing (TIF) money. City officials said they ensured that the school board and all those affected by TIF were fully informed about the project. The school board endorsed the TIF plan.

"You can't cut corners," Mayor Getzschman said. "You need to have a great relationship with the local school system. They have to be part of your team. They have to be part of the conversation."

TIF is an economic development tool, the Mayor continued, and it is a tool that Nebraska needs to keep or it will be at a disadvantage with other states.

Fremont is a "shining example" of TIF working well, Kolterman said.

She said the ability to have open communication between and among



*Cake at groundbreaking celebration. Photo provided by Jessica Kolterman, External Affairs, Lincoln Premium Poultry.*

government groups and Costco was an asset that helped the company navigate the regulatory process in an "open and congenial way."

The Mayor said the state is building a new four-lane highway around the edge of the development area. The project was "fast-tracked," he said, by the state for the project's benefit.

## Hire right legal staff

Mayor Getzschman advises communities that are working on any economic development project to "hire the right legal staff, get the right legal advice and follow it to a T."

"Nothing can be done today without controversy," the Mayor said. "You will be challenged at every step."

At a groundbreaking ceremony June 19, Gov. Pete Ricketts said it was a "monumental day for Costco, Fremont and the State of Nebraska."

Gov. Ricketts said: "Costco has a reputation for being a great corporate citizen and today's groundbreaking highlights what's to come: good-paying jobs, more opportunity for our local farmers and the all-important expansion of value-added agriculture in our state." ■

# Attractions, services make South Sioux City a growing, vibrant community

BY CHRISTY ABRAHAM  
LEGAL COUNSEL, LNM

South Sioux City is a growing and dynamic community of more than 13,000 residents and the largest city in Dakota County. ■



*Vietnam Veterans Memorial Wall. In 2014, a half-scale replica of the Vietnam Veterans Memorial Wall was erected in South Sioux City. It is engraved with the names of more than 58,000 fallen service members. Currently, under construction next to the wall is a visitors' center as part of Freedom Park, which is dedicated to the contributions and accomplishments of veterans of all services and generations.*



*South Sioux City Council Chambers. South Sioux City is a growing and dynamic community of over 13,000 residents and the largest city in Dakota County. Photo by Christy Abraham, Legal Counsel, LNM.*



*New fire station. South Sioux City is building a new fire station that will open soon. The new building is being built across the street from the city's current station.*



*The motto of South Sioux City is "Where Quality of Life is a Cardinal Rule!" The South Sioux City High School's mascot is the cardinal.*



# Nebraska's communities embrace thrilling solar eclipse

A total solar eclipse Aug. 21 that moved across the United States like a huge sash left Nebraskans and those in its path in awe. For a brief time, we were drawn together to watch one of nature's grandest displays. Thousands of people visited Nebraska to see the event and they were joined by school children across the state to share the experience. Municipal officials, many of whom had planned events for the eclipse, worked closely with state officials from several state agencies to ensure the safety and well-being of spectators. Municipal officials planned live music, barbecues and viewing parties. Cheers and applause could be heard as the moon moved across the sun. It was deemed a successful event.

*Editor's note: We are grateful to the Cities of Sidney, Broken Bow and Columbus, which submitted photos. ■*

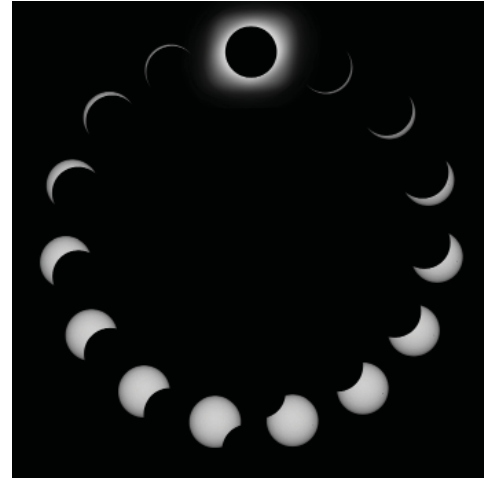


Photo by © Thinkstock.com.



Students in Sidney viewing solar eclipse. Photo by Lori Borchert, City of Sidney Bookkeeper/Webmaster.



*Woman viewing eclipse in Broken Bow. Photo by Broken Bow Chamber of Commerce and submitted courtesy of Brent Clark, City Administrator, Broken Bow.*




*Photo of Columbus City Clerk Janelle Kline and her family watching the eclipse at a campground by Callaway and Arnold. Photo submitted courtesy of Kline.*




*Broken Bow Chamber of Commerce Executive Director Donnis Huefle-Bullock, Custer Economic Development Corporation Administrative Assistant Shanna Humphries, and Tiffany Wagner, a visitor from El Reno, Okla. Photo by Broken Bow Chamber of Commerce and submitted courtesy of Brent Clark, City Administrator, Broken Bow.*




*Students in Sidney viewing solar eclipse. Photo by Lori Borchert, City of Sidney Bookkeeper/Webmaster.*





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# Violations and Enforcement Part III – ‘Big Stick Tools’

■ **BY CHUCK CHASE, CFM  
& LEROY SIEVERS**  
NEBRASKA DEPARTMENT OF  
NATURAL RESOURCES ■

In previous editions of *Floodplain Management Today*, we have written about violations and enforcement in articles titled “Ugly is not a Violation” and “Reaching for the ‘Big Stick.’” The articles discussed ways of gaining compliance through persuasion and gathering evidence. We referenced the saying, “walk softly but carry a big stick.” In this article, we want to discuss the various “big stick” enforcement options and how communities can use them.

## Big stick tools for all occasions

In Nebraska, your local floodplain ordinance, which is based on state model ordinances, should state: “Violation of the provisions of this ordinance or failure to comply with any of its requirements [...] shall constitute a misdemeanor.” In most cases, this is followed by a specific amount of the fine for violating the local floodplain regulations. The point is that you have the authority to seek fines. Yet, this is not automatic. As we will see with many of these tools, the property owner is entitled to due process.

Your ordinance probably goes on to say: “Any person who violates this ordinance ... shall upon conviction thereof be fined not more than...” Misdemeanor convictions are the result of a violation of criminal provisions. What this means to the local floodplain administrator is that a fine cannot simply be imposed on the property owner with a violation. Proof of a violation is required to be presented to a court of law. A violation will have to be established beyond a reasonable doubt. Consult with your



*Flooded street. © Thinkstock.com.*

community’s attorney to determine what evidence will be required and how it is to be obtained and preserved. Consulting now with the attorney can avoid obstacles in the future.

Before you pursue a fine or any other enforcement action, you should send a minimum of two written notices by certified mail. The location and nature of the violation should be made clear in the letter. Reference should be made to the floodplain ordinance/resolution and what specific sections have been violated. The property owner with the violation should be informed of possible fines and other possible actions. The notice should outline remedial actions that, if taken, would bring the structure or development into compliance, and the notice should have a reasonable timeline provided to complete the work. Don’t make the letter too technical.

## Issues discovered during development

You may stumble across a building site that has no permit at all or you may discover that a permitted building is

not being constructed as authorized. If the development is found to be out of compliance, a letter, as directed above, identifying the violation and potential enforcement actions should be sent or served to the owner and contractor requesting that all work stop.

Without an authorizing ordinance, this letter is a request and merely points out the possible consequences if the work continues.

This letter can be considered a Stop Work Order (SWO) if it is authorized by your local ordinance. A SWO authorized by local ordinance, whether in the style of a letter or a fileable form, may be issued by a specified department within local government, preferably within the department the floodplain administrator works. The ordinance must specify consequences if the SWO is violated.

A Temporary Injunction, which is an order issued by a court of law, may be granted based on evidence presented to a judge as part of a formal court

*Continued on page 15*



*Continued from page 14*

filed case. Evidence may be made by affidavit or live testimony along with exhibits. The defendant is allowed to present evidence. The injunction lasts until it is lifted by a trial on the merits of the dispute. To stop work before a trial, a Temporary Restraining Order (TRO) may be obtained from a judge. The evidence must be compelling and submitted through affidavits. Typically, TROs are issued for a limited time until the hearing for the temporary injunction.

The TRO and Temporary Injunction require the assistance of your community attorney, involve the court system and can be labor intensive and slow.

Consequently, tools that are more efficient may involve the use of occupancy permits or certificates of completion. Thus, if the development is a residence or business and construction is complete, and if your community has an adopted building code and a building inspector, you also may withhold the occupancy permit or withhold the certification of compliance in order to deny final utility hookup. Again, these actions must be authorized by building codes, your ordinance, and/or other provisions adopted by your jurisdiction.

### **New and completed structures**

A mobile home is placed in the woods as a hunting cabin; a home is constructed in a county without zoning regulations; a quonset is constructed on the back 40 down by the river – all in the floodplain and all without the knowledge of the floodplain administrator. It happens. It can even happen with the knowledge of the floodplain administrator in a community that, for one reason or another, is unable to halt construction.

Bringing a structure into compliance after it is completed can be a difficult and costly venture for the property owner, but doing so is important to ensure the community maintains good standing with the NFIP. A noncompliant structure can be relocated or elevated. Non-residential structures can be dry floodproofed. Do all you can to work with the owner to find a way to bring the structure into compliance. Keep in mind that the ultimate goal is compliance, not punishment.

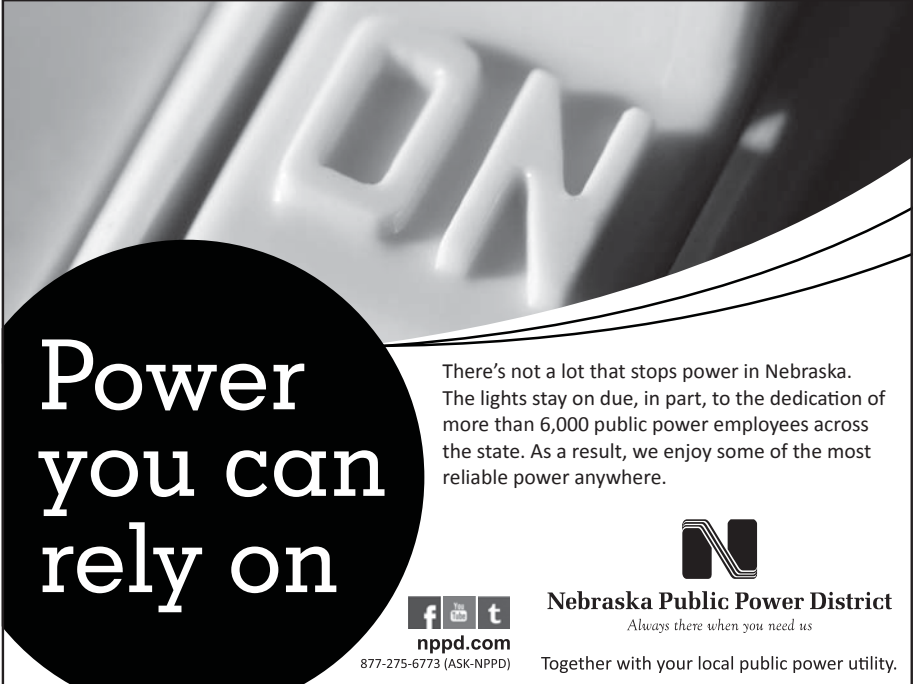
If you have tried all the enforcement tools you have at your disposal and compliance is not achieved, there are two tools still available as a last resort.

A Notice, sometimes referred to as a “Notice on Deed” or “Notice on Title,” can be used as an economic incentive. A Notice can be used for cases where the lowest floor of a structure is below the required elevation. The Notice is recorded in the Register of Deeds/County Clerk’s office,

identifying the building(s) and states that the structure is not compliant with the community’s ordinance. By stating the specifics of the violation, it informs any future owners of the non-compliant status of the structure. The Notice specifies that property should be covered by flood insurance. The Notice could recommend that an insurance agent be consulted since the rates may be substantial. It does not prohibit sale of the property and it is not a lien. Yet, it makes property less attractive to prospective buyers. A Notice of this type must be authorized by provision of local jurisdiction ordinance.

If all other enforcement options have been exhausted, a measure of last resort is the Section 1316 procedure. Section 1316 refers to the section of 44 CFR Part 73 that authorizes the denial of flood insurance to specific properties where violations are not

*Continued on page 16*





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## Violations and Enforcement Part III – ‘Big Stick Tools’

*Continued from page 15*

corrected. This process starts after a community has used all other enforcement mechanisms. A community would first work with NeDNR and FEMA Region VII and then submit a formal request with supporting documentation to be evaluated by FEMA. If approved, the particular property would be denied flood insurance and the community would remain in good standing with the NFIP for the uncorrected violation. That property also would be denied other federal assistance. Flood insurance availability could be restored if the violation is corrected and the community requests a rescission from FEMA.

### Final suggestions

- Document all actions taken, and if you have not documented up to now, it is not too late to start.
- Do all you can to gain compliance using diplomacy/negotiation before you use these “Big Stick” enforcement tools.
- If your ordinance does not grant you the authority to use stop work orders, Notice on Title, or other enforcement tools, you should begin to discuss these tools with your community’s attorney and governing body to decide if they are appropriate for your community.
- Always work with your community’s attorney as you move toward any of these ‘Big Stick’ enforcement tools.

Work with NeDNR and FEMA along the way. We can provide you technical assistance to ensure your ordinance is fully enforced.

The best position is to have prevented issues from making it this far. In most cases, this can be accomplished

through a robust floodplain management program, clear communication about development requirements, and good diplomacy at the onset of the project. However, there is only so

much you can do. Please reach out to Mitch Paine or Chuck Chase for any assistance on potential violations. ■

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# Vetting a public finance team: Has your municipal advisor passed the test?

■ **BY ERIK DOLAN, DIRECTOR, PROFESSIONAL QUALIFICATIONS, MUNICIPAL SECURITIES RULEMAKING BOARD** ■

When managing their personal finances, many people turn to financial advisors to help them make informed decisions about complex financial products and investment options. For state and local government officials responsible for managing the public's finances, specialized financial advisors called municipal advisors may be hired to provide advice on issuing municipal bonds or using municipal financial products.

If a municipal advisor is part of your public finance team, you should know that municipal advisors must meet baseline standards of professional qualification. Municipal advisors must pass a test developed by the Municipal Securities Rulemaking Board (MSRB) – the national regulator responsible for protecting the public interest by promoting a fair and efficient municipal securities market – to engage in municipal advisory activities.

## Confirm exams

If you are currently working with a municipal advisor or planning to start a new engagement, it would be prudent to confirm that your municipal advisor has passed the Series 50 exam. The names of individuals who have passed the Series 50 exam are available on the MSRB's website. It is in your community's best interest to make sure that all members of a public finance team are duly qualified in accordance with federal regulations. Verifying a municipal advisor's

qualifications can help avoid a disruption in the municipal advisory services you receive, including preventing a negative impact to the bond issuance process.

The MSRB creates and maintains rules for municipal advisors and municipal securities dealers that underwrite and trade municipal bonds. The Series 50 exam is one element of a comprehensive regulatory framework for municipal advisors that includes rules addressing core duties to clients, disclosures and conflicts of interest. Access more information about what to expect from your municipal advisor and how to research the background of your municipal finance professionals on the MSRB's website.

## About the MSRB

The MSRB protects investors, state and local governments and other municipal entities, and the public interest by promoting a fair and efficient municipal securities market. The MSRB fulfills this mission by regulating the municipal securities firms, banks and municipal advisors that engage in municipal securities and advisory activities. To further protect market participants, the MSRB provides market transparency through its Electronic Municipal Market Access (EMMA®) website, the official repository for information on virtually all municipal bonds. The MSRB also serves as an objective resource on the municipal market, conducts extensive education and outreach to market stakeholders, and provides market leadership on key issues. The MSRB is a Congressionally chartered, self-regulatory organization governed by a 21-member board of directors that has a majority of public members, in addition to representa-

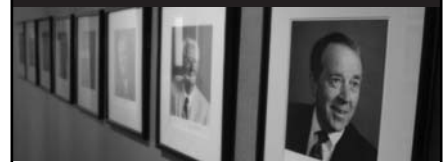
tives of regulated entities. The MSRB is subject to oversight by the Securities and Exchange Commission. ■

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*Erik Dolan is the Director, Professional Qualifications, at the Municipal Securities Rulemaking Board, where he manages the development and maintenance of testing standards and educational programs for MSRB-regulated municipal advisors and municipal securities dealers.*

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## Lincoln Mayor cuts ribbon for new hazardous materials collection center

Lincoln Mayor Chris Beutler in August joined local public and environmental health officials to celebrate the opening of Lincoln's new Hazardous Materials Collection Center (HMCC), 5101 N 48th Street.

The permanent facility for the disposal of hazardous materials will serve Lincoln and Lancaster County residents as well as qualifying small businesses, such as home-based operations, nonprofits, churches and others that produce less than 220 pounds of hazardous waste per month.

### Year-round disposal

"For the first time, residents of our city and county will have the ability to dispose of their most toxic and hazardous household products and waste all year long," Mayor Beutler said. "Small businesses will have a lower-cost option for hazardous waste disposal. And we will now be closer to reaching one of our Taking Charge goals of diverting at least 100,000 pounds of toxic material from the landfill annually. With this center, we will reduce health risks from poisoning and spills and we'll reduce the risk of environmental contamination of our water, land and air."

The HMCC will accept household hazardous waste by appointment only

on the first Wednesday and the third Saturday of each month. The first collection date will be Oct. 4. Residents can schedule appointments at [lincoln.ne.gov](http://lincoln.ne.gov) (keyword: household). Residents will be asked to identify the types and amounts of waste they plan to bring. Small businesses can call 402-441-8002 to see if they qualify for disposal services.

### Thanked funding partners

The cost to design, build and equip the HMCC was \$1.58 million, which included \$430,000 from the Nebraska Department of Environmental Quality (NDEQ) and \$400,000 in grants from the Nebraska Environmental Trust (NET). Mayor Beutler thanked the funding partners for their investment. The ribbon-cutting event was attended by Jim Macy, NDEQ Director; Mark Brohman, NET Executive Director; and Charlotte Burke, LLCHD Interim Health Director.

With the opening of the new facility, fewer household hazardous waste mobile collection events will be offered. The new HMCC will accept the same materials collected at the mobile events.

That includes items that contain mercury (CFLs, thermometers), pes-



*Lincoln Mayor Chris Beutler*

ticides, household cleaning products, paint thinners, stains, oil-based paint, pool cleaning chemicals and mixed or old gasoline. A complete list of accepted items is available at [lincoln.ne.gov](http://lincoln.ne.gov) (keyword: household).

### Check recycling guide

The HMCC does not accept latex paint, motor oil, fertilizers, gas grill cylinders, medicines and pharmaceutical waste, electronics and batteries. For information on recycling these and other materials, check the "Waste Reduction and Recycling Guide" at [lincoln.ne.gov](http://lincoln.ne.gov) (keyword: recycle guide). ■

*Source – City of Lincoln*

## League magazine available on website

The League of Nebraska Municipalities is pleased to announce that the *Nebraska Municipal Review* is available on the League's website at <http://www.lonm.org/> under the "Publications" tab. As always, we encourage you to share the news from your city or village with fellow

municipal officials across the state by sending information for the *Nebraska Municipal Review* to the League of Nebraska Municipalities, Attn: Lynn Marienau at 1335 L Street, Lincoln, NE 68508, 402-476-2829 by phone or [lynnm@lonm.org](mailto:lynnm@lonm.org) by e-mail. ■

## Sidney celebrates 150th anniversary

Sidney celebrated its 150th anniversary in August. Once known as the “Toughest Town on the Western Frontier,” Sidney helped shape Nebraska. Events included tours of Camp Lookout, activities at the fairgrounds, historical events, a parade on Illinois Street, a car show, music and fireworks. It was a weekend of fun and nostalgic events celebrating Sidney’s rich and colorful history. ■

Source – City of Sidney



*Sidney City Council Member and LNM President-Elect Wendall Gaston proclaiming Sidney to be known by all as “Friendly, Successful Sidney,” the best place to stop on the tracks during the dedication of Camp Lookout. Photo by Lori Borchert, City of Sidney Bookkeeper/Webmaster.*



*Jim, Nancy Eddy and their grandchildren showing the Sidney Sesquicentennial spirit. Photo by Lori Borchert, City of Sidney Bookkeeper/Webmaster.*



*Sidney's all-American cowboy, Kent From, at the 150th Parade. Photo by Lori Borchert, City of Sidney Bookkeeper/Webmaster.*

# National Civic League accepts applications for 2018 All-America City Award

The National Civic League is accepting applications from communities that have included diverse voices in problem-solving or promoted equitable practices and solutions to apply for the 2018 All-America City Award. The 2018 focus was chosen, in part, to bring attention to the 50th anniversary of the Fair Housing Act, as well as the Report of the National Advisory Commission on Civil Disorders (more commonly known as the Kerner Commission).

The National Civic League is particularly interested in learning about community projects that: promote positive community-police relations; promote racial healing and dialogues on race; expand government and institutional

representation and access; further educational equity in the community; create affordable and safe housing; reduce poverty; increase job readiness and employment; focus on restorative justice; seek equitable transportation access; promote or ensure access to healthy food and/or to safe and healthy natural environments.

Started in 1949, the All-America City Award program has recognized 500 communities that excel in collaborating to address pressing problems in the community. In Nebraska, 11 have won the All-America City Award. You can view the full list here (<http://www.nationalcivicleague.org/previous-all-america-city-winners/>). ■

Source – National Civic League

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## Positions

**Electric Lineman.** City of Kimball, NE is accepting applications for the position of Electric Lineman, commensurate on experience and training. Work duties include but not limited to testing, repair, building and maintenance of the municipal electric system. Lifting, construction, general labor and upkeep of the electric system will be expected. Must have or be able to obtain CDL and pass pre-employment drug test. Salary is based on experience and knowledge. A City application form is required and may be obtained at City Hall, 223 S. Chestnut Street, Kimball, NE 69145 or at [www.kimballne.org](http://www.kimballne.org). Applications will be accepted until the position is filled. EOE

**Utility Worker.** City of Red Cloud has an immediate opening for a full-time utility worker. Experience in an electrical distribution system and/or formal training in the electrical field is preferred. Duties include skilled labor for new construction, operation, and maintenance of the electric, water, and sewer systems. Perform skilled operation of equipment, maintenance and repair or energized and deenergized electric lines. Other duties include operation and maintenance of other municipal facilities and assisting in street and public property maintenance. Having a grade 4 water operators' license or willing to obtain one is a must. Wages based on experience including an excellent benefit package with insurance, vacation, holidays and retire-

## Positions

ment. Applications may be obtained at the City office at 540 N. Webster Street, Red Cloud, NE 68970. Or by email: [citysuper@gpcom.net](mailto:citysuper@gpcom.net). Applications will be accepted until the position is filled. For more information call (402) 746-2215 or 2214

**Village Superintendent.** Village of Arnold, (pop. 597 – Custer County), seeks Village Superintendent. Individual to coordinate, oversee, manage and ASSIST in operations of all departments. Departments include General (General Government, Pool, Parks, Community Center), Street, Electric, Water, Sewer, and Solid Waste. Requirements include graduation from high school or equivalent, and a valid Nebraska driver's license. Applicant must have or be able to obtain a CDL within 6 months of hire and have knowledge of electric distribution system. Certification in wastewater and water are desired but Village willing to train. Wage based on experience. Please contact Village of Arnold, PO Box 70, Arnold, NE 69120; 308-848-2228; [arnoldvillage@gpcom.net](mailto:arnoldvillage@gpcom.net) for application, job description and list of benefits. Resume and references must be attached to application. Position open until filled. EOE.

**League of Nebraska  
Municipalities**  
Phone: 402-476-2829  
Web site: [www.lonm.org](http://www.lonm.org)

## Mark your calendar for these League conferences

### Utilities Conference

Jan. 17-19, 2018  
Cornhusker Marriott Hotel,  
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### Midwinter Conference

Feb. 26-27, 2018  
Cornhusker Marriott Hotel,  
Lincoln

### Municipal Accounting and Finance Conference

June 20-22, 2018  
Graduate, Lincoln

### Annual Conference

Sept. 19-21, 2018  
Holiday Inn, Kearney



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**Nebraska Basic Code**

The NBC is a comprehensive code of ordinances intended for use by smaller NE municipalities (villages & 2<sup>nd</sup> class cities) wishing to avoid the cost of a custom code. It is intended as a model code that keeps NE municipalities in compliance with state law.

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