

# PETITION AUDIT REPORT

## **TOWN OF BERNICE** **BERNICE PUBLIC WORKS AUTHORITY (BPWA)**

July 1, 2008 through June 30, 2011



*Independently serving the citizens of  
Oklahoma by promoting the  
accountability and fiscal integrity of  
governmental funds.*



Oklahoma State  
Auditor & Inspector  
Gary A. Jones, CPA, CFE

**TOWN OF BERNICE  
BERNICE PUBLIC WORKS AUTHORITY (BPWA)  
DELAWARE COUNTY, OKLAHOMA  
PETITION AUDIT REPORT  
JULY 1, 2008 THROUGH JUNE 30, 2011**

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This publication, issued by the Oklahoma State Auditor and Inspector's office as authorized by 74 O.S. § 212(L), has not been printed, but is available on our agency's website ([www.sai.ok.gov](http://www.sai.ok.gov)) and in the Oklahoma Department of Libraries Publications Clearinghouse Digital Collection, pursuant to 74 O.S. § 3105.B.



# Oklahoma State Auditor & Inspector

2300 N. Lincoln Blvd. • State Capitol, Room 100 • Oklahoma City, OK 73105 • Phone: 405.521.3495 • Fax: 405.521.3426

April 10, 2012

Citizens and Petitioners  
Town of Bernice, Oklahoma

Transmitted herewith is the Petition Audit Report for the Town of Bernice and the Bernice Public Works Authority.

Pursuant to your request and in accordance with the requirements of **74 O.S. § 212(L)**, we performed a petition audit for the period July 1, 2008, through June 30, 2011.

The objectives of our petition audit primarily included, but were not limited to, the areas noted in your petition. Our findings and recommendations related to these objectives are presented in the accompanying report.

Because a petition audit is not an audit conducted in accordance with generally accepted auditing standards, we do not express an opinion on the account balances or financial statements of the Town of Bernice or the Bernice Public Works Authority for the audit period.

The goal of the State Auditor and Inspector is to promote accountability and fiscal integrity in state and local government. Maintaining our independence as we provide this service to the taxpayers of Oklahoma is of utmost importance.

We wish to take this opportunity to express our appreciation for the assistance and cooperation extended to our office during the course of our petition audit.

This report has been prepared for the citizens and registered voters of the Town of Bernice, and for town and state officials with oversight responsibilities, as provided by statute. Pursuant to **74 O.S. § 212(L)**, 10% of the registered voters of a political subdivision of the State may request the State Auditor and Inspector to audit the books and records of the political subdivision. This document is a public document pursuant to the Oklahoma Open Records Act, **51 O.S. § 24A.1, et seq.**

Sincerely,

A handwritten signature in blue ink, reading "Gary A. Jones", is positioned above the printed name.

GARY A. JONES, CPA, CFE  
OKLAHOMA STATE AUDITOR & INSPECTOR

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**MEMBERS OF THE BOARD OF TRUSTEES  
AS OF JUNE 30, 2011**

Bill Raven ..... Member, Ward 1; Mayor  
David Dennis ..... Member, Ward 2  
Clinton Brewster ..... Member, Ward 3  
DeWayne Langley ..... Member, Ward 4  
Byron Anderson ..... Member, Ward 5

**CLERK-TREASURER  
AS OF JUNE 30, 2011**

Connie King

## Introduction

The municipal government of the Town of Bernice (“Town”) is organized under the statutory Town Board of Trustees form of government, as outlined in **11 O.S. § 12-101, *et. seq.*** Section 12-101 states:

The form of government provided by Sections 11-12-101 through 11-12-114 of this title shall be known as the statutory town board of trustees form of government. Towns governed under the statutory town board of trustees form shall have all the powers, functions, rights, privileges, franchises and immunities granted, or which may be granted, to towns. Such powers shall be exercised as provided by law applicable to towns under the town board of trustees form, or if the manner is not thus prescribed, then in such manner as the board of trustees may prescribe.

The Town is subject to the provisions of other sections of Title 11 (Cities and Towns) of the Oklahoma Statutes.

The Town is governed by the Town Board of Trustees (Town Board), which consists of five members – called town trustees – who are elected at large but who live in five respective wards. The Town Board elects one of its members to serve as mayor. The town clerk-treasurer is also elected at large.

The Town does not have a manager/administrator/planner position. The Town contracts with a private law firm – Logan & Lowry, LLP – for legal services; the Town previously contracted with Hartley Law Firm, PLLC.

The Bernice Public Works Authority (BPWA) is a public trust established by **60 O.S. § 176**. The BPWA operates a utility service that provides water service to the residents of Bernice. As provided for by the BPWA’s trust indenture, the members of the Town Board serve *ex officio* as the trustees of the BPWA.

The Town and the BPWA are subject to statutory provisions found in various other titles of the Oklahoma Statutes, including, but not limited to, Title 25 (*Definitions and General Provisions*), Title 51 (*Officers*), Title 60 (*Property*), Title 61 (*Public Buildings and Public Works*), Title 62 (*Public Finance*), and Title 68 (*Revenue and Taxation*).

A private, independent audit firm – Turner & Associates, PLC – audits the Town and the BPWA annually. In addition, town officials prepare an annual financial statement that presents the financial condition of the

Town at the close of each fiscal year, in accordance with the requirements of **68 O.S. § 3002**.

The Office of State Auditor and Inspector conducted a petition audit of the Town and the BPWA, primarily relating to the objectives noted on the *Table of Contents* page of this report. The results of the petition audit are in this report.

All dollar amounts included in this report are rounded to the nearest dollar unless full amounts needed to be specified.

Fiscal years in this report are abbreviated by using the ending calendar year. For example, the fiscal year of July 1, 2010, through June 30, 2011, would be identified as “FY11.”

The *Background* and *Findings* sections of this report are generally written in past tense, as they cover the audit period, July 1, 2008, through June 30, 2011. The *Conclusions* and *Recommendations* sections are as of June 30, 2011, and any *Subsequent Events* sections cover July 1, 2011, through the publication of this report.

## Objective I: Review the collection of court fines and fees

### Background

Every municipality is required to keep a book of all approved ordinances<sup>1</sup> and publish or post in full all ordinances other than those pertaining to the appropriation of monies.<sup>2</sup> “Publish” means to have printed in a newspaper in circulation in the municipality or to post in at least 10 public places in the municipality if no newspaper is in circulation.<sup>3</sup>

Any ordinances (other than those pertaining to the appropriation of money) that are not published within 15 days of their passage are not in force.<sup>4</sup> If a municipality has its ordinances codified (arranged in a systematic collection), it must publish the codification, but it must do so simply by way of publishing just the titles and summaries of the contents.<sup>5</sup>

Municipalities may publish “compilations or codes of law or regulations relating to traffic [...] or any other matters which the municipality has the power to regulate” in that manner.<sup>6</sup> If a municipality has its ordinances codified, it is required to keep at least three copies of the code on file in the town clerk’s office “for public use, inspection and examination” as well as copies “for distribution or sale at a reasonable price.”<sup>7</sup>

Every municipality is required to codify and publish its penal ordinances in written form at least once every 10 years as well as supplements every two years.<sup>8</sup> Penal ordinances are those ordinances that have punishments tied to their violations, ordinances “akin to criminal statutes.”<sup>9</sup> Every municipality is required to adopt a resolution that notifies the public of the publication each time and file the resolution with the county clerk.<sup>10</sup>

Every municipality is also required to file copies of the compilations and supplements in the county law library.<sup>11</sup> Any municipality that does not

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<sup>1</sup> 11 O.S. § 14-105

<sup>2</sup> 11 O.S. §§ 14-106, 14-107(A)

<sup>3</sup> 11 O.S. § 1-102(8)

<sup>4</sup> 11 O.S. § 14-106

<sup>5</sup> 11 O.S. §§ 14-108(C), 14-107(A)

<sup>6</sup> 11 O.S. § 14-107(A)

<sup>7</sup> 11 O.S. § 14-108(B)

<sup>8</sup> 11 O.S. § 14-109; supported by 2007 OK 57

<sup>9</sup> 1953 OK CR 84

<sup>10</sup> 11 O.S. § 14-110; supported by 2007 OK 57

<sup>11</sup> 11 O.S. § 14-110

compile and publish its penal ordinances and file notification is prohibited from levying fines over \$50 for violations of the ordinances.<sup>12</sup>

Municipal courts that convict people of offenses (other than parking and standing violations) that are punishable by fines over \$10 or that receive forfeited bonds from persons who have been charged with such offenses are required to collect an additional \$19 for each offense or bond forfeiture.<sup>13</sup>

Municipal court clerks are to send at least \$9.67 of each collection to the Oklahoma State Bureau of Investigation (OSBI)<sup>14</sup> and at least \$8.92 to the Oklahoma Council on Law Enforcement Education and Training (CLEET).<sup>15</sup> The court clerks may retain \$0.25 of each collection for use by the municipal courts<sup>16</sup> and \$0.16 for use by the municipalities' governing bodies.<sup>17</sup> Those four amounts (\$9.67, \$8.92, \$0.25, and \$0.16) equal the additional \$19.

The Town has a municipal court that the Town Board established in July 1977 and re-established in September 2005. The Town has a Code of Ordinances. In 2005, the Town Board established fines for violations of certain ordinances as well as fees for the operation of the municipal court.

As of June 2011, the Delaware County Sheriff's Office provided law-enforcement services to the Town. The Town and the Sheriff's Office had a contractual agreement for the Sheriff's Office to station deputies in Bernice in exchange for \$5,500 per month. Traffic citations written by the deputies were based on the Town's ordinances and fines and were processed through the Town's municipal court.

In May 2011, the Delaware County Board of County Commissioners voted to end its contract with the Town on December 31, 2011. In June 2011, the Town Board voted to re-establish a town police department.

In a 2009 letter, a now-former town attorney notified the town judge and the town court clerk that, in his opinion, the Town properly published its penal ordinances.

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<sup>12</sup> 11 O.S. § 14-111(E);, supported by 2007 OK 57

<sup>13</sup> 20 O.S. §§ 1313.2(B), 1313.3(A), 1313.4(A)

<sup>14</sup> 20 O.S. §§ 1313.3(A), 1313.4(A)

<sup>15</sup> 20 O.S. § 1313.2(D)

<sup>16</sup> 20 O.S. § 1313.4(A)

<sup>17</sup> 11 O.S. § 14-111.1(A)

## Findings

*The Town has not fully complied with publication requirements for its penal code. There were errors and omissions made in the collection and remittance of statutorily-mandated OSBI and CLEET fees.*

OKLAHOMA UNIFORM VIOLATIONS COMPLAINT

State of Oklahoma  
COUNTY OF DELAWARE  
TOWN OF BERNICE

Jud. Dist. Court  
Municipal  
002809

SUMMONS

The undersigned, being duly sworn, upon his oath deposes and says that:

on or about (Date) 7-20-10 at (24 hour time) 1115 at or near (Location) 209 S. BROADWAY  
County Number 21 City Bernice State OK  
Name (last, first, middle) [REDACTED] Phone number [REDACTED]  
Address [REDACTED]  
City BERNICE OK Zip Code 74331  
Birthdate (mo., day, yr.) [REDACTED] Height [REDACTED] Weight [REDACTED] Race [REDACTED] Sex [REDACTED] Class [REDACTED] Employment [REDACTED]  
Driver License Number [REDACTED] Withdrawal ☐ Y ☐ N Month/Year [REDACTED] State [REDACTED]  
Employer [REDACTED] Did ☐ Unlawfully ☐ Operate ☐ Park  
Vehicle Make [REDACTED] Year [REDACTED] Body Style/Color [REDACTED] Tag Number [REDACTED] Year [REDACTED] State [REDACTED]  
Commercial ☐ Y ☐ N ☐ HAZ. MAT. (Hazardous Material) ACCIDENT: ☐ PD ☐ PI ☐ FATALITY  
and did then and there commit the following offense:  
SPEEDING MPH in MPH Zone ☐ PACE ☐ RACE ☐ PLANE ☐ OTHER ☐  
VIOLATION: 22-2 DISTURBING THE PEACE BY  
USING OFFENSIVE ABUSIVE INSULTING LANGUAGE  
Contrary to Statute/Ordinance: 5-3B-3-A1  
I, the undersigned issuing officer, hereby certify and swear that I have read the foregoing information and know the facts and contents thereof and that the facts supporting the criminal charge stated therein are true.  
Signature of Officer R. Kauffman Date 31 Jul 05  
Subscribed and subscribed before me this day of  
Name and Title My Commission Expires  
Court Appearance 9:11 day of AUG 2010 at 5:30 PM (GPS USE)  
Address of Court 207 S. BROADWAY 918-256-7777  
P.O. BOX 3807, BERNICE, OK 74331  
NOTICE: Release upon personal recognizance based upon a signed written promise to appear in court. Arrangement is conditional and failure to timely appear for arraignment shall result in suspension of the arrested person's driver license in Oklahoma, or in the arrestee's home state pursuant to the Nonresident Violator Compact.  
WITHOUT ADMITTING GUILT, I promise to appear in and court at said time and place.  
X SIGNATURE. (CHECK ONLY ONE BOX)  
☐ Signed Personally ☐ Bond Attached ☐ MANDATORY ☐ JUV ☐ Other  
☐ RECOGNIZANCE Name of Parent or Guardian Address  
Officer's Remarks: USING INSULTING LANGUAGE TO A CITY OFFICIAL IN CITY OFFICE  
AREA: ☐ business ☐ industrial ☐ school ☐ residential ☐ rural  
HIGHWAY TYPE: ☐ 1 lane ☐ 2 lane ☐ 3 lane ☐ undivided ☐ divided ☐ ramp

A 1977 affidavit signed by the then-“chairman” of the Town Board was filed with the Delaware County Clerk’s Office. The affidavit noted that an ordinance that established the Code of Ordinances had been posted in 10 public places in Bernice. That 1977 ordinance was published in *The Delaware County Journal* newspaper. The 1977 resolution that established the municipal court was filed with the County Clerk’s Office. This posting, publication, and filing likely met the requirement at that time.<sup>18</sup> However, the penal ordinances were not published within at least the subsequent 10 years, as had become required by state law.

The Town published in *The Grove Sun Daily* newspaper the 2005 ordinances that re-established the municipal court and the court fee and fines for offenses.

The Town last codified its ordinances in May 2011, but it did not publish the codification. Before

that, the Town last codified its ordinances in 2006, but it did not publish that codification, either. There was only one copy of the Code on file in the town clerk-treasurer’s office.

The Town Board last revised the fines and court fee in 2007, but it did not publish the resolutions. It also did not publish biennial supplements to the penal ordinances in 2007 or 2009.

<sup>18</sup> 1974 OK CIV APP 47

From January 2006 through June 30, 2011, the municipal court collected approximately \$208,158 in fines and approximately \$92,095 in court fees from 2,037 fines assessed.

For every fine that the municipal court collected, the town court clerk submitted \$9 to CLEET. However, that money was taken from the total fine assessed and was not assessed separately and in addition to the fine. Furthermore, the municipal court did not collect the additional \$10 for each fine or forfeiture, and the town court clerk did not submit funds to the OSBI.

1-2012-200283 Book 1874 Pg. 761 01/10/2012 2:08 pm Pg. 0738-0744 Fee: \$ 25.00 Doc: \$ 0.00 Card Pattern: Delaware County Clerk State of Oklahoma		
SCHEDULE A		
Offense	Fine	Bond
Speeding 1-10	\$100.00	\$145.00
Speeding 11-15	120.00	165.00
Speeding 16-20	140.00	185.00
Speeding 21-25	160.00	205.00
Speeding 26 or more	200.00	245.00
Speeding too fast for conditions	140.00	185.00
Operating a MV in a manner not reasonable	200.00	245.00
Reckless Driving	295.00	340.00
Eluding a police officer	500.00	545.00
Following too closely	100.00	145.00
Driving left of center	100.00	145.00
Improper backing	45.00	90.00
Failure to stop for stop sign	100.00	145.00
Failure to stop for school bus	400.00	445.00
Failure to yield to emergency vehicle	135.00	180.00
Failure to yield	100.00	145.00
Passing Violations	100.00	145.00
Turning Violations	45.00	90.00
Parking Violations	45.00	90.00
Parking in a Handicap Zone	65.00	110.00
No valid drivers license	200.00	245.00

The Town has published a list of offenses and their respective fines – which constitute three pages within Chapter 9 (*Municipal Court*) of the Code of Ordinances. This limited publication does not constitute publication of the penal ordinances. There is an entire chapter (Chapter 3 (*Offenses and Crimes*)) of the Code of Ordinances, for instance, that would constitute penal ordinances.

While the list of offenses is comprehensive with respect to fines (including a fine for “all other traffic violations and crimes and offenses”), the list does not constitute the full penal code. Two judges of the Oklahoma Court of Criminal Appeals wrote that the primary purpose of **11 O.S. § 14-109** “is to insure that citizens are provided with adequate notice of *all* municipal penal ordinances” [emphasis added].<sup>19</sup>

The publication of the fine schedule does not inform the citizens of all penal ordinances. For example, **Town Code § 5-3A-6** pertains to trespassing, an offense that is not referenced in the fine schedule.

<sup>19</sup> 1981 OK CR 133

5-3-1	5-3-3
<b>CHAPTER 3</b>	
<b>OFFENSES AND CRIMES</b>	
<b>SECTION:</b>	
5-3-1:	Attempts To Commit An Offense
5-3-2:	Aiding In An Offense
5-3-3:	Conspiracy To Commit An Offense
5-3-4:	Capacity To Commit An Offense
5-3-5:	Lawful Use Of Force
5-3-6:	Intoxication No Defense
5-3-7:	Witness, Self-Incrimination
5-3-8:	Time Limit On Actions
5-3-1:	<b>ATTEMPTS TO COMMIT AN OFFENSE:</b> Every person who attempts to commit an offense against the ordinances of the town, and in such attempt does any act toward the commission of such offense, but fails or is prevented or intercepted in the perpetration thereof, is guilty of an offense, and shall be punished in the manner prescribed for the attempted offense itself. (2005 Code)
5-3-2:	<b>AIDING IN AN OFFENSE:</b>
A.	Whenever in this code any act or omission is made unlawful or prohibited, it shall include causing, allowing, permitting, aiding, abetting or concealing the fact of such act or omission.
B.	When no punishment for counseling or aiding in the commission of a particular offense is expressly prescribed by ordinance, every person who counsels or aids another in the commission of such is guilty of an offense, or misdemeanor, and punishable in the same manner as the principal offender. (2005 Code)
5-3-3:	<b>CONSPIRACY TO COMMIT AN OFFENSE:</b> Any two (2) or more persons assembled or who shall assemble with the intent to mutually agree to do any unlawful act with force or violence and
<i>Town of Bernice</i>	

## Conclusions

The Town has not properly published its penal ordinances since 1977. As such, the municipal court should not have collected fines of more than \$50. The court has over-collected approximately \$106,308 in fines through the end of June 2011.

Additionally, because the 2007 ordinance that increased the court *fee* was not published, the municipal court should not have collected court costs in excess of \$40, which was the last amount that was properly set. The court over-collected approximately \$7,895 in court costs through the end of June 2011.



For each fine of \$10 or more assessed, and for each bond forfeited by a person charged with an offense punishable by a fine of \$10 or more, the municipal court should have collected an additional \$9 for the CLEET fee. CLEET did not lose money, though, because the town court clerk submitted to it \$9 for each fine. The Town, however, lost approximately \$18,333 – as of June 2011 – because it was submitting to CLEET \$9 for each fine from the *fine assessed* instead of from a *separately-collected fee*. Furthermore, the Town lost approximately \$163 in revenue – as of June 2011 – as a result of the portion of each CLEET fee that it could have retained, according to statute.

For each fine of \$10 or more assessed, and for each bond forfeited by a person charged with an offense punishable by a fine of \$10 or more, the municipal court should have collected an additional \$10 for the OSBI fees. The town court clerk should have submitted at least \$9.67 of each fee to OSBI. As such, OSBI did not receive approximately \$19,698 from the Town through June 2011. Additionally, the Town lost approximately \$672 in revenue – as of June 2011 – as a result of the portion of each OSBI fee that it could have retained, according to statute.

- Recommendations**
1. The Town should properly publish its penal ordinances and notify the public of such publication. In the interim and/or otherwise, the municipal court should not be assessing fines of more than \$50.
  2. The mayor should ensure that all approved ordinances and resolutions are properly filed in Town Hall.<sup>20</sup> Town officials should ensure that all approved ordinances are properly published. The town clerk-treasurer's office should have available for public viewing at least three copies of the Code of Ordinances, as required by statute.
  3. The Town Board should determine how best to reimburse the \$106,308 that the municipal court over-collected in fines as well as the \$7,895 that the court over-collected in court costs, plus any additional amounts that have been over-collected since July 1, 2011.
  4. For each fine of \$10 or more assessed, and for each bond forfeited by a person charged with an offense punishable by a fine of \$10 or more, the municipal court should collect an additional \$9 from each payee. The town court clerk should collect the proper fee, as well as prepare the required reports, and submit those fees and reports to CLEET in accordance with the procedures provided in **20 O.S. § 1313.2**.

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<sup>20</sup> 11 O.S. § 12-105

5. For each fine of \$10 or more assessed, and for each bond forfeited by a person charged with an offense punishable by a fine of \$10 or more, the municipal court should collect an additional \$10 from each payee. The town court clerk should submit the proper amount of the collected fee to the OSBI in accordance with the procedures provided in **20 O.S. § 1313.3**.
6. The Town Board should address the \$19,861 that the municipal court did not submit to OSBI, plus any additional amount that should have been collected since July 1, 2011.

**Subsequent Events** In September 2011, the Town Board decided to hire the former chief of the Burden, Kansas, Police Department as the chief of the new Bernice Police Department.<sup>21</sup> It was subsequently revealed that he had been charged in Kansas with disorderly conduct in November 2010 for an alleged domestic incident between him and his wife, and he entered into a one-year deferred-prosecution agreement in April 2011.

The agreement required the chief to resign from the Burden Police Department, perform 50 hours of community service, and attend a domestic-violence class and an anger-management class. Because he was not convicted of domestic abuse, he was not precluded from serving as a law-enforcement officer in Oklahoma.

In December 2011, the Town Board approved an ordinance that established a court fee and fines for violations of penal ordinances to be enforced by the Town's new police department. The ordinance, which included a list of offenses and their corresponding fines, was published in *The Grove Sun* newspaper.

The Town Board adopted a resolution informing the public of the "publication" of the Code of Ordinances. The resolution was filed with the Delaware County Clerk's Office. However, the penal ordinances themselves were still not actually published.

As of January 2012, the Sheriff's office stopped providing the contracted law-enforcement in Bernice.

In February 2012, the town attorney said that two additional copies of the Code of Ordinances would be filed in the town clerk-treasurer's office.

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<sup>21</sup> 11 O.S. § 12-111

## Objective II: Review the billing procedures for water service

### Background

In September 2007, the BPWA voted to borrow \$46,000 from the local bank for the purpose of implementing an automated meter-reading system, which it did. With the system, the BPWA's contract water administrator used a handheld electronic wand to electronically read customers' water meters every other month. Estimates based on the meter readings were used to bill for each following month, when the meters were not read.

According to the BPWA clerk, if a customer's account was overcharged or undercharged in any given month, the difference was made up the following month. She said that the BPWA was still working to fix system glitches that resulted in initially-incorrect readings for some customers.

As of June 2011, the BPWA charged customers a \$17.75 minimum charge for water service, which covered up to the first 1,000 gallons used, and \$3.75 per every 1,000 gallons used after the first 1,000.

The fee assessed for late payments was 17% of overdue bills. The BPWA increased that fee from 15% in May 2007. However, the company that printed the customer bills inadvertently printed the previous percentage on billing forms for a period of time after it was increased, according to the BPWA clerk.

#### Attention Water Customers

On May 14, 2007, the Board of Trustees of the Bernice Public Works Authority voted unanimously to raise the late fees from 15% to 17%. This increase will be effective as soon as this mailing goes out to the public.

If you have any questions, please call  
918-256-7777 Monday-Friday,  
8:00a.m.-Noon.

Thank you,  
B.P.W.A.

"BPWA is an equal opportunity provider, and employer." To file a complaint of discrimination write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW, Washington, DC 20250-9410 or call (800) 795-3272 (voice) or (202) 720-6382 (TDD).

As of May 2011, the BPWA charged a fee of \$500 for a new water tap. There is a deposit of \$50 for a new customer account and a fee of \$50 to reconnect a meter that has been disconnected.

The BPWA charged some customers multiple minimum charges each month. In 1988, the BPWA approved an ordinance that required then-

existing customers who had multiple water accounts on a single meter to pay the minimum charge for each unit each month. Those customers were typically businesses – such as recreational vehicle parks, resorts, and motels – or individuals who had more than one residence connected to one meter or a business and a residence connected to one meter.

By agreeing to the multi-unit water-users agreement, those customers did not have to pay to have a separate meter installed for each of their units. According to the BPWA clerk, by paying the minimum charge for each of their units each month, those customers paid for what they likely would have been charged with multiple water meters without incurring the additional cost of installing separate meters.

In 2009, a customer sued the Town and the BPWA after the BPWA allegedly had his multi-use meter pulled in order to require him to have individual meters installed.

As of June 2011, the BPWA had an established policy of requiring new water customers to pay any outstanding balances owed by respective *previous customers* before the new customers could receive water service.

## **Findings**

The BPWA overcharged some water customers but apparently worked with the customers to correct the overcharges. Problems still remain for some customers.

As of June 2011, some water customers owed outstanding bills for substantial amounts, and some chose to have their water disconnected or were not able to pay to have it reconnected. As of the end of June 2011, approximately nine customers owed more than \$500 each. Two of those owed more than \$1,000 each.

The BPWA clerk provided the minutes of the February 12, 2001, BPWA meeting, which she said was the meeting at which the BPWA instituted the policy that new water customers have to pay outstanding water bills owed by previous customers. However, the minutes reflected that the BPWA implemented a policy that simply made landlords responsible for their renters' outstanding water bills.

The Code of Ordinances did not reflect any policy regarding other accounts or situations with outstanding water bills. There is no written policy or ordinance in place – and there apparently is no law – that

sanctions the BPWA requiring new customers to pay the bills of some other individuals before receiving water service.

## **Conclusions**

The BPWA's automated meter-reading system sometimes results in reading and billing errors, and some water customers are initially billed incorrectly. The system has been in place long enough that any initial problems in the implementation of the new system should have been addressed by now.

While it is the prerogative of the BPWA to establish amounts for its fees and penalties, it should consider whether its present fee structure may be diminishing its water revenues by driving potential customers to seek alternative services.

The legality of requiring new water customers to pay the outstanding bills owed by *previous* customers in order to receive water service is questionable.

## **Recommendations**

1. The BPWA should consider what needs to be done to correct the "glitches" that continue to exist in its electronic meter-reading system.
2. The appropriate policy or remedy to address "final" bills would be for the BPWA to establish adequate meter *deposit* amounts for initiating service rather than trying to collect outstanding final bills from potential new customers. The deposit amounts could vary according to type and classification (e.g., residential, commercial), but the BPWA should review them periodically to ensure that the BPWA's water revenues are adequately secured by the deposits.
3. The BPWA should address the issue of collections it has gotten from current utility customers for the unpaid bills owed by previous customers. This policy could result in a civil case against the Town if not corrected in some way.
4. The BPWA should evaluate the additional cost of reading meters *monthly* (as opposed to estimating every other month) versus the added trouble and public-relations problems that "estimates" may be generating under its present policy.

**Subsequent Event** In February 2012, the district court ruled in favor of the BPWA in the lawsuit filed by a resident who alleged that his multi-use water meter was improperly pulled. It was not known if the resident intended to appeal.

**Town Response** In the Town's response attached to this report, the town attorney indicated that "BPWA's policy is that water meters are read each month." The response does not provide the "effective date" of the policy. During fieldwork, the Town utility clerk indicated that meters were "estimated approximately every other month and actually physically read every other month."

With regard to the BPWA policy requiring new residents to pay the outstanding bills left by the previous residents, no specific legal authority was cited. Common sense would indicate that the BPWA's practice or policy is highly questionable and unjust, if not illegal. It would seem that it would be highly unlikely that the Town's contract law firm would expect *someone else to pay its outstanding utility bills or vice versa*.

### Objective III: Review the enactment and enforcement of the zoning code

#### Background

A municipality may regulate buildings, structures, and land by enacting a zoning code in accordance with a comprehensive plan,<sup>22</sup> although the comprehensive plan may be the zoning code itself along with a zoning map.<sup>23</sup> A municipal governing body that wants to enact a zoning code must first appoint a zoning commission to draft recommendations for boundaries of zoning districts and regulations to be enforced within them and to present the recommendations at public hearings before presenting them to the governing body.<sup>24</sup>

Once the zoning commission has presented a report to the governing body, the governing body must hold at least one public hearing after publishing notice of the hearing at least 15 days prior to it.<sup>25</sup> A municipality that enacts a zoning code must have a five-member board of adjustment<sup>26</sup> that has the authority to decide appeals of zoning enforcements, grant exceptions to the zoning code, and grant variances to the code<sup>27</sup> in certain situations.<sup>28</sup> Before granting an exception or a variance, the board of adjustment must hold a public hearing after giving public notice of the hearing.<sup>29</sup>

Before making zoning changes or amending, supplementing, changing, modifying, or repealing regulations, restrictions, or district boundaries, the governing body of a municipality that has a zoning code must hold a public hearing after giving notice of the hearing.<sup>30</sup>

The Town Board enacted a zoning code in May 2009. There was no code or zoning map prior to that. The code allowed then-existing non-conforming uses of land within each zoning district (e.g., a business operated in a residential district) to continue despite not being in compliance with the new code. However, once those uses ceased, the

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<sup>22</sup> 11 O.S. § 43-103

<sup>23</sup> 1961 OK 78; supported by 1985 OK CIV APP 45

<sup>24</sup> 11 O.S. § 43-109

<sup>25</sup> 11 O.S. § 43-104(A)

<sup>26</sup> 11 O.S. § 44-101

<sup>27</sup> 11 O.S. § 44-104

<sup>28</sup> 11 O.S. § 44-107

<sup>29</sup> 11 O.S. § 44-104

<sup>30</sup> 11 O.S. §§ 43-105(A), 43-106(A)

code prohibited them from being started again (e.g., if a business in a residential district was stopped, it could not be started in the residential district again). The Town has a board of adjustment and/or a zoning board as well as a zoning administrator.

The Town Board held a public hearing on the proposed zoning code on March 26, 2009. Notice of the planned public hearing was published with a map in *The Grove Sun Daily* newspaper on March 10, 2009.

The Zoning Board consists of three members who were appointed by the Town Board when it created the Zoning Board in February 2009. The Board of Adjustment was created in the zoning code in May 2009, and it consists of three members who are to be appointed by the mayor and approved by the Town Board.

## Findings

***The Town Board and Zoning Board did not follow the statutory procedures for establishing a zoning code. The Town Board modified the “Board of Adjustment” composition, contrary to statute.***

Article 43 of Title 11 specifies the process for enacting a zoning code. **Title 11 O.S. § 43-109**, which prescribes the steps for establishing a zoning code, uses the term “*shall*” three times with regard to the prescribed process. According to Town records, the first Zoning Board and/or Board of Adjustment meeting was not held until May 2010, a year after the zoning code was ostensibly adopted by the Town Board.

Consequently, there was no record of a “Zoning Board” that:

1. recommended boundaries for the zoning districts,
2. recommended regulations to be enforced within the zoning districts,
3. prepared a preliminary report for the Town Board,
4. held public hearings on a preliminary report, or
5. submitted a final report to the Town Board in order for the Town Board to hold *its* hearings prior to adoption of the code.

The *Town Board* held a public hearing on the proposed zoning code and map on March 26, 2009, and adopted the zoning code at a special meeting on May 15, 2009. One substantive change to the proposed code, versus what was presented at the March public hearing, was making the number of members of the “Board of Adjustment” *three* instead of *five*.



**Title 11 O.S. § 44-101** states, in part, “The board of adjustment *shall* consist of five (5) members” [emphasis added]. The Town of Bernice is a statutory town form of government and cannot override a state statute with a local ordinance.

*Interviews with town officials indicated confusion about whether the Zoning Board and/or the Board of Adjustment were two different boards or the same board and what their duties were as well as what the zoning administrator’s duties were.*

The Code of Ordinances refers to one board as both the Board of Adjustment and the Zoning Board of Adjustment. The agendas for and the minutes of the meetings of the board(s) have used different names, including the Zoning Board, the Zoning Board of Adjustment, and the Board of Adjustments. The Zoning Board appointed a chairman of “the Zoning Board *and* Board of Adjustments” [emphasis added] at its June 8, 2010, meeting.

Additionally, the Code of Ordinances references a “planning commission” which does not appear to exist (unless the Zoning Board is also considered to be the planning commission).

The Board of Adjustment was comprised of only three members, two of whom were never officially appointed. The members were the same as the members of the Zoning Board, as detailed in the *Background* section of this Objective.

The Town Board appointed a person to the “Zoning Board” in November 2010 then appointed that same person to the “Board of Adjustment” in June 2011 to correct the “oversight” of his not being appointed to both boards at the November 2010 meeting.

A zoning commission is required by **11 O.S. § 43-109** and serves a different function from a board of adjustment, which is required by **11 O.S. § 44-101**. **Title 51 O.S. § 6** provides that “no person holding an office under the laws of the state [...] shall, during the person’s term of office, hold any other office [...] under the laws of the state.” **Attorney General Opinion 1986-65** opined that “since the position of municipal adjustment board member is created by State statute, imposes definite duties, and involves the exercise of sovereign power, the position is a public office.”

**Town Code § 10-10-2(A)(5)** stipulates that the zoning administrator “shall serve by appointment of the board of trustees,” and his/her term “shall begin upon the adoption of this title.” [emphasis added] However, while the Town Board adopted the zoning code on May 15, 2009, it did not appoint a zoning administrator until July 12, 2010, nearly 14 months after the adoption of the code.

*The lack of a clear structure with regard to oversight and enforcement of the Town’s zoning code has created confusion and the appearance of “arbitrary” enforcement.*

The haphazard way in which the zoning code was enacted has created some confusion in its administration and enforcement. In the 14-month period prior to appointing a zoning administrator, the Town attempted to enforce the zoning code through the mayor and/or the Board of Adjustment.

In May 2010, a citizen requested a permit and variance. The “Zoning Board” denied the request. The citizen “appealed” the denial, and the “Board of Adjustments,” composed of the same individuals, naturally upheld the denial.

In June 2010, Raven issued a letter to a citizen, notifying him that complaints had allegedly been filed with the Town, alleging that he was in violation of the zoning code’s prohibitions against excessive noise, excessive trash on property, junk cars and boats on property, debris on the roadway, setback regulations, and a business in a residentially-zoned area. According to the citizen, he never actually operated a business out of his house but simply used his residential address as his business address for purposes of his insurance license.

Also in June 2010, the Town filed a lawsuit against a citizen for trespass, alleging that the citizen encroached onto a street. The Town Board had previously approved allowing Raven to instruct the town attorney to file the suit at the May 2010 board meeting. In April 2011, the district court ruled in favor of the Town. The citizen appealed, and the appeal was pending as of the date of this report.

After appointment of the zoning administrator in July 2010, the Zoning Board / Board of Adjustment overturned apparent denials by the zoning administrator of requests for permits and/or variances by two citizens in September and November of that year.

According to one town record, between the time that the Town Board enacted the zoning code and the end of June 2011, the Town received seven applications for permits, variances, or waivers from citizens, but the town clerk-treasurer could provide records for only four of the seven. Also, there had been several apparent construction projects in town for which there were no permits on file.

In November 2010, the Zoning Board / Board of Adjustment granted a request for a variance by a citizen who is an attorney at the same firm at which the current town attorney works. Raven was at the meeting and appeared to support the citizen's building plan. The citizen said that the zoning administrator had verbally approved a variance, but the zoning administrator said that he had not.

The part of Bernice through which Highway 85A runs is zoned as a commercial district. Some blocks of residences/houses are included in that commercial district. Among those residences is Raven's, out of which he operates his personal business, Bill's Trucking. While his business would have been allowed to continue had those blocks been zoned residential, he could not have re-started the business if he stopped it, and no *new* businesses would have been allowed. However, because those blocks were zoned commercial, businesses can be started and/or re-started there, in effect protecting the "status quo" for the mayor (as well as any other commercial enterprises run from residences in that area of town).



**Figure 1: The commercial zone is in pink on both sides of the highway.**

## Conclusions

The Board of Adjustment was comprised of only three members, not five, as required by state law. As established in the *Findings* section of this Objective, the members were the same individuals who comprise the Zoning Board, which is likely prohibited by law if the two boards exist concurrently.<sup>31</sup> It is also “prohibited” by common sense, though: There can be no valid “appeals” process if the board that hears the “appeal” is the exact same group of individuals that made the decision that is being appealed.

Because the Town’s records indicated that the *Zoning Board* did not follow the procedures required by state law prior to the Town Board’s adoption of the zoning code, the zoning code was apparently adopted improperly and is likely invalid as a consequence.<sup>32</sup>

Furthermore, the initial attempts at enforcement of the zoning code appear arbitrary or, at least, haphazard.

## Recommendations

1. Should the Town Board decide that it wants to continue having a zoning code, it should re-adopt the zoning code or adopt a new zoning code by following the requirements of **11 O.S. §§ 43-104 and 43-109**. To encourage participation by the public, the Town Board should consider adopting the code at a regular meeting, after having had a public hearing, instead of at a “special” meeting.
2. If the Town Board chooses to keep a Zoning Board – more properly called a Zoning Commission – in existence after adopting the zoning code, it should restrict its duties to those allowed by **11 O.S. § 43-109**, clearly separate it from the Board of Adjustment, and have different individuals serve on it versus those serving on the Board of Adjustment.
3. If the Town Board wishes to have a Planning Commission, it should have the makeup and duties provided by **11 O.S. §§ 45-101 through 45-106**, and it should be one in the same as the Zoning Commission (as long as a Zoning Commission exists).<sup>33</sup>
4. The Board of Adjustment should be comprised of five members, in accordance with statute, and the Town’s zoning code should reflect that. The Town should follow that ordinance by having the mayor

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<sup>31</sup> 51 O.S. § 6; supported by 1986 OK AG 65

<sup>32</sup> 1985 OK CIV APP 45

<sup>33</sup> 11 O.S. § 43-109

appoint the members with approval of the Town Board, or it should amend that ordinance to allow the Town Board to appoint the members directly.

5. The Town Board should clearly define the existence and duties of the Board of Adjustment and the zoning administrator and adhere to those definitions.
6. Town officials should ensure that the zoning code is enforced uniformly and fairly. Any citizens who believe that they have been adversely affected by the current zoning code and its enforcement should consider their options, if any, in light of this report.

**Objective IV: Review compliance with the Open Meeting Act and Open Records Act**

**Background**

It is the public policy of Oklahoma “that the people are vested with the inherent right to know and be fully informed about their government” and “to encourage and facilitate an informed citizenry’s understanding of the governmental processes and governmental problems.”<sup>34</sup> The Oklahoma Open Meeting Act is “designed to enable citizens to be present and view the workings of government at open meetings.”<sup>35</sup>

The Oklahoma Court of Civil Appeals has held, in part:

The Open Meeting Act is not obscure or incomprehensible. On the contrary, anyone with ten minutes to spare can read the whole thing and understand virtually every word. Each member of a covered public body should have taken that ten minutes [*sic*]. Lack of familiarity is no excuse.

If *willful* is narrowly interpreted, if actions taken in violation of the Act could not be set aside unless done in bad faith, maliciously, obstinately, with a premeditated evil design and intent to do wrong, then the public would be left helpless to enforce the Act most of the time and public bodies could go merrily along, in good faith, ignoring the Act. [emphasis added]

We think the goal of the Legislature was not simply to prevent or punish deliberate violations, but to restore sadly sagging public confidence in government, a goal which is hurt by every non-complying meeting regardless of whether the noncompliance resulted from “evil motives” or not.

To wink at violations in one case is to invite them in another. The Oklahoma Legislature, elected voice of the people of this state, mandated open meetings. [...] Without vigorous enforcement in the courts, laudable legislation is reduced to “mere words.” [...] The Legislature has said, “Let the sun shine on government.” So say we today.<sup>36</sup>

It is important for elected officials to take it upon themselves to become aware of the requirements and prohibitions of the Open Meeting Act

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<sup>34</sup> 25 O.S. § 302, 51 O.S. § 24A.2

<sup>35</sup> 1998 OK AG 45

<sup>36</sup> 1981 OK CIV APP 57

because the political subdivisions that they serve are not authorized to legally defend them against criminal charges of violating the act.<sup>37</sup>

Before holding a meeting, a public body must give advance public notice, at least 24 hours for a regularly-scheduled meeting or at least 48 hours for a specially-called meeting, by publicly posting the agenda for the meeting.<sup>38</sup> However, at a regularly-scheduled meeting, a public body may consider new business, which is “any matter not known about or which could not have been reasonably foreseen prior to the time of posting” of the agenda.<sup>39</sup>

A public body may hold an emergency meeting with only as much advance public notice as possible, if any, in “a situation involving injury to persons or injury and damage to public or personal property or immediate financial loss when the time requirements for public notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss.”<sup>40</sup>

A majority of the members of a public body may not meet or discuss public business outside of a public meeting.<sup>41</sup> A public body may discuss certain matters, but not vote, behind closed doors in executive sessions of public meetings if certain procedures are followed in advance, including listing on the meeting agendas the matters to be discussed and the specific sections of the Open Meeting Act that allows for the discussions of the matters in executive sessions.<sup>42</sup>

All actions taken at public meetings, including during executive sessions, must be recorded in the form of written minutes.<sup>43</sup> All minutes except for those of executive sessions are public records.<sup>44</sup>

The purpose of the Oklahoma Open Records Act is “to ensure and facilitate the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.”<sup>45</sup>

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<sup>37</sup> 11 23 O.S. § 101, supported by 1980 OK AG 276

<sup>38</sup> 25 O.S. § 311(A)

<sup>39</sup> 25 O.S. § 311(A)(9)

<sup>40</sup> 25 O.S. §§ 311(A)(12), 304(5)

<sup>41</sup> 25 O.S. §§ 303, 304

<sup>42</sup> 25 O.S. § 307

<sup>43</sup> 25 O.S. § 312, supported by 25 O.S. § 307(F)(2) and 1996 OK AG 100

<sup>44</sup> 51 O.S. § 24A.5(1)(b), supported by 1996 OK AG 100

<sup>45</sup> 51 O.S. § 24A.2

All records “of public bodies and public officials” – except for certain records that are required by **51 O.S. § 24A.5(1)** to be kept confidential – shall be “open to any person for inspection, copying, or mechanical reproduction” during regular business hours, and public bodies “must provide prompt, reasonable access” to their records.<sup>46</sup>

A municipality or other government subdivision “may charge a fee only for recovery of the reasonable, direct costs of record copying or mechanical reproduction”, and the fee cannot exceed \$0.25 per page for records with dimensions of eight and one-half inches by 14 inches or smaller or \$1 per page for certified copies. However, if a request “is solely for commercial purpose” or “would clearly cause excessive disruption of the essential functions of the public body,” then the government subdivision “may charge a reasonable fee to recover the direct cost of record search and copying.”

However, “publication in a newspaper or broadcast by news media for news purposes shall not constitute a resale or use of a record for trade or commercial purpose, and charges for providing copies of electronic data to the news media for a news purpose shall not exceed the direct cost of making the copy.” Additionally, “in no case shall a search fee be charged when the release of records is in the public interest, including, but not limited to, release to the news media, scholars, authors, and taxpayers seeking to determine whether those entrusted with the affairs of the government are honestly, faithfully, and competently performing their duties as public servants.” Finally, “the fees shall not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.”

Any government subdivision that establishes any of these fees is required to post a written schedule of the fees at its principal office and file it with the county clerk.<sup>47</sup>

## **Findings**

***Sufficient notice was not posted for “joint” meetings of the Zoning Board and Town Board.***

All three members of the Zoning Board were present at the March 26, 2009, Town Board meeting, which was a special meeting at which the zoning code was discussed, but there was no notice posted of a “Zoning

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<sup>46</sup> 51 O.S. § 24A.5

<sup>47</sup> 51 O.S. § 24A.5



Board” meeting. Likewise, Raven, Dennis, Brewster, and Anderson were present at the May 20, 2010, Zoning Board meeting, but there was no notice posted of a “Town Board” meeting.

*A review of town records and interviews with town officials indicated a variety of actions and issues that were at least questionable as to compliance with the Open Meeting Act.*

Executive sessions were used to discuss contracts with independent contractors, contrary to **O.S. 25 § 307(B)(1)**.<sup>48</sup> At the January 14, 2008, BPWA meeting, the BPWA discussed in an executive session the water administrator’s contract. At the January 12, 2009, Town Board meeting, the Town Board discussed in an executive session the Town’s contract with the Delaware County Sheriff’s Office.

Minutes were almost never taken in or recorded for executive sessions during meetings, contrary to **25 O.S. § 312** (as supported by **25 O.S. § 307(F)(2)**).<sup>49</sup> The minutes of the August 17, 2009, Town Board meeting did not reflect the vote to hire a person as the animal-control officer. It is incumbent on a public board to provide more than a perfunctory review and approval of its meeting minutes to avoid errors and omissions.

Agendas of meetings that included possible executive sessions sometimes listed the wrong or no specific statutory authority for the sessions, contrary to **25 O.S. § 311(B)(2)**. In the case of possible sessions for discussion of employees, the employees’ names or specific positions were sometimes not listed, and the specific purposes of the sessions – whether employment, hiring, appointment, promotion, demotion, disciplining, or resignation – were not identified.

On May 5, 2010, an agenda for an emergency Town Board meeting for May 6 was posted. The only issue on the agenda was a possible executive session “to discuss with the town attorney violations of town ordinances and zoning codes” and possible action on the matter. The matter was apparently in regard to the citizen who allegedly encroached onto a town street, as mentioned in *Objective III*. The meeting was subsequently canceled after the town attorney and the citizen’s attorney agreed that the citizen would stop construction work until the next regularly-scheduled meeting. The agenda did not list any statutory authority for the executive session.

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<sup>48</sup> Supported by 2005 OK AG 29

<sup>49</sup> Supported by 1996 OK AG 100

Although **25 O.S. § 307(B)(4)** allows “confidential communications between a public body and its attorney,” a generic discussion of “violations of town ordinances and zoning codes” (the only description provided for the executive session) does not appear to be sufficient justification for an executive session under the statute.

At the November 18, 2010, meeting, the Town Board discussed in executive session the resignation of a Zoning Board member and the appointment of a new member. The minutes show a vote taken in the executive session on appointing a particular individual to the Zoning Board, contrary to **25 O.S. § 305**, followed by *another* vote in the open meeting to appoint that individual.

The Town Board changed town attorneys at its December 2010 meeting. Based on a review of a citizen’s video recording of the meeting, there was no discussion, a quick motion, and a quick vote to terminate the former town attorney’s services. The circumstances gave the appearance of an “already-decided” action by the Town Board.

During the meeting, immediately after Raven read the agenda item, he looked at Dennis, who, appearing to read from a piece of paper, made a motion to change the Town’s law firm. Immediately after Dennis made the motion, he looked at Raven, who nodded and then looked over toward another trustee. Langley then seconded Dennis’ motion, and Raven immediately called for a vote. The vote was unanimous (Anderson was absent).

A resident asked why the Town Board took that action, and Dennis said, “We just felt like maybe we could be better represented with another law firm.” The resident asked if the new firm had agreed to represent the Town, and Raven said that it had. The resident said, “So it was all planned; you knew before you came in tonight,” and Raven said, “Well, that would seem kind of foolish, wouldn’t it, to hire a law firm if we had not talked to them?”

According to Raven, all of the trustees wanted to terminate the Town’s use of the now former town attorney’s services and had previously “made comments to” him (Raven) about doing so. In May 2011, the Town Board voted to formally contract with the new law firm. Raven said that it was the first contract between the Town and the new firm. The town attorney said that “the agreement” had been that his law firm would work for the Town “on an interim basis” at the same rates as the Town’s previous contract law firm had charged.

Raven said that he sometimes talks to other trustees outside of meetings so that they can “all have an idea of what will be done” so that they “are not surprised by issues” at meetings. He said that the trustees used to arrive at the town meeting building before meetings “just to make small talk but not to discuss Town business” but no longer do that since the new town attorney advised them not to do so.

At its March 14 and April 11, 2011, meetings, the Town Board discussed in executive sessions creating the position of a maintenance employee, potentially contrary to **25 O.S. § 307(B)(1)**,<sup>50</sup> which requires a “specific person” – as opposed to a general “position” – to be the subject of an executive session. Following the April 11 executive session, the Town Board created the position and appointed an individual to fill it.

Prior to the April 11, 2011, Town Board meeting, a resident asked the King to include some issues on the meeting agenda (which is not an advisable way for the public to have issues addressed at meetings<sup>51</sup>). King wrote to the town trustees prior to the meeting that the issues would not be included on the agenda because she had, according to her, talked to three trustees, and they did not want the items included. The informal “poll” of a quorum of trustees and the de facto “decision” to not include the issues requested by the citizen would seem contrary to **25 O.S. § 305**.

*Various items addressed and decided under “new business” frequently appeared to be more “routine” and able to be specified as ordinary agenda items at subsequent meetings.*

The Town Board /BPWA conducted business, including spending public funds, during the “new business” section of at least 10 meetings:

- November 10, 2008: The Town Board voted to purchase a computer for the fire department for \$539.
- December 8, 2008: The Town Board voted to spend up to \$400 to repair a storm siren.
- February 9, 2009: The Town Board voted to purchase equipment for the fire department for approximately \$164.
- June 8, 2009: The Town Board voted to request temporary appropriations from the County for the upcoming fiscal year and to purchase concrete, for which the Town subsequently spent \$252.

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<sup>50</sup> Supported by 2006 OK AG 17

<sup>51</sup> 1998 OK AG 45

- July 13, 2009: The Town Board voted to purchase three “Children Playing” signs for an approximate total of \$75.
- October 13, 2009: The BPWA refunded the penalties on a water customer’s account.
- April 12, 2010: The Town Board voted to spend up to \$550 on items for the fire department.
- May 10, 2010: The Town Board voted to purchase a piece of park equipment for \$298.
- July 12, 2010: The Town Board voted to purchase from a bank a lot across the street from Town Hall for \$5,000.
- September 13, 2010: The BPWA renewed its loan with the local bank for the automated water-meter-reading system, as mentioned in *Objective II*.

At least some, if not most, of the decisions and transactions above were dubious applications and/or abuses of the “new business” language found in **25 O.S. § 311(A)(9)**, which pertains to matters “which could not have been reasonably foreseen prior to the time of posting” of the agendas [emphasis added].

***The fee schedule for copies of public records was not filed with the county clerk, in accordance with the Open Records Act.***

The Town charges for copies of public records and has a fee schedule posted at Town Hall, but the fee schedule was not filed with the county clerk, in accordance with **51 O.S. § 24A.5(3)(b)**.

## Conclusions

Open Meeting Act violations occur when:

- a majority of the members of a board (e.g., the Town Board, the Zoning Board) discuss their board’s business outside of their board meetings;
- the Town Board has “emergency” meetings for any purposes other than those allowed by law;
- the Town Board holds executive sessions for purposes which are not explicitly permitted, such as discussions of independent-contractor contracts<sup>52</sup> and communications with the town attorney

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<sup>52</sup> 2005 OK AG 29

regarding anything other than a pending investigation, claim, action, litigation, or proceeding;<sup>53</sup>

- the town trustees vote in executive sessions;
- the meeting agendas do not clearly and specifically describe the matters to be discussed during executive sessions or do not cite the specific statutory provisions allowing for the executive sessions;
- minutes of executive sessions are not taken; and
- matters that could have been reasonably foreseen prior to the posting of meeting agendas or that could be addressed at subsequent meetings are discussed and/or acted upon during the “new business” section of regular meetings.

An Open Records Act violation occurs when a written schedule of fees charged for copying public records is not on file at the County Clerk’s Office.

- Recommendations**
1. No town trustee should discuss town business with a quorum present or, in sequential fashion, separately with enough other trustees to make a quorum, outside of Town Board meetings.
  2. If a majority of the members of any of the boards wish to attend a meeting of another board (e.g., the town trustees attend a Zoning Board meeting), then a special meeting of their board should be called to be held simultaneously with the other board’s meeting. An appropriate meeting notice should be posted to notify the public of the joint meeting.
  3. While town employees and officials (other than town trustees) can speak separately with a majority of the trustees about specific town business, the trustees should be careful not to informally make any decisions among themselves through those communications (e.g., a majority of trustees knowingly making a decision through separate conversations with the town clerk-treasurer).<sup>54</sup>
  4. The Town Board should hold executive sessions only when absolutely necessary and only in the specific instances allowed by **25 O.S. § 307**.
  5. Board agendas should clearly and specifically describe the matter to be discussed during the executive session and list the specific statutory

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<sup>53</sup> 25 O.S. § 307(B)(4)

<sup>54</sup> 1981 OK AG 69

authority for the session, such as “Title 25, Oklahoma Statutes, Section 307(B)(1),” for example.

6. If the matter to be discussed in an executive session is an employment matter, the agenda should identify a specific current or prospective employee,<sup>55</sup> and the employee’s name or unique position should be specified on the agenda.<sup>56</sup>
7. The Town Board should not vote during executive sessions, and written minutes should be taken while in executive sessions.
8. During the “new business” section of meetings, the Town Board should address matters only when town officials did not know about the matters or could not have reasonably foreseen them prior to the posting of the meeting agendas and when the matters are significant enough that they cannot wait until the next meeting to be addressed.
9. The District Attorney’s Office should review and address the town trustees’ possible violations of the Open Meeting Act.
10. Town officials should file the Town’s fee schedule for record copying at the Delaware County Clerk’s Office, in accordance with the Open Records Act.

**Subsequent Events** In December 2011, the agenda for the Town Board meeting did not include a provision allowing citizens to be heard; the January and February 2012 agendas also did not allow for input from the public. Previously, agendas included a “Remarks by General Public” section. Governing bodies are not required to allow the public to speak at their public meetings, but they may allow it.<sup>57</sup>

**Town Code § 1-6-5(B)(3)** requires the Town Board to allow for “presentation of petitions, memorials, and other communications and hearing of citizens” at its meetings. That ordinance had not been repealed or revised by the Town Board as of February 2012.

In January 2012, Bernice residents allegedly witnessed the town trustees talk among themselves after the last meeting with a town attorney present. According to that town attorney, the trustees did not discuss town or BPWA business with each other.

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<sup>55</sup> 2006 OK AG 17

<sup>56</sup> 1997 OK AG 61

<sup>57</sup> 1998 OK AG 45

## **Objective V:      Review qualifications of town officials**

### **Background**

Municipal officials who are elected or appointed for the first time after January 1, 2005, are required to attend training within one year of taking their oaths of office; if they do not, they cease to hold their positions “at the next scheduled meeting of the governing body.”<sup>58</sup>

Raven and Brewster became town trustees prior to January 1, 2005. Dennis, Langley, and Anderson became town trustees after January 1, 2005, and King became the town clerk-treasurer after January 1, 2005. Dennis and King attended training on June 7, 2007. Langley and Anderson did not attend training.

Municipal officials may not appoint any of their relatives or any relatives of any members of the governing body to any office or position of profit within the municipal government.<sup>59</sup>

King’s husband previously served as the Town’s emergency management director and as a member of the Zoning Board / Board of Adjustment. The Town Board appointed him to the Zoning Board in February 2009, but he was never officially appointed to the Board of Adjustment. The Town Board last appointed him emergency management director in April 2009.

### **Findings**

Because Langley and Anderson did not attend training, they ceased legally holding their positions as town trustees as of the first Town Board meetings after one year had elapsed from their being sworn in as town trustees. Langley was first appointed to the Town Board on May 8, 2006; he should have run for election in April 2007 but did not; he was elected in April 2009. He legally ceased being a trustee in May 2007, and, after being elected in April 2009, he legally ceased being a trustee again as of April 2010.

Anderson was first appointed to the Town Board on February 9, 2009; he was elected in April 2009 and was re-elected in April 2011. He legally ceased being a trustee in April 2010, but he was re-elected in April 2011.

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<sup>58</sup> 11 O.S. § 8-114

<sup>59</sup> 11 O.S. § 8-106

The Town Board appointed King's husband to the Zoning Board and as emergency management director. King did not appoint him to any position (and, indeed, does not have the authority to appoint officials or employees). Since King is not a member of the Town's governing body, nepotism is not an issue, and there is no conflict with **11 O.S. § 8-106** with regard to King and her husband.

## **Conclusions**

When a vacancy occurs in an office, "the fact by reason whereof the vacancy arises shall be determined by the authority authorized to fill such vacancy."<sup>60</sup> An Attorney General opinion interpreted that to mean, despite the obvious conflict, that the remaining members of the Town Board would have to determine if Langley failed to receive the required training and, therefore, ceased to hold office.<sup>61</sup>

However, the Town Board never took any action on the matter before October 2011. As such, because it did not replace Langley within 60 days of his legally ceasing to be a trustee in April 2010, the Town Board should have called a special election to replace him, as required by state law.<sup>62</sup>

With regard to actions or decisions that the Town Board took during the timeframes that Langley and Anderson were not legally trustees, it appears that there is no issue with those actions or decisions being invalid. Even if there were votes that would have been different had Langley and Anderson not voted, an Attorney General opinion has opined, in part, that:

Even if elected municipal officials fail to qualify for their offices as required by statute, such incumbents who are otherwise fully qualified would be officers de facto, and their acts will be upheld as valid upon principles of policy and justice.<sup>63</sup>

**Recommendations** The Town Board should ensure that newly-elected officials attend the statutorily-mandated training.

**Subsequent Events** In August 2011, Anderson resigned from the Town Board. However, he would have had until April 2012 to attend training. In September 2011,

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<sup>60</sup> 51 O.S. § 8

<sup>61</sup> 1996 OK AG 98

<sup>62</sup> 11 O.S. § 8-109(A)

<sup>63</sup> 1997 OK AG 9



the remaining town trustees appointed Kristi Murphy to fill the vacant position.

In August 2011, the town attorney said that the Town Board planned for Langley to be an “inactive trustee,” not participating in meetings as a voting trustee, until he attended training later in the year.

However, the statute that requires first-time municipal officials to attend training within their first year or cease holding their positions does not provide for them to be “inactive” after their first year until receiving training.

In October 2011, the Town Board “re-appointed” Langley. Prior to that, Langley attended the required training, and the October 2011 Town Board meeting minutes indicated that the Town Board voted to reimburse Langley for his training costs (although, according to the attached response from the Town, he was not actually subsequently reimbursed). In November 2011, though, on the advice of the town attorney, the Town Board voted to call for a special election to fill Langley’s position.

Langley was the only candidate who filed to run in the special election, but after a Bernice resident challenged his candidacy, alleging that the Town Board ward boundaries were not properly drawn, Langley withdrew his candidacy. The town attorney subsequently indicated that the Town Board is having the ward boundaries redrawn based on the 2010 Census numbers and that the Town Board will then call for a special election.

## Objective VI: Review possible conflicts of interest of town officials

### Background

Municipal officials and employees generally cannot do business with the municipalities that they serve or for which they work.<sup>64</sup>

Raven owned Bernice Sanitation, which is a trash company located in Bernice, until he sold it in 2004. The company provided sanitation service to some Bernice residents, but it never contracted with the Town for exclusive sanitation-service rights, as is done in some municipalities

As of June 2011, Raven owned and operated Bill's Trucking, a trucking business.

### Findings

Raven received the following payments from the Town, as denoted in the Town's expenditure ledgers or by King:

- \$187 – “mileage to workshop” – May 31, 2008
- \$204 – “mileage to OKC for workshop” – November 17, 2008
- \$75 – “reimbursement - 5 yds. Compost for War Memorial” – September 16, 2009
- \$364 – “reimbursement, white rock for War Memorial” – October 9, 2009
- \$107 – “reimbursement for basketball goal combo” – December 21, 2009
- \$70 – “reimbursement for fuel for salt truck” – January 8, 2010

Between 2000 and 2007, the Town paid Raven different amounts of money as reimbursements for purchases that he allegedly made for the Town. The payments were supported by purchase orders and receipts in a folder in the town clerk-treasurer's office. Among the payments were a \$4,100 payment in 2000 and a \$13,110 payment in 2007.

The 2000 purchase was of a 1992 Dodge W30 CB truck. The purchase order was to Bill's Trucking and denotes that the truck was a grass-rig fire truck. An auction receipt lists Raven and his wife as the customer. Bernice Fire & Rescue is the named insured on the truck.

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<sup>64</sup> 11 O.S. § 8-113; 62 O.S. § 371

The 2007 purchase was of a 1999 Ford F350 truck. The purchase order was to Raven. A dealership receipt lists the Town of Bernice as the customer. The Town and the BPWA are the named insured on the truck.

Bill's Trucking was not billed in 2010 or 2011 for the annual occupational tax that the Town charges all businesses in Bernice. King said that it was an oversight and that she would retroactively bill Raven.

**Article X § 11 of the Oklahoma Constitution** generally prohibits public officials from doing business with their public entity:

The receiving, directly or indirectly, by any officer of the State, or of any county, city, or town, or member or officer of the Legislature, of any interest, profit, or perquisites, arising from the use or loan of public funds in his hands, or moneys to be raised through his agency for State, city, town, district, or county purposes shall be deemed a felony.

Recognizing that this section has resulted in some unique problems for small municipalities (with populations of less than 2,500 in the last census), the Legislature has provided further qualification or definition to the above conflict-of-interest law. **Title 11 O.S. § 8-113** allows municipal officials to do business with the municipality under certain, *limited* circumstances.

## Conclusions

While a legislature generally can make constitutional provisions *more* restrictive, they generally cannot make provisions *less* restrictive, which would operate to modify the provisions. Regardless, **11 O.S. § 8-113** has not been challenged in court. However, because of the obvious “appearance” of a conflict, it is never a *preferred* practice for even small-town officials to do business with the municipality that they are serving.

The trucks purchased in 2000 and 2007 are apparently still in use as fire trucks, as they are listed on the Town's insurance policy.

Absent corroborating information or evidence to the contrary, the other Raven purchases, made personally or through his business or former business, were apparently for the Town, and the transactions were reimbursements.

Raven's business should have been billed for the occupational tax in 2010 and 2011 as all other businesses were. As the long-time mayor, it is

reasonable to conclude that he should have known that he had not been billed and taken action to pay the fees.

- Recommendations**
1. Town purchases should be done according to statute and/or town policy established by ordinance or resolution.<sup>65</sup> Town officials should not personally purchase anything on behalf of the Town, which must then be reimbursed. Town-related *travel* expenses are normally done by reimbursement, and that is to be expected.
  2. Raven should pay the occupational-tax fees for 2010 and 2011, for which his business was not billed, and the town clerk-treasurer should ensure that town officials with businesses in town are billed every year.

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<sup>65</sup> 11 O.S. § 17-102, 62 O.S. § 310.2

## Objective VII: Review compensation and bonds of town officials and employees

### Background

The Oklahoma Constitution generally prohibits public officials' pay from being changed during their terms of office:

Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, unless by operation of law enacted prior to such election or appointment [...].<sup>66</sup>

Elected municipal officials' terms are four years.<sup>67</sup> When an elected municipal office becomes vacant and is filled by an appointment, an election for the office is required in the next general election, regardless of when the position is normally up for election.<sup>68</sup>

Any member of the governing body of a municipality who works in any position of employment within the municipal government may not receive compensation for work done in the position of employment.<sup>69</sup>

Municipal treasurers, municipal court clerks, and any other municipal officials or employees who are authorized to sign checks or warrants are required to be bonded with surety bonds for the performance of their duties.<sup>70</sup> Surety bonds protect government entities from fraud and malpractice. When a covered official or employee violates the terms of the bond, the Town can file a claim on the bond to recover losses incurred.

### Findings

Former Town Clerk-Treasurer Myrna Aleman resigned after being re-elected in April 2007, and Connie King was *appointed* to replace her. King was *elected* to fill Aleman's unexpired term in a special election in April 2009, and she was re-elected to a full term in April 2011.

In March 2009, the Town Board approved an ordinance increasing the town clerk-treasurer's salary from \$600 per month to \$1,204 per month,

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<sup>66</sup> Okla. Const. art. XXIII § 10; supported by 2007 OK AG 14, 1982 OK AG 125

<sup>67</sup> 11 O.S. §§ 8-102

<sup>68</sup> 11 O.S. § 8-109(A)

<sup>69</sup> 11 O.S. § 8-106; supported by 2001 OK AG 23

<sup>70</sup> 11 O.S. §§ 8-105, 27-111(A)

effective April 2009. In January 2011, the Town Board approved an ordinance increasing the town clerk-treasurer's salary to \$1,604 per month, effective April 2011.

Bernice's fire department is a "volunteer" department, meaning it is not a full-time department. Volunteer firefighters are paid at the end of each calendar year for the number of fire calls to which they responded that year. As of 2011, each firefighter was paid \$8 per call.

Dennis, who became a town trustee in 2007, serves as a town firefighter and receives the firefighter compensation for the fire calls to which he responds. He was paid the following amounts for *calendar* years:

- 2008: \$714
- 2009: \$552
- 2010: \$704

He was paid \$504 for fire calls for 2007, plus \$290 from "FEMA disaster" funds for work performed during an ice storm that year. He was paid \$928 for fire calls for 2011.

As of June 2011, the following employees and contract personnel were paid the following amounts per month:

- Town Clerk-Treasurer: \$1,604
- Town Court Clerk: \$500
- BPWA Clerk: \$1,055
- BPWA Water Operator: \$500
- Town Maintenance Worker: \$400
- Town Animal-control Officer: \$250
- Sheriff's Deputies: \$5,500 total to the Sheriff's Office
- Attorneys: \$800 retainer fee to the law firm
- Landscapers: approximately \$350 total
- Judge: \$250
- Janitorial services: approximately \$135

The BPWA water operator was additionally paid \$200 for each new meter tap that he set, \$12 per hour for manual labor for "system operations such as pulling meters and changing regulators" (with a minimum of two hours "per service trip"), and \$55 or \$65 per hour (depending on whether or not a second person was needed) for backhoe work. The Town's contract law firm's retainer fees covered an attorney's attendance at Town and BPWA

meetings and municipal court; the firm was additionally paid \$195 per hour beyond that.

The Town pays an annual \$100 premium on a \$3,500 bond for the town clerk-treasurer, and a 2005 ordinance requires the town court clerk to have a \$500 bond. At the time of fieldwork, the town court clerk was not bonded. Likewise, no other employees or officials were bonded.

## Conclusions

King's first pay increase, effective April 2009, was questionable because she was in the middle of an unexpired *first* term, which ran from April 2007 through April 2011.<sup>71</sup> King was *appointed* in 2007 and *elected* to fill the *unexpired* term in 2009. However, the existing case law and Attorney General's opinions that address such situations are not conclusively clear on this specific situation. The Town Board paid King, who is paid bi-weekly, an additional \$14,682 from April 2009 through March 2011.

Dennis was paid \$3,692 for his work as a firefighter from 2007 through the end of December 2011. Based on an Attorney General opinion and the dual-office-holding statute in Title 11,<sup>72</sup> Dennis' pay as a volunteer firefighter since he became a trustee in 2007 is also questionable.

Raven should be bonded because he is allowed to sign Town and BPWA checks/warrants. The BPWA clerk should also be bonded because she is allowed to sign BPWA checks.

## Recommendations

1. The questionable pay for King and Dennis should be reviewed by appropriate legal authorities, either the District Attorney's Office or the Attorney General's Office or both.
2. Additional clarification of state law pertaining to elected officials' elective terms and changes in pay may require a legislative study and/or additional review and clarification by the Attorney General's Office.
3. The Town Board should pass an ordinance that allows town officials to serve simultaneously in positions of town employment (although the town trustees cannot be paid for any work in such positions of employment, which is prohibited by statute).<sup>73</sup>

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<sup>71</sup> 1919 OK 369, supported by 2006 OK AG 26; 1924 OK 60; 1972 OK 116, supported by 2006 OK AG 26

<sup>72</sup> 1977 OK AG 188, 11 O.S. § 8-106

<sup>73</sup> 11 O.S. § 8-106; supported by 2001 OK AG 23

4. Raven and the BPWA clerk should be bonded since they are allowed to sign Town and/or BPWA checks/warrants. The Town Board should evaluate whether surety bonds for Town/BPWA officials and employees are sufficient to protect the Town's/BPWA's assets in the event of a covered loss.

**Subsequent Events** In September 2011, the town court clerk was bonded for \$500.



## Objective VIII: Review the purchase of security cameras

### Background

Security cameras were installed in the meeting room in the municipal court building and in the hall, the town clerk-treasurer's office, and the BPWA clerk's office in Town Hall. The cameras were purchased in November 2010. The cameras and installation cost \$4,479.



King issued a purchase order for \$3,279 on November 9, and Raven, Dennis, and Brewster signed it 15 days later. King issued a purchase order for \$1,200 on November 18, and Raven, Anderson, and Langley signed it the next day. A surge protector, a cable, and the digging of a trench for installation cost a total of \$130.

State law requires a vote of a municipal governing body, absent an ordinance providing otherwise, for an expenditure to be valid.<sup>74</sup>

The mayor and town clerk-treasurer are authorized by the Town Board to approve "necessary expenditures" for amounts up to \$5,000 "in emergency situations."

### Findings

The minutes of the July 13, 2009, Town Board meeting included a notation that "it was discussed to have the installation of security cameras on the next agenda." There was no other mention of security cameras on any other meeting agenda or in any other meeting minutes. King said that the Town Board apparently never actually voted to purchase the cameras.

### Conclusions

Absent some reported and/or direct threat, the need or desire for security cameras would not seem to constitute an "emergency" situation. Each of the five town trustees signed at least one of the purchase orders for the cameras, but the Town Board did not approve the purchase by a vote in an

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<sup>74</sup> 11 O.S. § 17-101

open public meeting. As such, purchase of the security cameras and installation do not appear to have been done properly.

- Recommendations**
1. Town purchases should be done according to statute and/or town policy as established by ordinance or resolution.
  2. The Town Board should review the camera-purchase and cost-of-installation transactions and vote its approval or disapproval, although the decision would necessarily be retroactive.

## Objective IX: Review town limits and election wards

### Background

When a municipality annexes or de-annexes territory, it is required to file the annexation/de-annexation ordinance and an updated municipal-limits map with the county clerk and with the Oklahoma Tax Commission (OTC).<sup>75</sup> City/Town-limits maps should be filed with the OTC so that the municipality's sales and use taxes can be appropriately assessed on purchases delivered to all addresses within the municipality.

For election purposes, after every federal census, every municipality is required to review its ward boundaries and, if necessary, redraw them so that they "are formed of compact and contiguous territory and are substantially equal in population."<sup>76</sup> Every municipality is required to file an updated map with the county election board.<sup>77</sup>

### Findings

The Town has not filed a map with the OTC since 2005, and some residences are not included in that map.



Figure 2: 2008 town limits (for comparison with 2005 OTC map).

<sup>75</sup> 11 O.S. §§ 21-104, 21-112

<sup>76</sup> 11 O.S. § 20-101

<sup>77</sup> 26 O.S. § 13-107

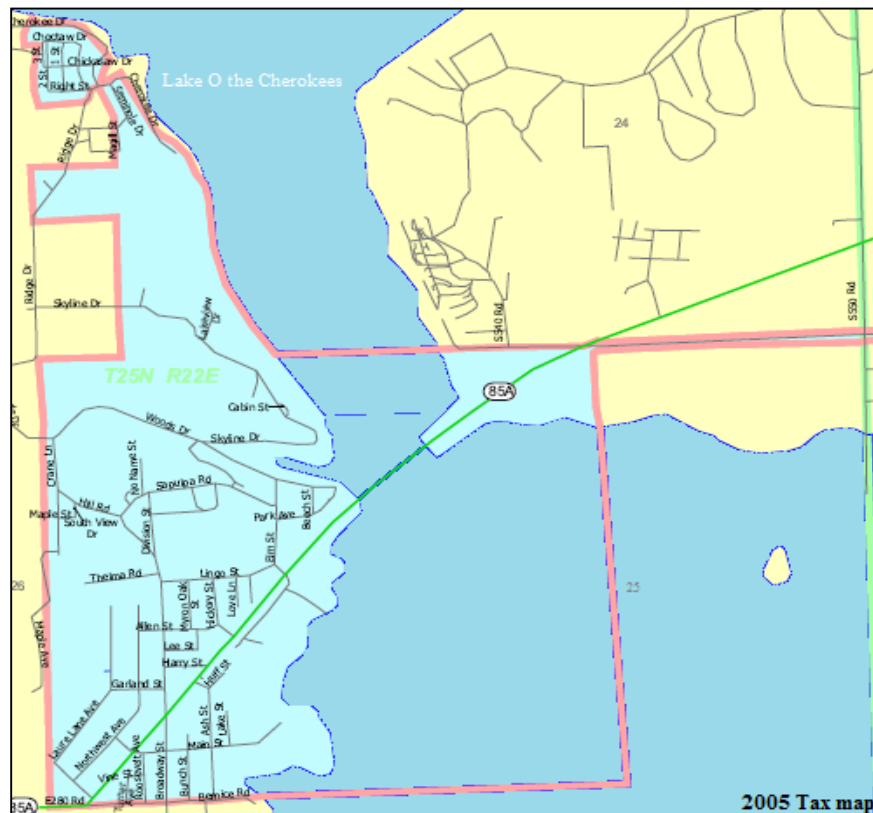


Figure 3: 2005 town-limits map on file with the OTC

There is and has been confusion among town officials and citizens about the exact town limits and the boundaries of the Town's five wards.

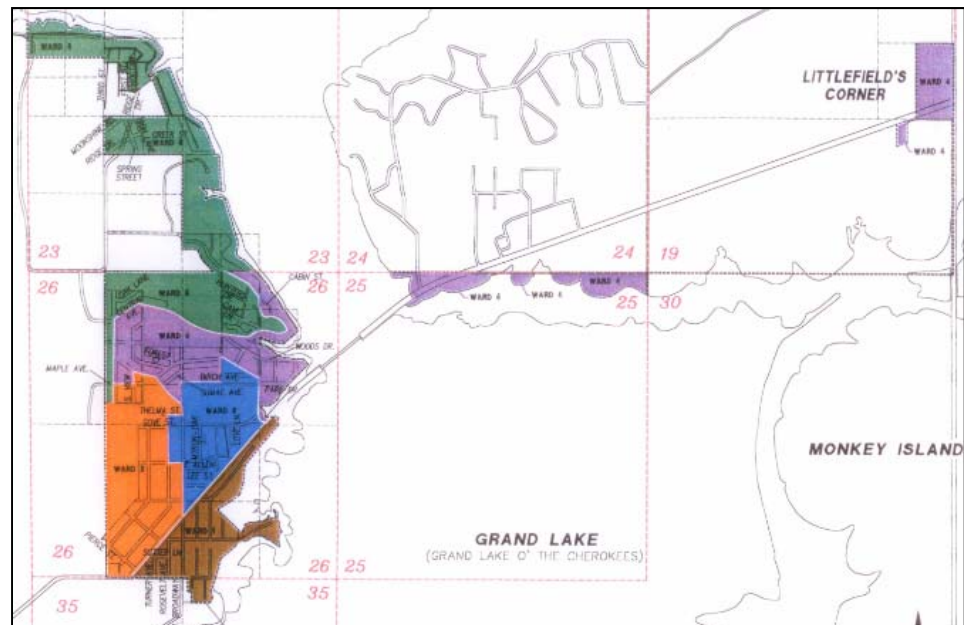
## Conclusions

Because not all Bernice residences are included in the town-limits map on file with the OTC, those citizens are not assessed municipal sales and use taxes on purchases delivered to their residences. Consequently, the Town does not receive that tax revenue.

## Recommendations

1. The Town should file its current town-limits map with the OTC. The Town should file any future annexation/de-annexation ordinances, along with updated town-limits maps, with the OTC and the Delaware County Clerk's Office.

However, the town attorney subsequently said that, because of notice requirements,<sup>78</sup> the ordinance approving the map was not published and, therefore, did not take effect. He said that notice of the proposed map was published in *The Grove Sun* newspaper on February 24 and that the Town Board will address the boundary changes again after 30 days from that date.



<sup>78</sup> 11 O.S. § 20-103

**Objective X:      Review the expenditure of Street & Alley Fund monies**

**Background**

Municipalities generally may transfer funds from one account to another unless funds are “restricted” in some way.<sup>79</sup> The Motor Fuel Tax Code restricts funds raised through it to be used by municipalities only for construction, maintenance, and repair of streets and alleys.<sup>80</sup> The Vehicle License and Registration Act restricts funds raised through it to be used by municipalities only for construction, maintenance, repair, improvement, and lighting of streets and alleys.<sup>81</sup> The Oklahoma Tax Commission (OTC) distributes certain percentages of the funds raised through the Motor Fuel Tax Code and the Vehicle License and Registration Act to the state’s municipalities.

For FY09, the Town received \$3,208 from proceeds of the Vehicle License and Registration tax and \$1,431 from proceeds of the Motor Fuel tax. That year, the Town spent the following amounts of money on street maintenance, repair, improvement, and lighting out of the following accounts:

- Asphalt: \$39,588
- Street Lights: \$3,554
- Street Signs: \$53

For FY10, the Town received \$3,215 from proceeds of the Vehicle License and Registration tax and \$1,010 from proceeds of the Motor Fuel tax. That year, the Town spent the following amounts:

- Street Lights: \$2,976
- Street Signs: \$231

For FY11, the Town received \$3,189 from proceeds of the Vehicle License and Registration tax and \$981 from proceeds of the Motor Fuel tax. That year, the Town spent the following amounts:

- Street Lights: \$2,400
- Miscellaneous Street & Alley: \$854

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<sup>79</sup> 62 O.S. § 461

<sup>80</sup> 68 O.S. § 500.6(A)(7)

<sup>81</sup> 47 O.S. § 1104(I)

- Street Signs: \$278
- Asphalt: \$259

In May 2009, the Town Board transferred \$12,000 from the “Street & Alley Maintenance & Operation” account to the “Police Budget Maintenance & Operation” account. In April 2011, the Town Board transferred \$25,000 from the “Street & Alley Maintenance & Operation” account to the “Legal Fees” account and another \$25,000 from the “Street & Alley Maintenance & Operation” account to the “Emergency Management” account.

## Findings

***A separate accounting for restricted “Street-and-Alley” tax revenues and expenditures has not been maintained by the Town.***

“Street & Alley Maintenance & Operation” expenditures, including the two \$25,000 transfers in April 2011, came out of the General Fund and not any designated Street and Alley Fund, according to King.

Also according to King, an account called “Street & Alley - Money Market,” which had a balance of \$697 as of June 2011, is not used. King said that the account was created and funded before she became the town clerk-treasurer.

In FY09, street expenditures greatly exceeded Vehicle License and Registration tax and Motor Fuel tax revenues, so it is reasonable to assume that the “restricted” revenues were used for “streets and alleys” that fiscal year. In FY10 and FY11, though, the Town received more funds through the Vehicle License and Registration Act and the Motor Fuel Tax Code than it expended on the construction, maintenance, repair, improvement, or lighting of streets and alleys for those fiscal years.

Due to the lack of a separate accounting, in FY10, the Town could not fully account for \$1,018 of the restricted tax proceeds that it received. Likewise, it could not fully account for \$379 of the restricted tax proceeds that it received in FY11.

However, because the “carry-over” cash balance for the General Fund was much larger than the residual amounts of Street & Alley net revenues for FY10 and FY11, there was no effective way to determine if those leftover amounts were expended on anything or if they were part of the amounts carried over in the General Fund at the end of each fiscal year.

**Conclusions**

Due to the circumstances, the most likely explanation for the “Street & Alley - Money Market” account is that it was originally set up to account for the restricted revenues from the Vehicle License and Registration tax and Motor Fuel tax. The requirement to account separately for the restricted Street & Alley Fund revenues and expenditures was apparently not adequately communicated when King became the town clerk-treasurer.

**Recommendations**

1. In order to fully account for the “restricted” use of the Vehicle License and Registration tax and Motor Fuel tax, the town officials should consider utilizing the current Street & Alley Money Market bank account for its likely intended purpose.
2. The town clerk-treasurer should deposit revenues from the Vehicle License and Registration tax and Motor Fuel tax received through the OTC into the Street & Alley Money Market account.
3. Town officials should consider transferring the apparent residual amounts (\$1,018 and \$379) left over from FY10 and FY11 to the Street & Alley Money Market account from the Town’s General Fund account.
4. Street and Alley Fund expenditures can be made directly from the Street & Alley Money Market account, or transfers can be made from that account to the Town’s General Fund account to reimburse *that* fund for specifically-identified street expenditures that qualify for the restricted uses.
5. This arrangement should permit the Town to fully account for its restricted Street & Alley tax revenues in the future.



## Objective XI: Review other concerns

### Background

#### Notebook Computer

In May 2009, the Town Board purchased a notebook computer and wireless Internet service for it. The computer and accessories cost \$728, and wireless Internet service cost \$54 per month as of May 2009.

#### Boat Lift

In July 2010, the Town Board purchased a boat lift for the fire department's boat. It previously solicited bids and received the following three:

- HydroHoist in Bernice: \$7,990
- Boat Floater in Bernice: \$8,120
- Jerry's Dock Construction in Bernice: \$8,130

The Town Board accepted the bid from Jerry's Dock Construction, the highest of the three bids.

#### Fire-tax Money

In 2001, Delaware County voters approved a county-wide sales tax to be used to fund the fire departments in the county. A sales tax levy of two-fifths of one percent is collected and divided equally among the 20 fire departments throughout the county. The departments can spend the money on general operation and maintenance, equipment purchases, training, and construction of or improvements to buildings. During the fiscal years from 2008 through 2011, the Town Board received and expended the following amounts of fire-tax funds:

	Beginning Balance	Funds Received	Funds Expended	Ending Balance
FY09	\$75,754	\$22,885	\$29,309	\$69,330
FY10	\$69,330	\$28,206	\$56,493	\$41,043
FY11	\$42,499	\$27,206	\$25,000	\$44,705

The funds are maintained and administered through the offices of the Delaware County Clerk and County Treasurer.

#### Radar Unit

In April 2011, the Town Board purchased a radar unit for \$1,695. The unit was for use in the patrol car of one of the county deputies serving Bernice.

Legal Fees

During the fiscal years from 2008 through 2011, the Town Board spent the following amounts on legal fees:

- FY09: \$7,896
- FY10: \$5,542
- FY11: \$23,839

Those amounts did not include municipal-court costs (e.g., the town judge's pay, the town court clerk's pay, the town attorneys' pay for municipal court proceedings). The Town Board more than quadrupled spending on legal fees from FY10 to FY11. In FY11, it spent the following amounts in the following areas, according to ledgers:

- Legal fees: \$3,466.01
- Council meetings / retainer: \$2,400
- Outside retainer: \$1,393.83
- Special zoning meeting: \$412.50
- Appeal hearing on June 8: \$200
- Audit letter: \$187.50
- Computer legal research: \$83.43
- Trip to courthouse on June 9: \$62.50
- Phone conference / King & an assistant district attorney regarding dogs: \$62.50
- Phone conference / an assistant district attorney: \$62.50
- Phone conference / King: \$62.50
- Phone call from a citizen: \$50
- Photocopies: \$28.80
- Letter to clerk / court date: \$25
- Letter to Town / check: \$15
- Faxes: \$10
- Postage: \$5.52
- Lawsuit against citizen for alleged street encroachment (as mentioned in *Objective III*)
  - Legal fees: \$13,224.34
  - Lot survey - citizen's property: \$900
  - Various items: \$562.50
  - Filing fee - Delaware County: \$203
  - Process server: \$160
  - Mileage: \$101
  - Court: \$62.50
  - Call to Raven / citizen's attorney: \$50
  - Photocopies: \$30.20

- Faxes: \$9
- Postage: \$8.98

#### Mayor

For the past several years, Raven has served as Bernice's mayor. The five town trustees elect one from among themselves every other year to serve as mayor.<sup>82</sup> The mayor still has a vote as a board member and has additional duties only as provided by state law or when the Town Board delegates certain authority to him by way of an ordinance or resolution.

State law provides, in part:

The mayor shall preside at meetings of the board and shall certify to the correct enrollment of all ordinances and resolutions passed by it. He shall be recognized as head of the town government for all ceremonial purposes and shall have such other powers, duties, and functions as may be prescribed by law or ordinance. The mayor shall have all the powers, rights, privileges, duties, and responsibilities of a trustee, including the right to vote on questions.<sup>83</sup>

**Town Code § 1-6-3(B)** describes the "powers and duties" of the mayor in language similar to the above statute. The mayor does not have any unique authority over any other town trustee or any town or BPWA employees or departments. Likewise, the town clerk-treasurer does not either<sup>84</sup>.

## **Findings**

#### Notebook Computer

Raven said that Dennis had the notebook computer that the Town Board purchased. The agenda of the meeting at which the Town Board voted to purchase the computer denoted that it would be "for Town use", but the meeting minutes denoted that it was "for councilman use." According to Raven, the computer was "for Town use" and Dennis got it because, at the time, he was helping write requests for grants. Raven said that Dennis was no longer writing grant requests but still had the computer.

#### Boat Lift

A town ordinance requires competitive bidding for purchases over \$50,000. As such, the Town Board was not required to solicit bids for the purchase of the fire department's boat lift – which ultimately cost \$8,130 – but chose to do so. King said that she did not remember why the Town

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<sup>82</sup> 11 O.S. § 12-104

<sup>83</sup> 11 O.S. § 12-105

<sup>84</sup> 11 O.S. §§ 12-106, 12-109, 12-110

Board chose the highest bid, which it was legally allowed to do because of its cost. The Town Board purchased the lift from Jerry's Dock Construction, which is owned by a Bernice firefighter who is also the general manager of Bernice Sanitation, which his wife purchased from Raven in 2004.

#### Fire-tax Money

Based on a review of the Town's expenditure ledgers, town officials appeared to be expending county fire-tax funds within the allowed categories of expenditures and in accordance with the restrictions imposed by the County.

#### Radar Unit

The Town owns the radar unit that the Town Board purchased. The purchase request from the Delaware County Sheriff's Office noted that.

#### Legal Fees

In FY11, the Town Board spent approximately \$15,312 on the lawsuit that it filed against the citizen who allegedly encroached onto a town street. Besides those expenses, the Town Board spent approximately \$8,528 on other legal fees. As such, 64% of the funds spent on legal fees in FY11 were related to the lawsuit against the citizen. The Town Board's legal expenses are within its discretion as long as the funds exist.

If the Town Board chooses to spend more money on legal expenses than it budgeted at the beginning of the fiscal year for those expenses, it can transfer money between accounts.<sup>85</sup> It did that in FY11, transferring \$25,000 from the "Street & Alley Maintenance & Operation" account in April.

#### Mayor

Raven allegedly sometimes exerts himself as though he has authority over the other trustees and more authority than the other trustees do over employees and/or departments.

### **Conclusions**

#### Notebook Computer

No laws or ordinances appear to have been violated.

#### Boat Lift

No laws or ordinances appear to have been violated.

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<sup>85</sup> 62 O.S. § 461

Fire-tax Money

No laws or ordinances appear to have been violated.

Radar Unit

No laws or ordinances appear to have been violated.

Legal Fees

No laws or ordinances appear to have been violated.

Mayor

Raven appears to sometimes act outside or beyond the statutory or Town Code authority of the mayor's position.

**Recommendations**

Notebook Computer

If the original purpose for the notebook computer has ended, then the Town Board should retrieve the Town's property and determine how it will be used.

Boat Lift

No recommendation is made for this issue.

Fire-tax Money

No recommendation is made for this issue.

Radar Unit

No recommendation is made for this issue.

Legal Fees

No recommendation is made for this issue.

Mayor

Raven should not unilaterally direct any town or BPWA employee's work, and he should not individually make decisions regarding Town or BPWA business, including, but not limited to, employment, zoning, and utilities.

Further, no town official should prohibit any of the town trustees from including issues on Town Board meeting agendas.

If the Town Board determines that there is a need for an official to function as a chief executive officer, then it should provide for those powers and duties through an ordinance or resolution as allowed by law.

**DISCLAIMER**

In this report, there may be references to state statutes and legal authorities that appear to be potentially relevant to the issues reviewed by the Office of State Auditor and Inspector. The State Auditor and Inspector has no jurisdiction, authority, purpose, or intent by the issuance of this report to determine the guilt, innocence, culpability, or liability, if any, of any person or entity for any act, omission, or transaction reviewed. Such determinations are within the exclusive jurisdiction of regulatory, law-enforcement, and judicial authorities designated by law.



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April 6, 2012

via email and USPS

Gary Jones, CPA, CFE  
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Dear Mr. Jones:

Thank you for providing the Town of Bernice (hereinafter, "Town" or "Bernice") with a draft of Oklahoma State Auditor and Inspector Petition Audit Report for the periods July 1, 2008 through June 30, 2011 (the "Audit Period"). The Town additionally appreciates the opportunity to provide a response to the draft report and respectfully requests that the Town's Response be included in the final report from your office. Unless otherwise noted herein, the Town's response is limited to the Audit Period.

### **I. General Background.**

Bernice is a town of approximately 500 residents located in Northeast Oklahoma. The Town has an elected official who serves as the Town Clerk/Town Treasurer and Town Court Clerk. The Town also employs a part time animal control officer. The Bernice Public Works Authority ("BPWA") is a public trust with Bernice being the sole beneficiary. BPWA has one employee, a part-time water clerk whose work includes preparing and sending water bills, providing requisite notices to water users, and various other administrative functions.

Bernice is governed by its Town Trustees. Although Oklahoma law allows payment to these Trustees for their service, the Bernice Town Trustees serve as volunteers without any compensation, whatsoever. Those persons who serve as Bernice Town Trustees serve, ex officio, as trustees of the BPWA.

The citizens of Bernice, like the citizens of each and every major city or small town in



Oklahoma, have the absolute right to expect strict and perfect compliance with all laws, rules, and regulations concerning municipal governance. The Town Trustees strive for perfect compliance.

Your draft report indicates certain shortcomings which occurred during the Audit Period. The Town agrees with some of your findings and disagrees with others. Importantly, however, your report does not indicate that any Trustee has utilized his/her role as Trustee for their personal gain or that any monies appear to be missing from Town funds. Additionally, you recognize in your report that there is no clear answer to many of the topics discussed within your report. You suggest some areas of the law need clarification through additional legislation and other areas of the law are simply unclear.

The Town and BPWA will review each of your findings, conclusions, and recommendations and continue its efforts to operate in strict accordance with applicable law.

The Town's Response will follow the Order of your draft Report. To the extent the Town's Response does not address an item within your draft report, such lack of response is not intended as admission or acknowledgment of the accuracy of the Oklahoma Auditor and Inspector's position.

## **II. Response to State Auditor and Inspector's Findings, Conclusions, and Recommendations.**

### **Objective 1: Review of Collection of Court Fines and Fees.**

The intent of the requirements for publication, recording, and codification of municipal ordinances as set forth in 11 O.S. §§ 14-101 et seq. is clear—to provide those citizens, visitors, and those merely passing through with the ability to understand the ordinances of such town and the ramifications for violating those ordinances. After passage, each ordinance of a municipality must be published in a newspaper of general circulation in the municipality. Because Bernice is located in Delaware County, Bernice has historically opted to publish its ordinances in the Grove Sun. However, except for a few exceptions, there is not a requirement that each municipal ordinance be recorded with the Delaware County Clerk.

You opine that the Town has not properly published its penal ordinances since 1977 and that the Town's municipal court should not have collected fines of more than \$50 per ticket since that time or collected more than \$40 per ticket in court costs. However, a careful review of the adoption, publication, and recording history of the Bernice Penal Code establishes substantial compliance with the requirements set forth at 11 O.S. §§ 14-101 et seq. Bernice's efforts to inform the public of its ordinances and the penalties for violation of its ordinances is as follows:

#### **Publication of Bernice Penal Code and Fine Amounts**

1. In 1977, Bernice adopted a general code of ordinances for the Town of Bernice which



included its penal code. This 1977 ordinance which adopted, by reference, the original Bernice Code was published in the Delaware County Journal on July 14, 1977.

2. In 2005, Bernice supplemented and amended its penal code. Notification of the amendment to the Bernice Penal Code was published in the Grove Sun on September 16, 2005, and set forth, in full, the following supplemental sections or amendments to the Bernice Penal Code:

- a. Section 13-1 Court Created;
- b. Section 13-2 Definitions;
- c. Section 13-3 Jurisdiction;
- d. Section 13-4 Judge;
- e. Section 13-5 Term of Judge;
- f. Section 13-6 Alternate Judge;
- g. Section 13-7 Acting Judge;
- h. Section 13-8 Appointment of Judges;
- i. Section 13-10 Removal of Judges;
- j. Section 13-11 Vacancy;
- k. Section 13-12 No change of Venue;
- l. Section 13-13 Clerk of the Court;
- m. Section 13-14 Traffic violations Bureau;
- n. Section 13-15 Clerk's Bond;
- o. Section 13-16 Attorney;
- p. Section 13-17 Chief of Police;
- q. Section 13-18 Style of prosecution;
- r. Section 13-19 Traffic violations complaint, resident;
- s. Section 13-20 Traffic violations complaint, non-resident;
- t. Section 13-21 Summons;
- u. Section 13-22 Warrant of Arrest;
- v. Section 13-23 Bail;
- w. Section 13-24 Arraignment;
- x. Section 13-25 Witnesses;
- y. Section 13.26 Penalty
- z. Section 13.27 Costs upon Judgment of Conviction. Court Costs;
- aa. Section 13.28 Suspension of Sentence;
- bb. Section 13.29 Statutes Court Procedure;
- cc. Section 13.30 Judge to Prescribe Rules;
- dd. Section 13.31 Contempt of Court Authorized.

3. Also in 2005, Bernice adopted an ordinance setting forth the fine amount for violation of the penal code. Ordinance 2005-5 was published in the Grove Sun on September 15, 2005, and set forth a comprehensive list of fines which would be applied to persons violating Bernice



ordinances.

4. In 2011, the Town adopted Ordinance 2011-3, which authorized the Bernice Police Department to write tickets for violation of Town penal ordinances. Ordinance 2011-3 also amended the fine schedule. Ordinance 2011-3 was published in the Grove Sun on December 20, 2011.

5. Because of a typographical error in Ordinance 2011-3, the Town adopted an Ordinance in early 2012 correcting the typographical error set forth on the amended fine schedule. Ordinance 2012-1 was published in the Grove Sun on January 13, 2012.

#### **Recording Notices and Ordinances with Delaware County Clerk.**

In addition to the notices of the Bernice Penal Code published in the Delaware County Journal and the Grove Sun newspapers set forth above, the public was also on constructive notice of those items that Bernice recorded over the years with the Delaware County Clerk, including the following:

On August 22, 1977, Resolution Number 10 of the Town of Bernice was recorded with the Delaware County Clerk at Book 31, Page 232. Such Resolution established the existence of the Town of Bernice Municipal Court and placed the public on notice of the Bernice Penal Code.

On August 22, 1977, R.W. Packer, Chairman of the Board of Trustees of the Town of Bernice, filed an affidavit with the Delaware County Clerk at Book 361, Page 234. Packer's affidavit establishes that on July 18, 1977, he posted a true and correct copy of Ordinance No. 9 which Adopted the Code of Ordinances for the Town of Bernice (which included the original Penal Code) and repealed any previous general ordinances not adopted therein. Packer's affidavit indicates that he posted such notice at ten (10) different locations in the Town of Bernice, namely: Indian Hills Resort, Community Building, Fire Department, Bernice Grocery, Bernice Café, Bernice Post Office, Bernice Point Resort, Craig Marina, Mac's D.X. Service Station, and Tips Sport Shop.

Ordinance 2005-4, Recorded with the Delaware County Clerk at Book 1683 at Page 42-50 on September 27, 2005, sets forth amendments to the Bernice Penal Code and establishes certain procedures of the Municipal Court;

Ordinance 2005-5, Recorded with the Delaware County Clerk at Book 1683 at Pages 38-41 on September 27, 2005, amends the Bond and Fine Schedule and provides notice of the exact amount of fines for violation of Bernice traffic ordinances.

Resolution 2005-6, recorded with the Delaware County Clerk on November 9, 2005, at page 1890, Page 109, provides additional notice of the existence of the Town of Bernice Municipal Court and provides notification of certain procedures of such court;



Resolution 2011-4, recorded with the Delaware County Clerk on December 13, 2011, at Book 1971, Page 394, provides notice of the publication of the Bernice Ordinances and informs the public that such ordinances are available at the Delaware County Law Library and the Bernice Town Clerk's office.

Ordinance 2011-3, was recorded with the Delaware County Clerk on December 13, 2011, at Book 1971, Pages 395-400. The substance of Ordinance 2011-3 is set forth above.

Ordinance 2012-1, was recorded with the Delaware County Clerk on January 10, 2012, at Book 1974, Pages 739. The substance of Ordinance 2012-1 is set forth above.

**Analysis:** The original Code of the Town of Bernice Ordinances was adopted in Town of Bernice Ordinance Number 9. This original compilation of the Town of Bernice Ordinances included the entire Penal Code. Notice of the adoption of the original compilation of Town of Bernice Ordinances was published in the Delaware County Journal on July 14, 1977. Pursuant to Title 11 O.S. § 14-107(A), the entire compilation does not need to be published in full, but a summary of their contents is sufficient. Additionally, the statutory scheme at the time of the original adoption of the Town of Bernice Ordinances provided that mere posting of the subject ordinances, rather than publication in a newspaper, was sufficient to enact such ordinance. See *Akalnik v. Town of Sperry*, 527 P.2d 860 (Okla. App. 1974). As evidenced by the affidavit of R.W. Packer recorded with the Delaware County Clerk on August 22, 1977, notice of the original enactment of the Code of Bernice Ordinances was posted in ten (10) public places.

In 2005, the Town of Bernice amended its Penal Code which established certain Municipal Court procedures, and established various fine, court costs, and bond amounts for violation of its Penal Ordinances. The 2005 ordinances (2005-4, 2005-5, and 2005-6) amending the 1977 Bernice Code were published in the Grove Sun on September 15 and 16, 2005. Importantly, and not required by Oklahoma law, Bernice Town Ordinance 2005-4, 2005-5, and 2005-6 were all recorded, in their entirety, with the Delaware County Clerk.

Without serious dispute, the publication and recording of the original 1977 Town of Bernice Ordinance Enactment, the separate publication and recording of Bernice Town Ordinance 2005-4, 2005-5, and 2005-6, in their entirety, placed the public on constructive notice of the Bernice Penal Code and the consequences of violating those penal ordinances.

In 2007, the Town of Bernice amended its fine schedule. This amended fine schedule was apparently neither published in a newspaper of general circulation in Delaware County, Oklahoma, nor recorded with the Delaware County Clerk. It is arguable that the Town of Bernice's failure to publish the 2007 amendment to its fine schedule would provide a potential defense to those charged the 2007 fine amounts. However, even assuming, arguendo, that the 2007 fine schedule did not follow the strict technical requirements for publication, the public clearly had constructive notice of



the existence of the Bernice Penal Code and, at the very least, the fine schedule adopted in 2005.

In late 2011, the Town of Bernice again amended its fine schedule. In January 2012, the Town of Bernice again amended its fine schedule. The 2012 Fine Ordinance Amendment merely corrected typographical errors of bond/court costs amounts. The 2011 and the 2012 Ordinances establishing fine amounts were published in the Grove Sun and recorded with the Delaware County Clerk.

On December 13, 2011, the Town of Bernice recorded Resolution 2011-4 which provided notice of the Town's Code of Ordinances and provided information to the public where the ordinances could be viewed, in their entirety. Such Resolution was recorded with the Delaware County Clerk on December 13, 2011.

Notification of Biennial Supplements are required to be recorded with the Delaware County Clerk only to the extent Bernice Town Code is amended and such amendment is not otherwise recorded with the Delaware County Clerk. Because any relevant Penal Code amendment, other than the 2007 fine schedule revision, was published in its entirety in a newspaper and recorded with the Delaware County Clerk, there was no reason to publish any additional notice of biennial supplements.

Finally, you cite 11 § 14-108 for the proposition that at least three copies of the Bernice Code of Ordinances shall be kept in the office of the municipal clerk for public use. Three copies are now available. Previously, the Town only had one copy of its updated ordinances on file at Town Hall for inspection and copying. In having only one copy, the Town relied on 11 O.S. § 14-105 which provides that "...a copy of the compilation or code shall be filed and kept in the office of the municipal clerk." (Emphasis supplied).

## **Objective II: Review of the Billing Procedures for Water Services.**

BPWA's policy is that water meters are read each month. If heavy snow or system malfunction prohibits the reading of water meters in any month, BPWA will merely estimate that water user's bill based on historical usage. BPWA, working with the manufacturer of the meter-reading system, has corrected the malfunctions with the hand-held electronic water meter reading system. BPWA is confident that all meters are being accurately read each month.

As you acknowledge in your report, the BPWA has the prerogative to establish fees and policies for collection of its water bills. BPWA has adopted and enforced a policy requiring all past due bills be satisfied before switching service to a new user. Although you conclude in your report that such practice results in collecting past-due water bills from people that did not incur the bill, that has not been BPWA's experience. Instead, generally the new user "strongly encourages" the previous user to satisfy any unpaid water bill or, alternatively, obtains a reimbursement from the



previous user. In landlord/tenant relationships where the tenant incurs a water bill and then vacates the leased premises without satisfying the tenant's water bill, the landlord had generally collected a security deposit which landlord uses to satisfy the past-due water bill.

Further, I could find no authority which would somehow prohibit BPWA from requiring that all past-due water bills be satisfied before switching to a new user. Likewise, you provided no authority for your position that such policy was questionable. The policy has enabled BPWA to collect water bills that would have otherwise not been collected, thereby allowing BPWA to keep down the cost of water to all Bernice citizens.

Finally, you express concern that "[t]his policy could result in a civil case against the Town if not corrected in some way." Again, you provide no authority indicating that the policy needs correcting. Arguably, the absence of such policy could result in a *qui tam* action against the BPWA for failing to collect for water supplied to various users.

### **Objective III: Review of the Enactment and Enforcement of the Zoning Code**

In light of the procedural irregularities noted in your report concerning the adoption of the Bernice Zoning Code coupled with certain portions of the Zoning Code which need to be amended, the Town of Bernice will likely repeal its existing zoning code and start anew.

### **Objective IV: Compliance with the Open Meeting Act and Open Records Act.**

You indicate that a review of town records and interviews with town officials indicated certain actions and issues that were at least questionable as to compliance with the Oklahoma Open Meeting Act. The Town appreciates your efforts in this regard and endeavors to eliminate any action that could even be characterized as "questionable."

### **Objective V: Review Qualifications of Town Officials.**

Town of Bernice Trustee Dwayne Langley was most recently elected as Ward 4 trustee in April 2009. Trustee Langley failed to complete his required training within one year of his election. The Town of Bernice did not appoint someone to fill Langley's position within sixty (60) days of him ceasing to be a trustee. Efforts to reappoint Langley to the position for which he was elected by his ward after he completed his training were too late. Langley did not attend any meetings from and after the time the Town became aware that he had failed to attend the requisite training within a year of his election. Langley was not reimbursed his expenses incurred in attending the training.

The Town voted to call for a special election to fill Langley's position. Langley was the only person who filed to run in the special election for Ward 4 Trustee. Because a citizen (living outside Ward 4) objected to his candidacy, Langley withdrew his name.



Section 20-101, Title 11, Oklahoma Statutes requires that each Oklahoma municipality shall re-evaluate its Ward boundaries following each federal census, as soon as practicable. Section 20-101 directs municipalities to change the boundaries or number of wards, if necessary, so that the wards are formed of compact and contiguous territory and are substantially equal in population. In 2010, the United States Census Bureau completed a census. The Town of Bernice has worked with the Census Bureau and a survey and mapping company to redefine the Town's ward boundaries. When those boundaries are established, the Town anticipates holding an election to fill the Ward 4 vacancy.

#### **Objective VI. Review Possible Conflicts of Interest of Town Officials.**

The 2000 and 2007 purchases of vehicles referenced in your report deserve additional explanation to clarify the facts. In 2000, Mayor Bill Raven was attending an auction in Vinita, Oklahoma, and he purchased a 1992 Dodge W30 truck for \$4,100. Raven, also a then-member of the Bernice Volunteer Fire Department, thought the truck could serve as good grass-rig fire truck for the Bernice Fire Department. Raven offered the 1992 Dodge W30 truck to the Town of Bernice at the exact price for which he purchased the truck at auction: \$4,100. The Town of Bernice elected to purchase the truck at that price. Raven did not profit from the sale of the 1992 Dodge W30 truck to the Town of Bernice.

In 2007, the Town of Bernice voted to purchase a 1999 Ford F350 truck to use for plowing snow and spreading ice and sand. The Town authorized the purchase for up to \$13,000. Mayor Bill Raven and councilman Clinton Brewster, in Brewster's personal vehicle, drove from Bernice to Cincinnati, Ohio to take delivery of the truck. Raven and Brewster stayed at a hotel in Cincinnati, Ohio, and purchased the truck the next day. Brewster drove his personal vehicle back to Bernice, and Raven drove the recently-purchased F350 back to Bernice. The cost of the truck was \$13,000 and title fees totaled \$110.52. The Town of Bernice issued a cashier's check to Bill Raven for \$13,110.52 which Mayor Raven took with him to Cincinnati to purchase the truck. Bill Raven simply endorsed the cashier's check to Mid America Auto Group, LLC, and took delivery of the truck. Mayor Raven did not profit through the Town's purchase of the 1999 Ford F350 truck.

Mayor Raven owns Bill's Trucking, which has a backhoe and dump truck. Mayor Raven formerly owned Bernice Sanitation. While Mayor Raven owned Bernice Sanitation, he provided trash pick-up service for the Town of Bernice at the Fire Station and at City Hall for no charge. Mayor Raven has utilized his heavy equipment for various public improvement projects in the Town of Bernice. For example, Mayor Raven uses his equipment to clear snow from Bernice streets, uses his brushhog to mow the highway right of way ditch through portions of Bernice, routinely uses his equipment to fix streets in Bernice, uses his equipment to help clear low-hanging limbs from Bernice streets, performed much of the dirt work and concrete work for the Bernice War Memorial using his equipment, used his equipment to perform much of the dirt and foundation work for the basketball court behind City Hall, built benches and tables for the Town's park, used his equipment to perform



the dirt, foundation, and rip-rap work for the Bernice Helicopter pad, and volunteers his time and equipment in smaller Bernice projects too numerous to mention. Mayor Raven has never been paid for his time, equipment time, or even reimbursed his expenses for this work.

**Objective VII: Review Compensation and Bonds of Town Officials and Employees.**

You question the legality of the raise to the Town Clerk/Town Treasurer which took effect in April 2009. The Town believes such raise was not a violation of applicable Oklahoma law. The Oklahoma Constitution, Article 23, § 10 provides that:

*In no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, **unless by operation of law enacted prior to such election or appointment.** (Emphasis Supplied).*

Former Town Clerk-Treasurer Myrna Aleman was elected in April 2007 for a term of 4 years. She resigned shortly thereafter. The Town Board of Trustees appointed Connie King to fill that position. Connie King, because she was appointed rather than elected, was required to stand for election in April 2009 rather than simply fill out the unexpired term of Ms. Aleman through April 2011. **Prior to the April 2009 election**, the Town Board of Trustees voted to increase the salary of the Town Clerk to \$1,204 per month. Connie King won the election in April 2009. Even if you consider King's "term of office" to run from her appointment until expiration of Myrna Aleman's term in April 2011 (notwithstanding the intervening 2009 election) the raise to the Town Clerk is clearly allowed under the Oklahoma Constitution. The Town voted to increase the salary of the Town Clerk **PRIOR** to the April 2009 election. Any person winning that election, including King, would have been entitled to the increased salary.

David Dennis serves as a City Councilman and also serves on the Bernice Volunteer Fire Department. The Bernice Volunteer Fire Department has a policy of reimbursing its firefighters \$7.50 for each fire run they make. This "fire-run money" is an estimation of the expenses these volunteer firefighters incur in responding to the calls.

The Oklahoma Attorney General has specifically addressed the propriety of reimbursing a municipal official for expenses such official incurs when serving on a volunteer fire department. In Oklahoma Attorney General Opinion 77-188, two questions were posed:

1. May an individual who is a member of a volunteer fire department serve as a City Councilman or member of a School Board?
2. If so, may he be reimbursed for expenses incurred while serving in the capacity of a volunteer firefighter?



In answering both questions “yes,” the Oklahoma Attorney General recognized that city officials may be reimbursed for expenses incurred by reason of their service to the community. The attorney general went on to recognize that volunteer firefighter “run money” is a liquidated sum paid on a per-call basis to reimburse members of the volunteer fire department for expenses incurred as a result of such service. The Oklahoma Attorney General concluded: “Therefore, so long as the ‘run money’ is reasonably calculated to reimburse for expenses rather than to provide additional compensation to the members of the volunteer fire department, the Councilman would not be violating the provisions of [applicable law] by accepting run money.”

Although there have been legislative changes since publication of Attorney General Opinion 77-188, no subsequent legislation would prohibit David Dennis from continuing to serve on the Bernice Volunteer Fire Department or being reimbursed his expenses in doing so.

#### **Objective VIII. Review the Purchase of Security Cameras.**

The mayor and town clerk-treasurer are authorized by the Town Board to approve “necessary expenditures” for amounts up to \$5,000 in emergency situations. Expenditures for other than emergency situations must be approved by the Town Board of Trustees. Placement of the subject security cameras totaled \$4,479 and was not approved by the Town Board. However, in the present matter, there was a reported threat. The town clerk-treasurer reported that she was accosted by a Bernice resident in her office and spit on. Mayor Raven, after meeting with the town clerk concerning this incident, felt that security cameras were immediately necessary to protect the safety of the town clerk-treasurer and town property.

#### **Objective IX—Review of Town Limits and Election Wards.**

The United States Census Bureau completed a census in 2010. After every federal census, municipalities are required to review its ward boundaries and, if necessary, redraw them so that they are formed of compact and contiguous territory and are substantially equal in population. Such exercise requires a block by block analysis of the population and an exact determination of the limits of the city or town. Bernice hired Rose & McCrary, Engineers and Surveyors, to help identify the exact boundaries of the Town of Bernice and, with the 2010 census data, develop a general map dividing the town limits up into five wards substantially equal in population. Upon completion of such map and verification of the populations in each of the five (5) wards, the Town has published and posted notice of its intent to consider adoption of the Proposed New Ward Boundary Map set forth in Figure 4 of your Report. Such item is set for consideration by the Bernice Town Trustees on April 9, 2012.

#### **Objective X—Review the Expenditures of Street & Alley Fund Monies.**

The Town agrees that the dormant account titled “Street & Alley—Money Market” fund



would provide an appropriate vehicle to segregate those monies distributed to the Town of Bernice through the Motor Fuel Tax Code and the Vehicle License and Registration Act. Monies distributed from such account would be used only for the restricted purpose.

### **Objective XI—Other Concerns.**

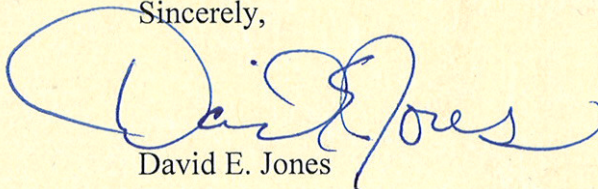
Your report notes that the legal fees of Bernice more than quadrupled in FY 2011 to \$23,839, much of which was attributable to litigation styled: *Town of Bernice, Oklahoma v. Kay Zapf*, District Court in and for Delaware County, Oklahoma, Case No. CJ 2010-184. You understate the litigation as a “lawsuit against citizen for alleged street encroachment.” Much more than “street encroachment” was at stake in the *Zapf* litigation. In the *Zapf* matter, the defendant had completely removed a street connecting Choctaw and Chickasaw streets in Bernice. Although the street was not a platted, it had been used by Bernice citizens for over forty (40) years, was paved by the Town, and was maintained by the Town. Additionally, Defendant Zapf removed a significant portion of a separate platted street (Chickasaw Street) in the Town of Bernice, resulting in a narrowing of such street.

After trial, the Delaware County District Court ruled in favor of the Town of Bernice and ordered Defendant Zapf to replace the removed road and to restore Chickasaw Street to its platted width. Defendant Zapf appealed the District Court’s ruling, and the appeal is currently pending. Although your report sets out in detail the fees and expenses the Town of Bernice incurred in the *Zapf* litigation, your report failed to note that the District Court of Delaware County, Oklahoma, ordered Defendant Zapf to reimburse the Town of Bernice the sum of \$16,360.65 for the fees and expenses it incurred in such litigation. Defendant/Appellant Zapf has placed a cash bond with the District Court to cover these fees and expenses if her appeal is unsuccessful.

### **III. Conclusion**

At your suggestion, the Town of Bernice will carefully consider (and likely implement) each recommendation contained within your report and work with the Delaware County District Attorney to resolve those issues for which there is no bright-line answer. The Town appreciated the thoroughness in which the Oklahoma Auditor and Inspector researched many of these complex issues. If you need any additional information, please do not hesitate to contact the Town.

Sincerely,



David E. Jones



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