

*Amended Ordinance No. 946
of 8-24-11*



City of Omaha
Jim Suttle, Mayor

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10/23/11 AM 11:58
CITY OF OMAHA

Finance Department

Omaha/Douglas Civic Center
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Pam Spaccarotella
Director

Allen R. Herink
City Comptroller

Honorable President

and Members of the City Council,

The attached ordinance is prepared at the request of Mayor Suttle.

The ordinance exercises the City's authority to collect a tax for revenue on any occupation or business within the City. State law requires only that the taxes be uniform in respect to the class upon which they are imposed. The ordinance identifies businesses engaged in providing food and drink as a distinct class from which an occupation tax may be collected. The ordinance expressly identifies this occupation class as one that is uniquely benefited from tourism and discretionary recreational activity and that is dependent upon the business's location within the City and the business's access to services provided by the City. Although restaurants and bars are valuable to the City and provide services that should be promoted, they place demands on the City's resources and their greater participation in providing revenue for general City purposes is fair and just.

The ordinance uses the gross receipts derived from the sale of food or beverages as the measure of the extent to which a restaurant or bar does business in the City. The ordinance imposes a tax in the amount of 4% of those gross receipts. Receipts are subject to the tax only to the extent the sale is otherwise subject to the state sales and use tax. Therefore, this ordinance does not impose any new accounting burden beyond what is currently necessary to calculate the sales tax.

Some sales and businesses are expressly exempted from this occupation tax. These exemptions are listed in the definitions of "food", "gross receipts", and "restaurant". The ordinance also creates an enforcement and collection process.

If this ordinance is adopted, the tax burden will be spread broadly across many businesses that will collect revenue from both residents and nonresidents who enjoy the benefits provided by these businesses located within our City.

Respectfully submitted,

Pam Spaccarotella
City of Omaha Finance Director

Amended by CCISAC 9/16
of 8-24-10 (ll)

ORDINANCE NO. 38771

1 AN ORDINANCE to amend Chapter 19 of the Omaha Municipal Code pertaining to occupation
2 taxes; to create a new Article XVI imposing an occupation tax on persons operating
3 restaurants and drinking places within the City; to define such businesses; to establish
4 requirements for collection and payment of the tax; to provide a condition for termination
5 of the tax; and to provide an effective date hereof.

6 BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF OMAHA:

7 Section 1. Chapter 19 of the Omaha Municipal Code is hereby amended to include a new
8 Article XVI, including new sections 19-800 through 19-813, reading as follows:

9 **ARTICLE XVI.**
10 **RESTAURANT AND DRINKING PLACES**
11 **OCCUPATIONAL PRIVILEGE TAX**
12

13 **Sec. 19-800. Definitions.**
14

15 As used in this article, the following words and phrases shall have the meanings
16 ascribed to them in this section, except where the context clearly indicates or requires a
17 different meaning:
18

19 (a) City shall mean the City of Omaha and the area within the corporate limits
20 of the City of Omaha.
21

22 (b) Director shall mean the director of the City of Omaha Finance
23 Department.
24

25 (c) Drinking place shall mean any establishment or business offering the
26 public on-premises consumption of alcoholic and/or non-alcoholic beverages including,
27 but not limited to, bars, taverns, night clubs, and dance halls and concession stands at
28 race tracks, golf courses, sports and meeting facilities, arenas, or stadiums. A drinking
29 place may also be a restaurant.
30

31 (1) The term does not include any business offering beverages free of charge.
32 The term "free of charge" means without any consideration, donation,
33 contributions, or monetary charges of any nature paid for access to the
34 beverages and, without limitation, requires the absence of any admission
35 charge, cover charge, table reservation fee, gate charges, seat charges,

1 entertainment fee, green fees, or required minimum purchase of beverages
2 or merchandise.

3
4 (2) The term does not include a place offering beverages on premises owned
5 or operated by a civic, charitable, educational, religious, governmental, or
6 political organization exempt from income taxes under the United States
7 Internal Revenue Code.

8
9 (d) Engaged in shall mean to offer to the public, carry on, or take part in the
10 operation of a business as owner, operator, or agent. A person renting or using a facility
11 for a taxable activity or service, either as a one-time event or otherwise, shall be
12 considered to be engaged in the business.

13
14 (e) Food shall mean all edible refreshment or nourishment, whether solid
15 semi-solid, or liquid. The term shall not include:

16
17 (1) Any food that is not subject to the sales and use tax imposed by the
18 Nebraska Revenue Act of 1967, as it is amended from time to time; and

19
20 (2) Snack foods, which shall mean unopened bottles or cans of soft drinks,
21 chewing gum, candy, popcorn, peanuts and other nuts, unopened packages
22 of cookies, donuts, crackers, and potato chips, and unopened packages of
23 other items of essentially the same nature which are consumed for
24 essentially the same purpose and which are packaged for home
25 consumption.

26
27 (f) Gross receipts shall mean the total amount of consideration, donation,
28 contributions, or monetary charges of any nature paid to obtain or for access to food or
29 beverage without any deduction on account of expenses, taxes, or other costs.

30
31 (1) The term includes, without limitation:

32
33 (i) the price charged for food or beverages;

34
35 (ii) any admission charge, cover charge, membership fee, table
36 reservation fee, gate charges, seat charges, or entertainment fee or
37 similar payment if the payment gives the payee a right to obtain
38 food or beverage which is otherwise subject to this tax;

39
40 (iii) the amount paid to a person engaged in a business or activity by
41 vendors or contractors who provide food or beverages to that
42 person's customers on the premises and which are within the scope
43 of this tax; and,

1 (iv) receipts from the sale of beverages or food in a restaurant or
2 drinking place even if it is not actually consumed on the premises,
3 including the receipts from prepared "take out", "drive-through",
4 or "to go" food.

5
6 (2) The term does not include:

7
8 (i) The value of food or beverages furnished by restaurants or
9 drinking places to employees as part of their compensation when
10 no charge is made to the employee.

11
12 (ii) Tips to an employee when the amount of the tip is wholly in the
13 discretion of the purchaser and the full amount of the tip is turned
14 over to the employee, whether or not the tip is paid to the
15 employee or added to the bill.

16
17 (iii) Payments made to a caterer by a civic, charitable, educational,
18 religious, governmental, or political organization exempt from
19 income taxes under the United States Internal Revenue Code for
20 food or beverage delivered to the premises of the organization.

21
22 (g) Person shall mean any natural person, individual, partnership, association,
23 organization or corporation of any kind or character engaging in a restaurant business.

24
25 (h) Restaurant shall mean any place that is kept, used, maintained, advertised,
26 or held out to the public as a place where food is prepared and sold for immediate
27 consumption either on the premises or elsewhere.

28
29 (1) The term includes, but is not limited to, cafes, grills, bistros, delicatessens,
30 coffee shops, bakeries, lunch counters, sandwich stands, and concession
31 stands at race tracks, sports and meeting facilities, arenas, or stadiums and
32 includes a space or area within a hotel, motel, bed and breakfast, boarding
33 house, hospital, grocery store, convenience store, supermarket, or office
34 building where food is obtained or consumed if a separate charge is made
35 for the food. A restaurant may also be a drinking place.

36
37 (2) The term does not include:

38
39 (i) a place operated by a religious, civic, educational, charitable,
40 governmental, or political organization exempt from income taxes
41 under the United States Internal Revenue Code where food is
42 offered solely to its members or students;

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- (ii) a public or private daycare center that offers food solely to its employees or the children staying at the center;
- (iii) a convalescent home, nursing home, home for the aged or infirmed, or substance abuse facility that offers food solely to its residents;
- (iv) premises where food is obtained solely from vending machines operated by coin, cards, or other per-purchase operation regardless of whether the food may be consumed on the premises;
- (v) push carts, lunch wagons, ice cream trucks, or other mobile facilities from which food ready for consumption is sold;
- (vi) temporary stands at festivals or other similar events from which food ready for consumption is sold unless entrance to the place at which the food is sold is subject to an admission charge; or
- (vii) any business offering food free of charge. The term "free of charge" means without any consideration, donation, contributions, or monetary charges of any nature paid for access to the food and, without limitation, requires the absence of any admission charge, cover charge, table reservation fee, gate charges, seat charges, entertainment fee, green fees, or required minimum purchase of food or merchandise.
- (viii) a place offering food on premises owned or operated by a civic, charitable, educational, religious, governmental, or political organization exempt from income taxes under the United States Internal Revenue Code.

(i) Taxpayer shall mean any person engaged in the business of a restaurant or drinking place who is required to pay the tax herein imposed.

Sec. 19-801. Intent and purpose of article.

(a) The city council determines that persons engaging in restaurant and drinking place businesses are benefited from tourism and recreational activity that places unique demands on the city's resources but which is activity that should be promoted and encouraged. Further, residents and non-residents who patronize these businesses are enjoying a discretionary activity that is dependent upon, and generating revenue from, the business's location within the city and the business's access to the services provided by

1 the city. Subjecting the business's revenue to taxation for general city purposes is fair,
2 reasonable, and just.

3
4 (b) Pursuant to the authority of Neb. Rev. Stat. § 14-109, the city council
5 finds, determines, and declares that restaurant and drinking place businesses form a
6 discrete class of occupation engaged in within the city and it is appropriate that a tax be
7 imposed on this class of businesses for the purpose of raising revenue to support and
8 further general city activities and services. This determination is made with due
9 recognition of the inherent value of business conducted within the city and the relation
10 business has to the municipal welfare and the expenditures required of the city, and with
11 consideration of the just, proper and equitable distribution of tax burdens within the city.

12
13 (c) The City Council further determines that some activity or revenue that
14 might fall within the scope of this ordinance should be excluded from its scope because
15 (i) the activity is offered without charge, (ii) the activity has a primary purpose other than
16 to generate revenue for the business by the sale of food or drink, (iii) because the revenue
17 is generated from activity that does not have the discretionary characteristics and qualities
18 that support using restaurant or drinking place revenue as a measure of taxation, (iv) the
19 sale of food or drink is primarily intended to encourage and support the civic, charitable,
20 educational, or religious activities of a nonprofit corporation, and/or, (v) the sale of food
21 or drink is by a nonprofit corporation contracting with the City of Omaha and assessing a
22 tax measured by those sales has the contradictory effect of reducing revenue paid to the
23 City as compensation for the contract.

24
25 **Sec. 19-802. Tax imposed.**

26
27 (a) On or after October 1, 2010, and in each calendar month thereafter, there
28 is hereby imposed an occupational privilege tax upon each and every person conducting
29 business as a restaurant or drinking place within the city for any period of time during a
30 calendar month. The amount of the tax shall be two and one-half percent (2.5%) of all
31 gross receipts for each calendar month derived from the sale of food or beverages subject
32 to this tax.

33
34 (b) The person engaged in the taxable business may itemize the tax levied on
35 a bill, receipt, or other invoice provided to the purchaser but each person engaged in the
36 restaurant or drinking place business shall remain liable for the tax imposed by this
37 section.

38
39 **Sec. 19-803. Tax imposed for revenue purposes; tax cumulative.**

40
41 (a) The tax imposed by this article is for revenue purposes to support the
42 government of the city. The levy of the tax under this article is in addition to all other
43 fees, taxes, excises, and licenses levied and imposed under any contract or any other

1 provisions of this code or ordinances of the city and in addition to any fee, tax, excise, or
2 license imposed by the state.

3
4 (b) Payment of the tax imposed by this article shall not relieve the person
5 paying it from the payment of any other tax now or hereafter imposed by contract or
6 ordinance or by this code, including those imposed for any business or occupation he/she
7 may carry on, unless otherwise provided therein. It is intended that the occupation tax
8 imposed by this article shall be cumulative except where otherwise specifically provided.
9

10 **Sec. 19-804. Return and administration fee.**

11
12 (a) Each and every person engaged in a restaurant or drinking place business
13 within the city for any period of time shall prepare and file with the director a return for
14 the taxable calendar month and at the same time pay to the director the tax herein
15 imposed. The return shall be on a form prescribed by the director and shall be filed on or
16 before the last day of the month following receipt of any amount subject to this tax.
17

18 (b) The director may adopt and promulgate regulations allowing for quarterly
19 reports and payments in lieu of monthly reports and payments, taking into consideration
20 the amount of tax due and the nature of the business conducted. In addition, a person
21 subject to the tax imposed herein may, upon written application to and with the written
22 consent of the director, make reports and remittances on a quarterly basis in lieu of
23 monthly. Such quarterly reports shall be due on the 15th day of April, July, October, and
24 January of each year and shall report the gross receipts and the amount due for the
25 immediately preceding three (3) calendar months.
26

27 (c) As reimbursement for the cost of collecting the tax, a taxpayer may deduct
28 and withhold from the taxes otherwise due and paid two percent (2%) of the amount paid
29 to the director.
30

31 **Sec. 19-805. Suspension or revocation of other licenses.**

32
33 No delinquency in payment of the tax herein provided for by this article and no
34 conviction for violation of this article may be grounds for the suspension or revocation of
35 any other license issued to any person engaged in business within the city under any
36 licensing provisions of this code or other ordinances, nor may the same be grounds for
37 the suspension or revocation of any license issued by any licensing authority pursuant to
38 the statutes enacted by the general assembly of Nebraska.
39

40 **Sec. 19-806. Failure to file return; delinquency; assessment by director.**

41
42 (a) If any person neglects or refuses to make a return or payment of the taxes
43 as required by this article, the director shall make an estimate, based upon such

1 information as may be reasonably available, of the amount of the taxes due for the period
2 or periods for which the taxpayer is delinquent, and, upon the basis of such estimated
3 amount, compute and assess in addition thereto a penalty equal to ten percent (10%)
4 thereof, together with interest on such delinquent taxes at the rate of one percent (1%) per
5 month, or fraction thereof, from the date when due.

6
7 (b) The director shall give to the delinquent taxpayer written notice of such
8 estimated taxes, penalty and interest.

9
10 (c) Such estimate shall thereupon become an assessment, and such assessment
11 shall be final and due and payable from the taxpayer to the director ten days from the date
12 of service of the notice; however, within such ten-day period the delinquent taxpayer may
13 petition the director for a revision or modification of such assessment and shall, within
14 such ten-day period, furnish the director the facts and correct figures showing the correct
15 amount of such taxes. Such petition and the facts and figures submitted shall be
16 submitted in writing and shall be given under oath of the taxpayer.

17
18 (d) The director may modify such assessment in accordance with the facts
19 which he/she deems correct. Such adjusted assessment shall be made in writing and
20 notice given to the taxpayer. All such decisions shall become final upon the expiration of
21 30 days from the date of service unless proceedings are commenced within that time for
22 appeal in the district court of Douglas County, Nebraska, as may be provided by law.

23
24 **Sec. 19-807. Jeopardy assessment.**

25
26 (a) If the director finds that collection of the tax will be jeopardized by delay,
27 in his/her discretion, he/she may declare the taxable period immediately terminated,
28 determine the tax, and issue notice and demand for payment thereof; and, having done so,
29 the tax shall be due and payable forthwith, and the director may proceed to collect such
30 tax as hereinafter provided.

31
32 (b) Collection may be stayed if the taxpayer gives such security for payment
33 as shall be reasonably satisfactory to the director.

34
35 **Sec. 19-808. Administration of article; miscellaneous provisions.**

36
37 (a) Administration by director. The administration of the provisions of this
38 article is hereby vested in the director, who shall prescribe forms and reasonable rules
39 and regulations in conformity with this article for the making of returns, for the
40 ascertainment, assessment, and collection of the tax imposed hereunder, and for the
41 proper administration and enforcement hereof. Duties of the director may be performed
42 by any qualified deputy or other person designated by the director.
43

1 **(b) Notices.** It shall be sufficient for the purpose of this article that any
2 notices required to be given to the taxpayer be in writing and personally delivered or
3 mailed to the taxpayer's last-known address.

4
5 **(c) Duty to keep books and records.** It shall be the duty of every taxpayer to
6 keep and preserve suitable records and other such books or accounts as may be necessary
7 to determine the amount of tax for which he/she is liable hereunder.

8
9 **(1)** Records of the gross revenue by which this tax is measured shall be kept
10 separate and apart from the records of other sales or receipts in order to
11 facilitate the examination of books and records as necessary for the
12 collection of this tax.

13
14 **(2)** It shall be the duty of every such taxpayer to keep and preserve for a
15 period of three years all such books, invoices and other records, which
16 shall be open for examination at any time by the director or his/her duly
17 authorized agents. If such person keeps or maintains his/her books,
18 invoices, accounts and other records, or any thereof, outside of the state,
19 upon demand by the director he/she shall make the same available at a
20 suitable place within the state, to be designated by the director, for
21 examination, inspection and audit by the director or his/her duly
22 authorized agents.

23
24 **(3)** The director, in his/her discretion, may make, permit or cause to be made
25 the examination, inspection or audit of books, invoices, accounts and other
26 records so kept or maintained by such person outside of the state at the
27 place where same are kept or maintained or at any place outside the state
28 where the same will be made available, provided such person shall have
29 entered into a binding agreement with the city to reimburse it for all costs
30 and expenses incurred by it in order to have such examination, inspection
31 or audit made in such place.

32
33 **(d) Investigation of taxpayer's books.** For the purpose of ascertaining the
34 correctness of a return, or for the purpose of determining the amount of tax due from any
35 person, the director, or his/her duly authorized deputies, may hold investigations and
36 hearings concerning any matters covered by this article; and may examine any relevant
37 books, papers, records or memoranda of any such person; and may require the attendance
38 of such person, or any officer or employee of such person, or of any person having
39 knowledge thereof; and may take testimony and require proof for his/her information.
40 The director and his/her duly authorized deputies shall have power to administer oaths to
41 such persons.
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(e) Sale of business. Whenever any taxpayer sells his/her restaurant or drinking place business or quits engaging in a restaurant or drinking place business, any tax payable under this article shall become immediately due and payable and the taxpayer shall immediately make a report and pay the tax due.

(f) Status of unpaid tax in bankruptcy and receivership. Whenever the business or property of any taxpayer subject to this article is placed in receivership, bankruptcy or assignment for the benefit of creditors, or seized under distraint for property taxes, all taxes, penalties and interest imposed by this article and for which the taxpayer is in any way liable under the terms of this article shall be a prior and preferred lien against all the property of the taxpayer, except as to preexisting claims or liens of a bona fide mortgagee, pledgee, judgment creditor or purchaser whose rights shall have attached prior to the filing of the notice as hereinafter provided on the property of the taxpayer, other than the goods, stock-in-trade, and business fixtures of such taxpayer; and no sheriff, receiver, assignee or other officer shall sell the property of any person subject to this article under process or order of any court without first ascertaining from the director the amount of any taxes due and payable under this article; and, if there be any such taxes due, owing and unpaid, it shall be the duty of such officer to first pay the amount of such taxes out of the proceeds of such sale before making payment of any moneys to any judgment creditor or other claimants of whatsoever kind or nature, except the costs of the proceedings and other preexisting claims or liens as above provided.

(g) Release of liens. The tax imposed by this article, together with the interest and penalties herein provided and the costs of collection which may be incurred, shall be and, until paid, remain a first and prior lien, except as otherwise provided by constitution or statute, superior to all other liens, on all the merchandise, furniture and fixtures, tools and equipment of the taxpayer within the city, and may be foreclosed by seizing under distraint and sale of so much of said merchandise, furniture and fixtures, tools and equipment as may be necessary to discharge the lien. The lien created by this article shall apply only to tax obligations hereafter incurred. Any lien for taxes as shown on the records of the county clerks and recorders as herein provided shall, upon the payment of all taxes, penalties and interest covered thereby, be released by the director in the same manner as mortgages or judgments are released.

(h) Statute of limitations. Any suit for collection of any taxes imposed by this article or for any interest thereon or penalties with respect thereto shall be instituted, or any other action to collect the same shall be commenced, or any notice of lien shall be filed in accordance with Nebraska law. The taxpayer and the director may agree in writing to an extension of any limitation and the period so agreed on may be extended by subsequent agreements in writing.

Sec. 19-809. Recovery of unpaid tax by action at law.

1 (a) The Director may treat any taxes, penalties or interest due and unpaid as a
2 debt due the city.

3
4 (b) In case of failure to pay the taxes, or any portion thereof, or any penalty or
5 interest thereon when due, the director may recover at law the amount of such taxes,
6 penalties and interest in any court as permitted by law.

7
8 (c) The return of the taxpayer or the assessment made by the director, as
9 herein provided, shall be prima facie proof of the amount due.

10
11 (d) Such actions may be actions in attachments, and writs of attachment may
12 be issued to the constable or sheriff, as the case may be; and in any such proceeding no
13 bond shall be required of the director except as may be required by statute, nor shall any
14 constable or sheriff require of the director an indemnifying bond for executing the writ of
15 attachment or writ of execution upon any judgment entered in such proceedings; and, in
16 accordance with the procedure established by statute, if any, the director may prosecute
17 appeals or writs of error in such cases without the necessity of providing bond therefor.

18
19 (e) It shall be the duty of the city attorney, when requested by the director, to
20 commence action for the recovery of taxes due under this article; and this remedy shall be
21 in addition to all other existing remedies, or remedies provided in this article.

22
23 **Sec. 19-810. City a party to title actions for determination of lien.**

24
25 In any action affecting the title, ownership, or rights to real estate or to personal
26 property against which a lien for collection of the taxes imposed herein has attached, the
27 city may be made a party defendant for the purpose of obtaining a judgment or
28 determination of its lien upon the property involved therein.

29
30 **Sec. 19-811. Authority of director to waive penalty.**

31
32 The director is hereby authorized to waive, for good cause shown, any penalty
33 assessed in this article. Any interest imposed in excess of six percent (6%) per annum
34 shall be deemed a penalty.

35
36 **Sec. 19-812. Penalties.**

37
38 (a) *Penalty for deficiencies caused by disregard of rules.* If any part of the
39 deficiency is due to negligence or intentional disregard of authorized rules and
40 regulations with knowledge thereof, but without intent to defraud, there shall be added
41 ten percent (10%) of the total amount of the deficiency; and in such case interest shall be
42 collected at the rate of one percent (1%) per month, or fraction thereof, on the amount of
43 the deficiency from the time the return was due, from the person required to file the

1 return, which interest and addition shall become due and payable within ten days after
2 written notice and demand by the Director.

3
4 (b) Penalties for deficiency caused by fraud. If any part of the deficiency is
5 due to fraud with the intent to evade the tax, then there shall be added 50 percent (50%)
6 of the total amount of the deficiency, and in such case the whole amount of the tax that is
7 unpaid, including the additions, shall become due and payable ten days after written
8 notice and demand by the director, and an additional one percent (1%) per month, or
9 fraction thereof, on said amounts shall be added from the date the return was due until
10 paid.

11
12 **Sec. 19-813. Severability.**

13
14 If any provision, clause, sentence, or paragraph of this article or the application
15 thereof to any person or circumstances shall be held invalid, that invalidity shall not
16 affect the other provisions of this article which can be given effect without the invalid
17 provision or application, and to this end the provisions of this article are declared to be
18 severable.

19
20 **Section 19-814. Sunset.**

21 The occupation tax imposed by this article shall terminate and collection of the
22 tax shall cease upon the amendment of the Nebraska Local Option Revenue Act, as it is
23 amended from time to time, authorizing the city to impose and collect sales and use tax at
24 a rate higher than one and one-half percent (1.5%) if approved by the voters of the city,
25 and subsequent effective approval by those voters of at least an additional one-half
26 percent (1/2%).

27
28 Section 2. This ordinance shall be in full force and take effect fifteen days from and after
29 the date of its passage.

INTRODUCED BY COUNCILMEMBER

Henry Hernandez

APPROVED BY:

Jim Smith 8/27/10
MAYOR OF THE CITY OF OMAHA DATE

PASSED AUG 24 2010 *AS AMENDED 4-3*

*Years: Gray, Ferron, Mulligan, Germandt
Nays: Stoher, Thompson, Pester*

ORDINANCE NO. 38741
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ATTEST:

Euster Brown 8/27/10
CITY CLERK OF THE CITY OF OMAHA DATE

APPROVED AS TO FORM:

Thomas J. Paul 8-25-10
DEPUTY CITY ATTORNEY DATE

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I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's Office.

Euster Brown
Euster Brown, City Clerk, City of Omaha