

**QUESTION 3 THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK I
OR IN EXAMPLIFY ANSWER SCREEN 3**

David bought his home in 1988. The backyard was surrounded by a solid six-foot high fence. Over the years the fence rotted, decayed and finally fell apart. David read the City ordinance and got a permit to replace his fence.

The City ordinance stated:

It shall be unlawful for the owner of a premises to erect a fence unless application is first made in writing for a permit. All fences shall be of an open "X" crisscross pattern.

The penalty for any violation of this ordinance is for a first offense: \$300.00. Continued noncompliance is a misdemeanor punishable by up to 93 days imprisonment.

The new fence David erected has one very small two-inch opening at the bottom only but no "X" crisscross pattern. The code enforcer issued David a ticket for violation of the fence ordinance and told him to remove the fence. David paid the fine, but did not remove it. Six months later the enforcer issued a ticket for David's noncompliance with the fence ordinance and David is now charged with a misdemeanor.

David drove around the city and observed many different styles of fences that are not in an "X" crisscross pattern. Fences in his own neighborhood were not in a crisscross "X" pattern. The code enforcer approved a large number of picket fences; a steel fence with perpendicular bars eight inches apart for David's next door neighbor; and rail fences comprised of long horizontal boards separated by a space of 10-inches at the house behind David. None of these fences have an "X" crisscross pattern.

David informed the code enforcer that those approved fences did not have an "X" crisscross pattern. The code enforcer responded to David that he personally knows what the city council intended by the ordinance, that the fence have sufficient space between the boards. The code enforcer told David he knows what the council wants and what space is sufficient because he overheard city council members talk about it at a restaurant after a meeting.

The code enforcer refused to approve David's fence. David is charged with a misdemeanor for violation of the ordinance. David challenges the ordinance because it is vague and the ticket was arbitrarily issued.

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Is David correct? State the law that controls, apply the law to the facts of this case, and give reasons for your conclusion.

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