

EXAMINER'S ANALYSIS OF QUESTION NO. 3

A constitutional challenge of an ordinance or an enactment based on vagueness is "brought under the Due Process Clause of the 14th Amendment of the United States Constitution." *People v Lino*, 447 Mich 567, 575 (1994); *People of City of Grand Rapids v Gasper*, 314 Mich App 528, 536 (2016). Const 1963, art 1, § 17. The applicant should recognize that the constitutional challenges could be brought under both the US and Michigan constitutions. The analysis is the same.

An ordinance or enactment is "void for vagueness" if what it prohibits is "not clearly defined." *Gasper*, 314 Mich App at 536 (2016); *Grayned v City of Rockford*, 408 US 104, 108-109 (1972). An ordinance must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolendar v Lawson*, 461 US 352, 357 (1983); *Lino*, 447 Mich at 574. A person of ordinary intelligence should have a "reasonable opportunity to know what is prohibited" so he or she may act accordingly. *Gasper*, 314 Mich App at 536, quoting *Grayned*, 408 US at 108-109.

There are generally three ways an enactment (ordinance) can be void for vagueness using the same criteria used to construe statutes. *Lino*, 447 Mich at 574; *Kolendar*, 461 US at 365. These are:

1. It does not provide fair notice of the conduct proscribed.
2. It confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed.
3. Its coverage is overbroad and impinges on First Amendment freedoms. *People v Howell*, 396 Mich 16, 20 (1976).

There is the additional danger that a person may "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Gasper*, 316 Mich App at 536-537, quoting *Grayned*, 408 US at 108-109.

A challenge for vagueness not on First Amendment grounds is "examined in light of the facts of each particular case." *Howell*, 396 Mich at 21; *Lino*, 447 Mich at 574. No First Amendment challenge is made in this case. The ordinance is void for vagueness because:

1. It does not provide sufficient notice as to what conduct is required or prohibited; and
2. It allows arbitrary and discriminatory enforcement by the code enforcement officer.

Either ground is sufficient under the law to render the ordinance vague in this case. *Gasper*, 314 Mich App at 538.

Discussion

David read the City ordinance, got a permit, and built a new fence. He received a ticket because it was not "open" and did not comply with the ordinance. He paid the fine. David's failure to remove the fence escalated the matter into a misdemeanor offense for the continuing violation.

1. The ordinance in question does not provide criteria by definition, standard, specification, or measurement of the type of fence required. Any person of reasonable intelligence erecting a fence is left to guess whether it complies with the ordinance's undefined term "open."

2. The code officer is vested with complete discretion to determine whether the fence complies with the ordinance. The lack of definition and standard in the ordinance renders enforcement subjective, arbitrary, and discriminatory. Compliance is predicated on his personal view of whether it is "open," the meaning which he learned when he overheard council members talk about it after a meeting. Enforcement on this basis is "subjective and arbitrary" on an ad hoc basis because the definition is known only to the enforcer, not learned from a reading of the ordinance language.

In conclusion, David is correct that the plain language of the code does not fairly apprise him of what is expected of him in building an "open" fence by specific definition. In addition, the unstated standard of the type of fence leaves it to the discretion of the code enforcer to determine on "an ad hoc basis" whether the fence erected complies with the ordinance. David should prevail on the argument that the ordinance is void for vagueness.