

Virginia Local Government Law

Is the “Reasonable Person” Dead in Virginia?

By: Andrew McRoberts. *This was posted Thursday, January 21st, 2010*

Well, it’s over. The “reasonable person” is dead. Or is it?

The [U.S. Supreme Court denied the request for a writ of certiorari](#) by the City of Virginia Beach to review the Virginia Supreme Court’s decision overturning the City’s noise ordinance in [Tanner v. City of Virginia Beach](#), 277 Va. 432, 674 S.E.2d 848 (2009). [The Daily Press article on the writ denial is here](#), and the [Virginia Lawyer’s Weekly article on the same topic is here](#).

Unfortunately, the U.S. Supreme Court did not ride to the aid of Virginia Beach, Virginia localities and others dealing with the aftermath of *Tanner*.

This leaves Virginia localities to grapple with various issues. Local government drafting issues were discussed in [my first blog article from last year](#), while larger questions of law were discussed in [my second blog article on the topic](#).

The two biggest issues that remain post-*Tanner* have nothing particularly to do with noise ordinances. *Tanner* may cast a big shadow. The question is — how big?

The first issue is the arguable inconsistency in how the Virginia Supreme Court has interpreted the Virginia and U.S. due process clauses. The Virginia Supreme Court has repeatedly held them to be co-extensive. And yet, the Virginia Supreme Court has ruled in *Tanner* that the “due process clause” is violated by the “reasonable person standard” as inherently vague and subjective. This is inconsistent with how the federal courts have dealt with the issue, including the Fourth Circuit Courts of Appeals, which have upheld the standard as inherently objective. This is discussed further in my earlier article.

What does this mean for other due process cases down the road? Are the two due process clauses no longer the same legal standard?

The second issue is also significant one in legal jurisprudence — that is, the arguable end of the objective “reasonable person” standard in Virginia, at least in criminal statutes and ordinances. Since violations of most local government ordinances are misdemeanors, this falls heavily upon Virginia localities. Already, criminal

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cases have been thrown out by judges in localities because the ordinance in question used the “reasonable person” standard.

But is *Tanner* limited merely to criminal statutes and ordinances? What is *Tanner*’s effect in the civil context? After all, the “reasonable person” standard is used frequently and routinely in statutes, ordinances, regulations, and contracts. Is it subjective and vague in all contexts?

Since law school, I have been taught and read in case after case that the “reasonable person” standard is objective. This has been sustained in legal jurisprudence through the centuries. Now, in *Tanner*, the Virginia Supreme Court has apparently held that it is subjective (at least in Virginia, in this case). Does this mean that the venerable “reasonable person” standard is now off-limits, or at least inadvisable in any context that calls for an objective standard for clarity and enforceability, be it statute, ordinance, regulation or contract?

Many local government attorneys would say “no.” The Virginia Supreme Court made its ruling in a criminal context, applying a familiar due process vagueness standard — “that a statute or ordinance be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal.” *Tanner*, 277 Va. 432, 439, 674 S.E.2d 848 (2009). The Court used the word “context” several times in its discussion of the “reasonable person” standard, and even distinguished the use of the “reasonable person” standard in a noise ordinance from other criminal contexts. The analysis and reasoning the Supreme Court used in *Tanner* simply does not apply to a civil ordinance, and may not even apply to a non-noise ordinance.

Because of this criminal - civil distinction, many localities have sought to address *Tanner* by making the noise ordinance a civil affair, thus avoiding the case’s criminal due process analysis.

As I write, [2010’s Senate Bill 246 \(Watkins\)](#) and several identical bills are making their way through the Virginia General Assembly. If adopted, these bills would clarify that localities have the authority to impose civil penalties on noise ordinance violators. Many localities intend to retain the often-preferred “reasonable person” standard to regulate noise, but avoid the constitutional infirmity of the Virginia Beach criminal noise ordinance.

So, the “reasonable person” is not dead. It’s being resuscitated as we speak. If it needed such heroic measures at all.

What do you think? Is the “reasonable person” standard dead in Virginia? On life support? Or, alive and well, just not for use in defining criminally loud noise?

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