



## Virginia Local Government Law

### Fairly Debatable Standard Upheld: Town of Leesburg v Giordano

**By: Andrew McRoberts. *This was posted Monday, November 22nd, 2010***

In [Town of Leesburg v Giordano](#), the Virginia Supreme Court faced clearly-settled law but an interesting argument. And, as can happen in such cases, it resulted in a well-reasoned majority opinion and a strongly-worded dissent. The opinion was issued on November 4, 2010.

The case involved out-of-town water and sewer rates set by ordinance of the Town Council of Leesburg. Ordinances are legislative matters, and the Virginia Supreme Court has held several times that setting of rates by the governing body is a legislative action. E.g., [Eagle Harbor LLC v. Isle of Wight County, 271 Va. 603, 628 S.E.2d 298 \(2006\)](#). Every legislative action may be challenged, but a challenger faces a difficult test — overcoming the fairly debatable standard. Under this standard, even if the challenger introduces significant, even compelling evidence of unreasonableness, the locality can prevail if there is “any evidence” of reasonableness. [Board of Supervisors v. Stickley, 263 Va. 1, 556 S.E.2d 748 \(2002\)](#).

Here, even though the plaintiffs’ expert witness did a complex rate study and testified at length to the unreasonableness of the rates, Town witnesses testified that the method to set rates was appropriate, that an out-of-town differential is common, that this differential was in line with others across Virginia, and that the rates themselves were reasonable. Locality won. Simple. Right?

Maybe. The majority certainly so held, and confirmed the “fairly debatable” standard as applying in reviewing the reasonableness of local government rate setting, and that “any evidence” of reasonableness is all that is required to uphold a legislative act.

But maybe not. The dissent pointed out that these particular utility customers lived outside of the Town limits and so had no say in the election of this Council. The dissent even compared the Council’s act to the taxation without representation in the not-so-recent “unpleasantness” of the late 18th century. The dissent suggested that the Town Council “had an obvious incentive to please their constituents at the expense of those who could not vote.” Opinion, n.2. As a result, the dissent disagreed not only with the majority but also the trial court, all of which applied the “fairly debatable” standard. Instead, the dissent suggested a “preponderance of the evidence” standard should apply.

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This is an interesting argument and won the support of two justices.

But courts defer to legislators not just because of who elects them, but because of a separation of powers concern. The “fairly debatable” standard is deferential for good reason. Courts should not be in the business of deciding the contents of ordinances unless there is *no* reasonable basis whatsoever. Otherwise, the concern is unelected judges or worse, hired gun experts will be in the process of second-guessing officials elected to make these tough calls when evidence suggests that either result could be considered reasonable.

Like many tough calls our elected bodies make every month, utility rates are not a matter of a mere calculation or an expert’s report. Although involving financial models and mathematics, rates are based in part on policy considerations which are unquantifiable.

For example, in this case, the evidence showed that Town bore “owner’s risk” for losses, regulatory changes and weather-related expenses, and was required to raise Town taxes if the utility fund ever failed to pay bonds or necessary expenses of the utility. Customers outside the Town could not be taxed and did not bear that risk, which was largely unquantifiable. Given this evidence, the majority agreed to leave this decision to the elected officials.

This case is a significant case for local government ratemakers, as it reaffirms the deference afforded their decisions, and the proper application of the “fairly debatable” standard of review. This case also reaffirms the discretion municipal utilities have to measure owner’s risk and other unquantifiable factors and set rates accordingly.

*Sands Anderson PC authored two amicus curiae briefs in this case on behalf of the Virginia Municipal League.*

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