

Close to home: Local regulation of drones faces uncertain future

This legal analysis finds that federal pre-emption restricts a municipality's ability to regulate unmanned aerial vehicles, though several cities have tried.

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It seems that drones are making headlines on an increasingly regular basis, and their sudden ubiquity appears to be much more than a passing trend. Many people thought they were reading science fiction a few years ago when Amazon announced that it was launching a drone delivery program, but with testing under way under the auspices of the Federal Aviation Administration it is clear that the plan is very much in motion.

Drones are forecast to be a top holiday gift for the 2015 giving season, with roughly 700,000 expected to ship within the U.S. In short, drones aren't going away. The appearance of drones on the scene poses myriad issues from a legal perspective – primarily in the areas of privacy and safety – and local officials may wonder whether they can and should take action to regulate their use. While there is an argument to be made for regulating drones at the local level, there are countervailing issues of federal pre-emption and operators' constitutional rights that should also be taken into consideration.

Local efforts to regulate use

A spattering of local governments across the country have taken it upon themselves to fill what they deem to be a regulatory void when it comes to drone use. To name a few examples at the local level: St. Bonifacius, Minn. effectively banned the operation of drones within the town's air space, with certain limited exceptions. Northampton, Mass. enacted a similar



ordinance establishing that landowners have “exclusive control of the immediate reaches of the air space and that no drone aircraft shall have the ‘public right of transit’ through this private property.” The City of Pittsburgh banned the use of drones above or in the vicinity of public parks. Just recently, the City of Chicago passed a comprehensive ordinance that, among other things, prohibits drones from flying higher than 400 feet and within five miles of airports, essentially mirroring proposed regulations issued by the FAA. Los Angeles passed a similar ordinance paralleling the FAA model.

Because the practical effects of drones are most keenly felt at the local level, it makes sense that local governments are taking action. Certainly, traditional police powers typically allow local governments to pass reasonable regulations to protect the safety and privacy of its residents. However, there has been considerable discussion on the legal authority of local governments to regulate in this area due to questions about federal pre-emption

and the constitutional rights of operators.

The federal landscape

In the most general terms, pre-emption is the constitutional principle that federal law will take precedence over a state or local law in situations where they would be incompatible taken together. Federal pre-emption will occur in three basic circumstances: First, in cases where Congress specifically states its intent to pre-empt state/local law within the applicable statute; second, as ruled in *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141 (1982), when the scheme of federal regulation is so dominant and pervasive that “the federal system will be assumed to preclude enforcement of state laws on the same subject;” and, lastly, when a state/local law actually conflicts with the federal regulatory scheme.

To understand the pre-emption question as applied to drones and other aircraft, one first must be familiar with the federal aviation landscape.

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Since 1958, the FAA has regulated the operation of aircraft in the national air space. The FAA has clarified in recent years that it considers unmanned aerial vehicles (“UAVs,” commonly referred to as “drones”) to be “aircraft” subject to its jurisdiction and existing regulations. Recognizing, however, that many regulations applicable to manned aircraft were simply not suitable for UAVs, Congress passed the FAA Modernization and Reform Act (“FMRA”) in 2012.

In the FMRA, Congress instructed the FAA to create a comprehensive set of regulations to facilitate the safe integration of drones into the national air space. Pursuant to that directive, in February 2015 the FAA issued a set of proposed regulations applicable to the commercial use of drones, which have yet to be finalized and are not expected until 2016 or possibly 2017. In the meantime, prospective users must obtain a “Section 333 exemption” to operate a drone for commercial purposes. A grant of exemption comes with certain conditions and limitations (e.g., drone must be operated within visual line of sight and at no more than

400 feet above ground level), and the operator must have an FAA registered aircraft and a pilot’s license. The proposed regulations will streamline the process, but are expected to include a comprehensive set of conditions and limitations on the operation of drones for commercial purposes.

As to recreational drone users, the FMRA established that recreational or hobby use is to be exempt from future FAA regulation as long as it complies with certain enumerated safety standards.

This author is not aware of any cases to date where a local ordinance governing drones was struck down on

pre-emption grounds. Given the FAA’s established dominance in the area of manned aircraft, however, it is not surprising that many efforts to regulate full-sized aircraft operations at the local level have been deemed pre-empted by federal law. For example, the Supreme Court held in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973) that a local ordinance that banned aircraft from taking off from the local airport during nighttime hours was invalid. The court explained that the FAA already thoroughly regulated aircraft noise, thus pre-empting state and local control in that area. In another example, the highest court of

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Colorado held in *Banner Advertising, Inc. v. People of City of Boulder*, 868 P.2d 1077 (Colo. 1994) that a local ordinance that banned banner towing by planes was pre-empted in a case where a company had obtained a certificate of waiver from the FAA specifically allowing it to tow banners subject to certain restrictions.

At the same time, however, some courts have recognized that local government does have the ability to regulate the air and land below “navigable air space,” which historically refers to minimum cruising altitudes and the airspace necessary for landing and takeoff applicable to manned aircraft. For instance, in *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990) the 8th Circuit Court of Appeals upheld a zoning regulation that would have required a heliport operator to obtain a conditional use permit with various conditions attached to it. As the court put it: “We see no conflict between a city’s regulatory power over land use, and the federal regulation of air space...”

The FMRA itself does not contain an express pre-emption clause regarding the operation of drones, but the FAA’s final regulations on the topic presumably will regulate the use of drones below what is currently considered to be navigable air space, and will affirmatively allow commercial operation if certain requirements are met. As to recreational users, the pre-emption issue is murky because the FMRA states that the FAA will *not* regulate recreational users if they com-

ply with certain minimum standards. For these and other complex reasons, there is simply no way to conclusively determine whether local regulation of drone use will withstand a legal challenge on pre-emption grounds.

First Amendment considerations

Briefly, the other potential roadblock a local government attempting to regulate drone use may encounter is the First Amendment. Several courts, including our First Circuit Court of Appeals in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), have held that the First Amendment’s guarantee of freedom of speech and expression includes the right to gather information, or the “right to record.”

The right to record has been found to apply in situations where private citizens record police activity or other matters of public concern, and commentators have suggested that the right is likely applicable to private citizens’ use of drones equipped with video recording devices. However, the right to record, like other First

Amendment activity, is subject to reasonable “time, place, and manner” restrictions. Ultimately, any local effort to regulate drone use that implicates the right to record will come down to a balancing of the government’s legitimate interests and the constitutional right in question.

Conclusion

While the legal implications of drone regulation can be truly confounding, one thing that’s clear is that the sudden proliferation of drone use by businesses and individuals shows no signs of slowing down. Certainly, local regulation of drones is something to be considered depending on the needs and experiences of the municipality in question. Narrow drafting and careful attention to current and proposed regulations can minimize – though likely not eliminate – the risk of legal challenge down the road. Due to the complexity of the legal issues in play, it remains to be seen how far municipal governments can go in terms of regulating drone use at the local level. ■

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