

Client Alert

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May State and Local Governments Control Low-Flying Drones?

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Most of the attention paid to drones has focused on issues of aviation and Federal Aviation Administration (FAA) authority. Yet much of the impact of low-flying drones will fall, not on the national air transportation system, but on those who live and work at ground level. Accordingly, states, counties and municipalities are increasingly asserting regulatory authority over drones and citing the need to protect the health and safety, including privacy, of residents.

Historically, state and local governments protect their residents through land use and zoning restrictions, among other laws adopted under their broad police powers. For example, a community may choose to preserve its beach or mountain views by restricting the construction of high-rise hotels or apartments on the shoreline, and a state may control noise in school zones or near hospitals. And, of course, the “rules of the road” for surface vehicles are essential for pedestrian, cyclist and vehicle safety. Indeed, such power has traditionally been reserved to states and local governments. Drones—with uses quickly proliferating in both urban and rural areas—have the potential to impact the privacy, quietude, and safety of residents, in a manner that older aircraft technologies do not. But what authority (if any) do states and local governments have to prevent or allow uninspected, or unauthorized, drones operated by unlicensed “pilots” to operate directly above and around their residential and commercial areas, or even in and around local and state parks?

This question will only become more critical with advances in technology, including arrival from China of what the *Wall Street Journal* calls the “Model T of drones,” a mass-market device selling for about \$1000 that could induce explosive growth in drone usage in the United States.

STATE AND LOCAL REGULATION OF DRONES

More than half of the state governments in the United States have formally considered legislative actions to address drone operations. At least ten states have gone further and enacted such legislation. Alaska, for example, passed a bill creating procedures and policies for the use of drones by law enforcement, including regulations governing information collected by drones. Illinois, Indiana, and Iowa have also passed legislation that similarly regulates the use of drones in law enforcement. Louisiana’s legislation extends to the civil sector, prohibiting the unlawful use of an unmanned aircraft system (UAS), defined as the “intentional use of a UAS to conduct surveillance of a targeted facility without the owner’s prior written consent.”

At least two states have passed laws that directly address drone flight as opposed to privacy. Oregon allows property owners to sue a drone operator if (1) a drone has flown less than 400 feet above the owner’s property at

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least once, (2) the property owner has told the drone operator that he/she does not consent to the drone flying over his/her property, and (3) the operator then flies the drone less than 400 feet above the property again. Tennessee has gone even further, criminalizing the operation of low-flying drones over private property.

Non-federal efforts to regulate drones are not limited to the state level; municipalities are also stepping in to regulate drones. St. Bonifacius, Minnesota, for example, passed a resolution banning anyone from operating a drone “within the airspace of the city,” making a first offense a misdemeanor and a repeat offense a felony. Northampton, Massachusetts passed a resolution affirming that – within the city limits – “the navigable airspace for drone aircraft shall not be expanded below the long-established airspace for manned aircraft,” and that “landowners subject to state laws and local ordinances have exclusive control of the immediate reaches of the airspace and that no drone aircraft shall have the ‘public right of transit’ through this private property[.]” Some towns have considered legalizing self-help remedies like “drone hunting,” while others have simply passed resolutions calling for federal action.

It seems plain that laws regulating drones are becoming a standard part of the regulatory landscape in most states. What is the legal status of such regulations today, and what will become of these local regulations when the FAA issues drone-specific regulations? Can and should the FAA curtail local authority to regulate drones? If so, how will the FAA be able to effectively regulate the many inexpensive drones available for myriad uses, benign and malign, that operate below what traditionally has been considered “navigable airspace”?

THE FAA'S AUTHORITY TO REGULATE DRONES

The FAA has a statutory mandate to regulate the navigable airspace of the United States. In 2012, when Congress passed the FAA Modernization and Reform Act (the “2012 Act”), it extended this statutory mandate to drone operations, specifying that the FAA must develop a plan for integrating drones into the existing regulatory framework.¹

The 2012 Act coupled with the FAA's statutory mandate suggests that the FAA may have the authority to regulate drones at *any altitude* through notice and comment rulemaking, even in airspace that is traditionally below FAA purview and regulated by the states through zoning ordinances.²

Until the FAA acts, there is a considerable argument that state and local governments may retain their broad police powers to control use of drones within their borders, particularly at the low altitudes at which most drones operate. After the FAA releases final drone regulations, however, a variety of preemption questions could arise.

What happens when a state, for important economic reasons, wants to allow farmers to use drones in precision agriculture, but FAA regulations hinder or prohibit that use? Or, if a state wants to ban drones from flying low over private residences or playgrounds and hospitals for privacy and safety reasons, would the FAA require that the

¹ Notably, the FAA is behind schedule in publishing the Notice of Proposed Rulemaking for small UAS.

² The FAA's authority to regulate UAS operations under the existing regulatory framework was recently affirmed by the NTSB in *Huerta v. Pirker*. For more information, see our client alert available at: <http://www.mofo.com/~media/Files/ClientAlert/2014/11/141120HuertavPirker.pdf>. The NTSB decision, however, does not speak to the preemptive effect of federal regulation of drones.

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local government permit such flight, objectionable as it might be to local residents, so long as it is conducted in accordance with the FAA regulations? Will the state “police power” interest prevail or will preemption prohibit the state regulation? Or will the FAA expressly acknowledge and preserve the state police power so long as it does not intrude into the FAA’s control of the national air transportation system? These are key emerging questions, both of policy and of law.

PREEMPTION OF STATE AND LOCAL REGULATION

From a legal perspective, these questions largely depend on whether the FAA’s authority and the manner in which it is exercised is determined to “preempt” the historical state and local powers to protect residents. Preemption questions often arise when both significant federal interests and weighty local interests conflict. The regulation of drone activity is a clear case of such potential conflict.

Although the FAA has yet to issue its Notice of Proposed Rulemaking (NPRM) for small UAS, at least one petition has already been filed requesting that the anticipated NPRM include an “express preemption clause.” This is not surprising given the interests at stake; drone manufacturers, suppliers, and operators want a uniform federal standard to abide by, not a patch-work of state regulations that may be more restrictive than the federal framework. Whether an express preemption provision will be proposed in the NPRM, and whether that is a good idea, remains to be seen.

One thing is clear: courts have often held that state regulation of traditional aircraft in the areas of safety and operations are preempted. Most of these courts have done so on the basis of “field preemption” (which occurs when Congress’s regulatory scheme sufficiently pervades a particular area so as to evidence an intent for federal law to occupy the entirety of the field), even in cases where federal law does not include an express preemption provision of the kind discussed above.

Even in the context of safety and operations, however, courts have limited federal law’s preemptive scope. In the Ninth Circuit, for example, the breadth of FAA field preemption depends on the specificity and comprehensiveness of the federal regulations at issue. Absent an express preemption provision in the small UAS final rules, similar case-specific field-preemption standards will likely apply. Thus, the breadth and pervasiveness of the forthcoming drone regulations will greatly influence the degree and scope of preemption.

CONCLUSION: BUCKLE YOUR SEATBELTS

This is a new arena brought on by a remarkable application of many different technological advances. There are no tidy precedents or analogous regulatory schemes. There are substantial commercial interests in the spread of drones, as well as privacy and safety concerns at the state and local levels.

Accordingly, the FAA is likely to take a fair period of time to develop final regulations. In the meantime, states and local governments are likely to attempt to fill what they perceive as a regulatory void. Thus, it is likely that there will be continuing conflicts about the extent of the FAA’s focused authority on aviation and the broader concerns state and local governments have under their historical police powers.

Until this settles out, we forecast a bumpy ride!

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Morrison & Foerster LLP, with its deep expertise in aviation and state and local government law, is positioned well to serve clients seeking to navigate the potentially complex questions of federal preemption, retained state and local police powers and the ever-expanding numbers and uses of drones across the country. MoFo's Drone Practice Group integrates aviation, privacy and data security, environmental, and administrative-law expertise in order to serve clients in this emerging industry.

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