

THE DRONE

ADVOCACY KIT



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Dear fellow drone flyer,

This kit will hopefully help you along your path of legal flights with your sUAS. It will also help you understand what rules belong to the FAA and the Federal Government, as well as what political subdivisions (states, counties, cities, etc.) can do when it comes to regulation of sUAS.

Foremost, as described in the FAA's *State and Local Regulation of UAS Fact Sheet* (https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf), published 12/17/15, there are specific ways localities can and cannot regulate the flights of sUAS.

That fact sheet (attached as part of this packet) reinforces that the FAA has the sole authority to regulate the National Airspace System (NAS). But it also points out that localities can prohibit or regulate sUAS use for such things as voyeurism, dangerous acts, hunting and fishing, and LEO use.

The FAA's authority over the NAS was recently upheld in Massachusetts Federal Court when Judge William Young found in favor of Dr. Michael Singer in his case against the city of Newton, MA.

On 12/19/16, Newton passed a series of laws restricting use of sUAS, therefore attempting to control the NAS. This was passed even after warnings from many within the sUAS community. Dr. Singer sued, and won. Newton later appealed, but on 12/7/17, Newton dropped its appeal, thus making the Singer case federal precedent. While it is only rule of law in Massachusetts, the fact that it is a Federal Case means that other Judges in other districts can use it as precedent when deciding similar cases.

It is up to the sUAS community to remain vigilant in our own cities and states to make sure laws are not passed that curtail our rights to fly safely and legally in the NAS.

Is it also up to us to ensure that we do follow laws as written at the local level.

There are plenty of examples of the sUAS community working together with cities and states and helping craft ordinances that don't disrupt our businesses and hobby. Breckenridge, CO is a perfect example of this. Local drone operators found out about a proposed ordinance that would violate FAA NAS authority, and showed up at the town meeting to testify against it. It was withdrawn for rewrite, and some of those same drone operators then worked with the city to craft an ordinance that satisfies the city's desire to keep drones safe, and the operators' desires to continue to fly.

There will be successes (Breckenridge, CO) and failures (Newton, MA). And there are also plenty of instances when cities and counties will pass drone ordinances

with little or no notice. So we all need to keep our eyes and ears open at the local level.

In November of 2017, President Trump issued an executive memorandum to the Department of Transportation (DOT) that instructs the FAA to, among other things, design a way for state, local, and tribal governments to implement possible ways to control sUAS. This will need to be done with cooperation of the FAA, but it will open up control of the NAS and allow those political subdivisions. This process will take at least two years, and quite possibly three, so while it's in the works, it's not something we need to worry about at the moment. We do need to keep an eye on it though.

That Presidential Memo can be found here: <https://www.whitehouse.gov/the-press-office/2017/10/25/presidential-memorandum-secretary-transportation>

This is a very exciting, and at the same time frustrating, time for anyone involved in the sUAS community. The technology of our aircraft evolved much faster than laws that can be used to regulate them. And the vast majority of people who are trying to implement those regulations are doing so out of ignorance. And I don't mean ignorance in the pejorative manner, only in the vein of lack of knowledge.

If you plan on fighting proposed or current drone ordinances, whether alone or as a group (and I strongly suggest working as a group), arm yourselves with the knowledge contained in this kit, and emphasize your group's willingness to work along side your local politicians in order to come up with a compromise benefitting all sides. A professional attitude and appearance will go a very long way to helping your cause. Use your knowledge to help local legislators to understand not only the federal laws, but the capabilities of our aircraft as well. Knowledge is power, for both sides.

All information contained in this kit is accurate at the time of writing, but things change rapidly in this community. So double check and cross reference any examples in this kit. However, for the most part, it will all be accurate.

Fly safe, fly smart, and let's all do our part to keep the NAS free and open to all sUAS pilots and operators. And good luck in your endeavors.

A handwritten signature in black ink, appearing to read 'Vic Moss', with a stylized flourish extending to the right.

Vic Moss
Remote Pilot, Drone U Instructor,
Executive Team Member



SUBJECT: Unmanned Aircraft Systems Integration Pilot Program

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. It shall be the policy of the United States to promote the safe operation of unmanned aircraft systems (UAS) and enable the development of UAS technologies for use in agriculture, commerce, emergency management, human transportation, and other sectors. Compared to manned aircraft, UAS provide novel, low cost capabilities for both public and private applications. UAS present opportunities to enhance the safety of the American public, increase the efficiency and productivity of American industry, and create tens of thousands of new American jobs.

The private sector has rapidly advanced UAS capabilities to address the needs of recreational, commercial, and public users. To promote continued technological innovation and to ensure the global leadership of the United States in this emerging industry, the regulatory framework for UAS operations must be sufficiently flexible to keep pace with the advancement of UAS technology, while balancing the vital Federal roles in protecting privacy and civil liberties; mitigating risks to national security and homeland security; and protecting the safety of the American public, critical infrastructure, and the Nation's airspace. Well-coordinated integration of UAS into the national airspace system (NAS) alongside manned aircraft will increase the safety of the NAS and enable the authorization of more complex UAS operations.

The Federal Aviation Administration (FAA) has taken steps to integrate UAS into the NAS at specific test sites and has issued operational requirements for small UAS operations in the NAS. Further integration will require continued private-sector cooperation and the involvement of State, local, and tribal governments in Federal efforts to develop and enforce regulations on UAS operations in their jurisdictions. Input from State, local, tribal, and private-sector stakeholders will be necessary to craft an optimal strategy for the national management of UAS operations. A coordinated effort between the private sector and among these governments will provide certainty and stability to UAS owners and operators, maximize the benefits of UAS technologies for the public, and mitigate risks to public safety and security.

Sec. 2. UAS Integration Pilot Program.

- (a) Within 90 days of the date of this memorandum, the Secretary of Transportation (Secretary), in consultation with the Administrator of the FAA (Administrator), shall establish a UAS Integration Pilot Program (Program) to test the further integration of UAS into the NAS in a select number of State, local, and tribal jurisdictions.
- (b) The objectives of the Program shall be to:
 - (i) test and evaluate various models of State, local, and tribal government involvement in the development and enforcement of Federal regulations for UAS operations;
 - (ii) encourage UAS owners and operators to develop and safely test new and innovative UAS concepts of operations; and
 - (iii) inform the development of future Federal guidelines and regulatory decisions on UAS operations nationwide.

Sec. 3. Implementation.

- (a) To implement the Program, the Secretary or the Administrator, as appropriate, shall:
 - (i) solicit proposals from State, local, and tribal governments to test within their jurisdictions the integration of civil and public UAS operations into the NAS below 200 feet above ground level, or up

to 400 feet above ground level if the Secretary determines that such an adjustment would be appropriate;

(ii) select proposals by State, local, and tribal governments for participation in the Program according to the criteria listed in subsection (b) of this section;

(iii) enter into agreements with the selected governments to establish the terms of their involvement in UAS operations within their jurisdictions, including their support for Federal enforcement responsibilities; describe the proposed UAS operations to be conducted; and identify the entities that will conduct such operations, including, if applicable, the governments themselves; and

(iv) as necessary, use existing authorities to grant exceptions, exemptions, authorizations, and waivers from FAA regulations to the entities identified in the agreements described in subsection (iii) of this section, including through the issuance of waivers under 14 CFR Part 107 and Certificates of Waiver or Authorization under section 333 of the FAA Modernization and Reform Act of 2012 (FMRA) (Public Law 112 95).

(b) In selecting proposals for participation in the Program under subsection (a) of this section, the Secretary shall consider:

(i) overall economic, geographic, and climatic diversity of the selected jurisdictions;

(ii) overall diversity of the proposed models of government involvement;

(iii) overall diversity of the UAS operations to be conducted;

(iv) the location of critical infrastructure;

(v) the involvement of commercial entities in the proposal, and their ability to advance objectives that may serve the public interest as a result of further integration of UAS into the NAS;

(vi) the involvement of affected communities in, and their support for, participating in the Program;

(vii) the commitment of the governments and UAS operators involved in the proposal to comply with requirements related to national defense, homeland security, and public safety, and to address competition, privacy, and civil liberties concerns; and

(viii) the commitment of the governments and UAS operators involved in the proposal to achieve the following policy objectives:

(A) promoting innovation and economic development;

(B) enhancing transportation safety;

(C) enhancing workplace safety;

(D) improving emergency response and search and rescue functions; and

(E) using radio spectrum efficiently and competitively.

(c) Within 180 days of the establishment of the Program, the Secretary shall enter into agreements with State, local, or tribal governments to participate in the Program, with the goal of entering into at least 5 such agreements by that time.

(d) In carrying out subsection (c) of this section, the Secretary shall select State, local, or tribal governments that plan to begin integration of UAS into the NAS in their jurisdictions within 90 days after

the date on which the agreement is established.

- (e) The Secretary shall consider new proposals for participation in the Program up to 1 year before the Program is scheduled to terminate.
- (f) The Secretary shall apply best practices from existing FAA test sites, waivers granted under 14 CFR Part 107, exemptions granted under section 333 of the FMRA, the FAA Focus Area Pathfinder Program, and any other relevant programs in order to expedite the consideration of exceptions, exemptions, authorizations, and waivers from FAA regulations to be granted under the Program, as described in subsection (a)(iv) of this section.
- (g) The Secretary shall address any non compliance with the terms of exceptions, exemptions, authorizations, waivers granted, or agreements made with UAS users or participating jurisdictions in a timely and appropriate manner, including by revoking or modifying the relevant terms.

Sec. 4. Coordination.

- (a) The Administrator, in coordination with the Administrator of the National Aeronautics and Space Administration, shall apply relevant information collected during the Program and preliminary findings to inform the development of the UAS Traffic Management System under section 2208 of the FAA Extension, Safety, and Security Act of 2016 (Public Law 114-190).
- (b) The Secretary, in coordination with the Secretaries of Defense and Homeland Security and the Attorney General, shall take necessary and appropriate steps to:
 - (i) mitigate risks to public safety and homeland and national security when selecting proposals and implementing the Program; and
 - (ii) monitor compliance with relevant laws and regulations to ensure that Program activities do not interfere with national defense, homeland security, or law enforcement operations and missions.
- (c) The heads of executive departments and agencies with relevant law enforcement responsibilities (Federal law enforcement agencies), including the Attorney General and the Secretary of Homeland Security, shall develop and implement best practices to enforce the laws and regulations governing UAS operations conducted under the Program.
- (d) In carrying out the responsibilities set forth in subsection (c) of this section, the heads of Federal law enforcement agencies shall coordinate with the Secretaries of Defense and Transportation, as well as with the relevant State, local, or tribal law enforcement agencies.
- (e) In implementing the Program, the Secretary shall coordinate with the Secretaries of Defense and Homeland Security and the Attorney General to test counter UAS capabilities, as well as platform and system-wide cybersecurity, to the extent appropriate and consistent with law.

Sec. 5. Evaluation and Termination of UAS Integration Pilot Program.

- (a) The Program shall terminate 3 years from the date of this memorandum, unless extended by the Secretary.
- (b) Before and after the termination of the Program, the Secretary shall use the information and experience yielded by the Program to inform the development of regulations, initiatives, and plans to enable safer and more complex UAS operations, and shall, as appropriate, share information with the Secretaries of Defense and Homeland Security, the Attorney General, and the heads of other executive departments and agencies.
- (c) After the date of this memorandum and until the Program is terminated, the Secretary, in consultation with the Secretaries of Defense and Homeland Security and the Attorney General, shall submit an annual

report to the President setting forth the Secretary's interim findings and conclusions concerning the Program. Not later than 90 days after the Program is terminated, the Secretary shall submit a final report to the President setting forth the Secretary's findings and conclusions concerning the Program.

Sec. 6. Definitions. As used in this memorandum, the next stated terms, in singular and plural, are defined as follows:

- (a) The term "unmanned aircraft system" has the meaning given that term in section 331 of the FMRA.
- (b) The term "public unmanned aircraft system" has the meaning given that term in section 331 of the FMRA.
- (c) The term "civil unmanned aircraft system" means an unmanned aircraft system that meets the qualifications and conditions required for operation of a civil aircraft, as defined in 49 U.S.C. 40102.

Sec. 7. General Provisions.

- (a) Nothing in this memorandum shall be construed to impair or otherwise affect:
 - (i) the authority granted by law to an executive department or agency, or the head thereof;
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals; or
 - (iii) the conduct of public aircraft operations, as defined in 49 U.S.C. 40102(a)(41) and 40125, by executive departments and agencies, consistent with applicable Federal law.
- (b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.
- (d) The Secretary is authorized and directed to publish this memorandum in the Federal Register.

DONALD J. TRUMP



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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
MICHAEL S. SINGER,)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	No. 17-10071-WGY
)	
CITY OF NEWTON,)	
)	
Defendant.)	
_____)	

YOUNG, D.J.

September 21, 2017

FINDINGS OF FACT, RULINGS OF LAW, & ORDER

I. INTRODUCTION

The crux of this dispute is whether portions of a certain ordinance (the "Ordinance") passed by the City of Newton ("Newton") on December 19, 2016 are preempted. First Am. Compl. Declaratory and Injunctive Relief, ECF No. 12. Michael S. Singer ("Singer") challenges portions of the Ordinance which require that all owners of pilotless aircraft (commonly referred to as "drones" or "UAS") register their pilotless aircraft with Newton, and also prohibit operation of pilotless aircraft out of the operator's line of sight or in certain areas without permit or express permission. Id.; Def. City Newton's Mem. Law Supp. Cross Mot. Summ. J. and Opp'n Pl.'s Mot. Summ. J., Ex. 2, Newton Ordinances § 20-64, ECF No. 40-3.

In early March, Newton answered Singer's complaint, Answer Def. City of Newton First Am. Compl., ECF No. 17, and both parties appeared before the Court soon after, when they agreed to cross-file motions for summary judgment and proceed on a case stated basis,¹ Electronic Clerk's Notes, ECF No. 21. Both parties subsequently filed motions for summary judgment, Pl.'s Corrected Mot. Summ. J., ECF No. 34; Def. City of Newton's Cross Mot. Summ. J., ECF No. 39, and fully briefed the issues, Pl.'s Corrected Mem. Supp. Mot. Summ. J. ("Pl.'s Mem."), ECF No. 35; Pl.'s Resp. Def.'s Cross-Mot. Summ. J. ("Pl.'s Resp."), ECF No. 50; Pl.'s Resp. City's Statement Undisputed Facts ("Pl.'s Resp. Facts"), ECF No. 51; Def. City Newton's Mem. Law Supp. Cross Mot. Summ. J. and Opp'n Pl.'s Mot. Summ. J. ("Def.'s Mem."), ECF No. 40; Def. City of Newton's Statement Undisputed Facts Supp. Cross Mot. Summ. J. and Resps. Pl.'s Statement Undisputed Material Facts Supp. Mot. Summ. J. ("Def.'s Facts"), ECF No. 41;

¹ The case stated procedure allows the Court, with the parties' agreement, to render a judgment based on the largely undisputed record in cases where there are minimal factual disputes. TLT Constr. Corp. v. RI, Inc., 484 F.3d 130, 135 n.6 (1st Cir. 2007). In its review of the record, "[t]he [C]ourt is . . . entitled to 'engage in a certain amount of factfinding, including the drawing of inferences.'" Id. (quoting United Paperworkers Int'l Union Local 14 v. International Paper Co., 64 F.3d 28, 31 (1st Cir. 1995)).

see also Amici Curiae Br. ("Amicus Br."), ECF No. 57.² After oral argument on June 13, 2017, this Court took the matter under advisement. Electronic Clerk's Notes, ECF No. 59.

II. FINDINGS OF FACT

Newton is a municipality in the Commonwealth of Massachusetts and is organized under a charter pursuant to the Home Rule Amendment of the Massachusetts Constitution. Pl.'s Resp. Facts ¶ 1; Def.'s Facts ¶ 1. Singer resides in Newton. Am. Compl. ¶ 22. He is a Federal Aviation Administration ("FAA")-certified small unmanned aircraft pilot and owns and operates multiple drones in Newton. Id. ¶¶ 22, 25. Singer does not operate or register his drones as a hobbyist. Tr. Case-Stated Hearing ("Tr.") 20:15-18, ECF No. 60.

In August 2015, members of Newton's City Council proposed discussing the possibility of regulating drones for the principal purpose of protecting the privacy interests of Newton's residents. Pl.'s Resp. Facts ¶ 3; Def.'s Facts ¶ 3. On March 23, 2016, an initial draft of the Ordinance was presented for discussion. See Def.'s Mem., Ex. 3, Public Safety & Transportation Committee Report dated Mar. 23, 2016 1, ECF No. 40-4. Following further inquiry and amendment, see, e.g.,

² The Court gratefully acknowledges the helpful brief amicus curiae filed by the Consumer Technology Association and the Association for Unmanned Vehicle Systems International.

Def.'s Mem., Ex. 7, Public Safety & Transportation Committee Report dated May 5, 2016 1, ECF No. 40-8; Def.'s Mem., Ex. 9, Public Safety & Transportation Committee Report dated Sept. 7, 2016 6-7, ECF No. 40-10, but without FAA approval, Def.'s Mem., Ex. 16, Def. City of Newton's Answers Pl.'s First Set Interrogs. ("Def.'s Answers Interrogs.") 3, ECF No. 40-17, Newton's City Council approved the final Ordinance on December 19, 2016, Def.'s Mem., Ex. 12, Public Safety & Transportation Committee Report dated Dec. 19, 2016 1, ECF No. 40-13.

The Ordinance states in part:

Purpose: The use of pilotless aircraft is an increasingly popular pastime as well as learning tool. It is important to allow beneficial uses of these devices while also protecting the privacy of residents throughout the City. In order to prevent nuisances and other disturbances of the enjoyment of both public and private space, regulation of pilotless aircraft is required. The following section is intended to promote the public safety and welfare of the City and its residents. In furtherance of its stated purpose, this section is intended to be read and interpreted in harmony with all relevant rules and regulations of the Federal Aviation Administration, and any other federal, state and local laws and regulations.

Def.'s Mem., Ex. 2, Newton Ordinances § 20-64, ECF No. 40-3.

"Pilotless aircraft" is defined as "an unmanned, powered aerial vehicle, weighing less than 55 pounds, that is operated without direct human contact from within or on the aircraft." Id. § 20-64(a). In section (b), the Ordinance imposes certain registration requirements upon owners of all pilotless aircraft. Id. § 20-64(b). Section (c) sets forth operating prohibitions,

including, inter alia, a ban on the use of a pilotless aircraft below an altitude of 400 feet over private property without the express permission of the owner of the private property, id. § 20-64(c)(1)(a), "beyond the visual line of sight of the Operator," id. § 20-64(c)(1)(b), "in a manner that interferes with any manned aircraft," id. § 20-64(c)(1)(c), over Newton city property without prior permission, id. § 20-64(c)(1)(e), or to conduct surveillance or invade any place where a person has a reasonable expectation of privacy, id. § 20-64(c)(1)(f)-(g). Violations of the Ordinance are punishable by a \$50 fine following a one-time warning. Id. § 20-64(f).

III. RULINGS OF LAW

Specifically, Singer challenges four subsections of the Ordinance: the registration requirements of section (b) and the operation limits of subsections (c)(1)(a), (c)(1)(b), and (c)(1)(e). Pl.'s Mem 3-4; Pl.'s Resp. i. Singer argues that the Ordinance is preempted by federal law because it attempts to regulate an almost exclusively federal area of law, Pl.'s Mem. 6-15, in a way that conflicts with Congress's purpose, id. at 14-15. In turn, Newton posits that the Ordinance is not preempted by federal law because it falls within an area of law that the FAA expressly carved out for local governments to regulate, Def.'s Mem. 8-10, and thus can be read in harmony with federal aviation laws and regulations, id. at 10-11.

A. Preemption Standards

The Supremacy Clause of the United States Constitution provides that federal laws are supreme, U.S. Const. art. VI, cl. 2, thus requiring that federal laws preempt any conflicting state or local regulations, see Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (citing McCulloch v. Maryland, 4 Wheat. 316, 427 (1819)). Under our federalist system, however, a court must be wary of invalidating laws in areas traditionally left to the states unless the court is entirely convinced that Congress intended to override state regulation. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)). In contrast, if a state government attempts to regulate an area traditionally occupied by the federal government, a court need not seek to avoid preemption. See United States v. Locke, 529 U.S. 89, 108 (2000). Neither of these circumstances requires that Congress explicitly have stated its purpose; “[t]he question, at bottom, is one of statutory intent.” Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992).

If Congress has not expressly preempted an area of law, then a court must determine whether field or conflict preemption is evident. See French v. Pan Am Express, Inc., 869 F.2d 1, 2 (1st Cir. 1989). Field preemption occurs where federal regulation is so pervasive and dominant that one can infer

Congressional intent to occupy the field. See Massachusetts Ass'n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176, 179 (1st Cir. 1999) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); French, 869 F.2d at 2). Conflict preemption arises when compliance with both state and federal regulations is impossible or if state law obstructs the objectives of the federal regulation. See Grant's Dairy - Me., LLC v. Commissioner of Me. Dept. of Agric., Food & Rural Res., 232 F.3d 8, 15 (1st Cir. 2000) (citing Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)).

B. The Federal Aviation Administration

Congress has stated that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). This declaration does not preclude states or municipalities from passing any valid aviation regulations, see Braniff Airways v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 595 (1954), but courts generally recognize that Congress extensively controls much of the field, see, e.g., Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 105, 107 (1948); United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323, 336 (1st Cir. 2003). Accordingly, where a state's exercise of police power infringes upon the federal government's regulation of aviation, state law

is preempted. See City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 638-39 (1973).

In the FAA Modernization and Reform Act of 2012, Congress directed the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system," FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 § 332, 126 Stat. 11, 73 (2012) (codified at 49 U.S.C. § 40101 note), while limiting the FAA from "promulgat[ing] any rule or regulation regarding a model aircraft," id. § 336(a). Under this directive, the FAA promulgated 14 C.F.R. part 107, which declares that it "applies to the registration, airman certification, and operation of civil small unmanned aircraft systems^[3] within the United States." 14 C.F.R. § 107.1(a). The rule requires, inter alia, that anyone controlling a small unmanned aircraft system register with the FAA, id. §§ 91.203, 107.13; and keep the aircraft within the visual line of sight of the operator or a designated visual observer, id. §§ 107.3, 107.31, and below an altitude of 400 feet above ground level or within a 400 foot radius of a structure, id. § 107.51(b).

³ The FAA defines "small unmanned aircraft" as "an unmanned aircraft weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft," and "small unmanned aircraft system" as "a small unmanned aircraft and its associated elements." 14 C.F.R. § 107.3.

C. Field Preemption

Singer argues that because the federal government regulates unmanned aircraft and local aircraft operations, there is federal intent to occupy the field. Pl.'s Mem. 6-11; Pl.'s Resp. 3; see also Amicus Br. 7-29. Newton does not challenge that aviation is a traditionally federal field, but counters that federal regulations explicitly grant local authorities the power to co-regulate unmanned aircraft. Def.'s Mem. 8-11.

The FAA has stated:

[C]ertain legal aspects concerning small UAS use may be best addressed at the State or local level. For example, State law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person's use of a UAS.

. . . The Fact Sheet also summarizes the Federal responsibility for ensuring the safety of flight as well as the safety of people and property on the ground as a result of the operation of aircraft. Substantial air safety issues are implicated when State or local governments attempt to regulate the operation of aircraft in the national airspace. The Fact Sheet provides examples of State and local laws affecting UAS for which consultation with the FAA is recommended and those that are likely to fall within State and local government authority. For example, consultation with FAA is recommended when State or local governments enact operation UAS restrictions on flight altitude, flight paths; operational bans; or any regulation of the navigable airspace. The Fact Sheet also notes that laws traditionally related to State and local police power -- including land use, zoning, privacy, trespass, and law enforcement operations -- generally are not subject to Federal regulation.

81 Fed. Reg. 42063 § (III)(K)(6). Thus, the FAA explicitly contemplates state or local regulation of pilotless aircraft, defeating Singer's argument that the whole field is exclusive to

the federal government. The FAA's guidance, however, does not go quite as far as Newton argues -- rather than an express carve-out for state and localities to regulate, the guidance hints that whether parallel regulations are enforceable depends on the principles of conflict preemption.⁴

D. Conflict Preemption

Singer argues that the challenged sections of the Ordinance obstruct federal objectives and directly conflict with federal regulations. Pl.'s Mem. 11-17. Newton fails to respond specifically to these arguments, again asserting that the FAA has granted states and localities the power to co-regulate pilotless aircraft. Def.'s Mem. 8-11. The Court addresses each challenged subsection of the Ordinance in turn.

1. Section (b)

Singer argues that section (b) of the Ordinance infringes upon and impermissibly exceeds the FAA's exclusive registration requirements. Pl.'s Mem. 11-15; Pl.'s Resp. 6-7. Section (b) states: "Owners of all pilotless aircraft shall register their pilotless aircraft with the City Clerk's Office, either individually or as a member of a club" Newton Ordinances § 20-64(b). The Ordinance defines "pilotless

⁴ In fact, Newton has acknowledged that "[c]ommercial drone use is heavily regulated by the FAA [and] pre-empted from municipal regulations." Public Safety & Transportation Committee Report dated Mar. 23, 2016 3.

aircraft" as "an unmanned, powered aerial vehicle, weighing less than 55 pounds, that is operated without direct human contact from within or on the aircraft." Id. § 20-64(a).

The FAA has also implemented mandatory registration of certain drones. See 14 C.F.R. §§ 48.1-48.205. Although such registration initially applied both to model and commercial drones, the FAA may not require registration of model aircraft, because doing so would directly conflict with the Congressional mandate in the FAA Modernization and Reform Act. See Taylor v. Huerta, 856 F.3d 1089, 1092, 1094 (D.C. Cir. 2017). Newton argues that this space creates a void in which the city may regulate drones. Tr. 9:5-10:1. The FAA, however, explicitly has indicated its intent to be the exclusive regulatory authority for registration of pilotless aircraft: "Because Federal registration is the exclusive means for registering UAS for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval." Def.'s Mem., Ex. 14, State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet⁵ ("FAA UAS Fact Sheet") 2, ECF No. 40-15. Newton did

⁵ Although the FAA UAS Fact Sheet is not a formal rule, it is the FAA's interpretation of its own rule, which this Court accords deference under Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945).

not obtain FAA approval before enacting the Ordinance. Def.'s Answers Interrogs. 3. Further, regardless of whether there is some space that would allow Newton to require registration of model drones, here Newton seeks to register all drones, Tr. 10:3-14, without limit as to the at which altitude they operate, in clear derogation of the FAA's intended authority. Accordingly, the Ordinance's registration requirements are preempted.

2. Subsections (c)(1)(a) and (c)(1)(e)

Singer argues that subsections (c)(1)(a) and (c)(1)(e) conflict with FAA-permitted flight, Pl.'s Mem. 11, and restrict flight within the navigable airspace, id. at 12-14. Subsection (c)(1)(a) prohibits pilotless aircraft flight below an altitude of 400 feet over any private property without the express permission of the property owner. Newton Ordinances § 20-64(c)(1)(a). Subsection (c)(1)(e) prohibits pilotless aircraft flight over public property without prior permission from Newton. Id. § 20-64(c)(1)(e). Notably, subsection (c)(1)(e) does not limit its reach to any altitude. See id. This alone is a ground for preemption of the subsection because it certainly reaches into navigable airspace, see 49 U.S.C. § 40102(a)(32); 14 C.F.R. § 91.119. Subsections (c)(1)(a) and (c)(1)(e) work in tandem, however, to create an essential ban on drone use within the limits of Newton. Nowhere in the city may

an individual operate a drone without first having permission from the owner of the land below, be that Newton or a private landowner.

The FAA is charged with "prescrib[ing] air traffic regulations on the flight of aircraft . . . for --

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground; [and]

(C) using the navigable airspace efficiently." 49 U.S.C.

§ 40103(b)(2). In 2012, Congress tasked the FAA with

"develop[ing] a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." Pub. L. No. 112-95 § 332. In so doing, the FAA mandated that drone operators keep drones below an altitude of 400 feet from the ground or a structure. 14 C.F.R.

§ 107.51(b). Newton's choice to restrict any drone use below this altitude thus works to eliminate any drone use in the confines of the city, absent prior permission. This thwarts not only the FAA's objectives, but also those of Congress for the FAA to integrate drones into the national airspace. Although Congress and the FAA may have contemplated co-regulation of drones to a certain extent, see 81 Fed. Reg. 42063

§ (III)(K)(6), this hardly permits an interpretation that essentially constitutes a wholesale ban on drone use in Newton. Accordingly, subsections (c)(1)(a) and (c)(1)(e) are preempted.

3. Subsection (c)(1)(b)

Singer argues that subsection (c)(1)(b) conflicts with the FAA's visual observer rule and related waiver process, which only the FAA can modify. Pl.'s Mem. 13 (citing 49 U.S.C. § 106(f)(2), (g)(1); 14 C.F.R. §§ 107.31, 107.205). Subsection (c)(1)(b) states that no pilotless aircraft may be operated "at a distance beyond the visual line of sight of the Operator." Newton Ordinances § 20-64(c)(1)(b). The Ordinance neither defines the term "Operator," nor sets an altitude limit.

The FAA "requires a delicate balance between safety and efficiency, and the protection of persons on the ground The interdependence of these factors requires a uniform and exclusive system of federal regulation." City of Burbank, 411 U.S. at 638-39 (internal citations omitted). The Ordinance seeks to regulate the method of operating of drones, necessarily implicating the safe operation of aircraft. Courts have recognized that aviation safety is an area of exclusive federal regulation. See, e.g., Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206, 208 (2d Cir. 2011) ("Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field."); US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010) ("[F]ederal regulation occupies the field of aviation safety to the exclusion of state regulations.");

Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007) (“Congress has indicated its intent to occupy the field of aviation safety.”). The First Circuit, in fact, has ruled “that Congress intended to occupy the field of pilot regulation related to air safety.” French, 869 F.2d at 4. In French, the First Circuit took note of Congress’s delegation of authority to the FAA to issue the certificate -- and the terms for obtaining it -- required for any person to pilot a commercial aircraft. See id. at 3. Concluding that this grant of authority and the FAA’s subsequent regulations expressed Congress’s intent to preempt any state law in the area, id. at 4, the First Circuit struck down Rhode Island’s statute requiring airline pilots to submit to drug testing, see id. at 7.

The circumstances are not so different here. Congress has given the FAA the responsibility of regulating the use of airspace for aircraft navigation and to protect individuals and property on the ground, 49 U.S.C. § 40103(b)(2), and has specifically directed the FAA to integrate drones into the national airspace system, Pub. L. No. 112-95 § 332. In furtherance of this duty, the FAA has designated specific rules regarding the visual line of sight for pilotless aircraft operation. See 14 C.F.R. §§ 107.31-35, 107.205. First, the FAA requires either that (1) a remote pilot both command and manipulate the flight controls or (2) a visual observer be able

to see the drone throughout its flight. Id. § 107.31. The regulations define “visual observer” as “a person who is designated by the remote pilot in command to assist the remote pilot in command and the person manipulating the flight controls of the small UAS to see and avoid other air traffic or objects aloft or on the ground.” Id. § 107.3. Second, the FAA allows waiver of the visual observer rule. Id. §§ 107.200, 205.

The Ordinance limits the methods of piloting a drone beyond that which the FAA has already designated, while also reaching into navigable space. See Newton Ordinances § 20-64(c)(1)(b). Intervening in the FAA’s careful regulation of aircraft safety cannot stand; thus subsection (c)(1)(b) is preempted.

IV. CONCLUSION

For the foregoing reasons, this Court holds that Ordinance sections (b), (c)(1)(a), (c)(1)(b), and (c)(1)(e) are preempted and judgment will enter so declaring. As it is unchallenged, the remainder of Newton’s Ordinance stands. Of course, nothing prevents Newton from re-drafting the Ordinance to avoid conflict preemption.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

State and Local Regulation of Unmanned Aircraft Systems (UAS)
Fact Sheet

Federal Aviation Administration
Office of the Chief Counsel

December 17, 2015

BACKGROUND

Unmanned aircraft systems (UAS) are aircraft subject to regulation by the FAA to ensure safety of flight, and safety of people and property on the ground. States and local jurisdictions are increasingly exploring regulation of UAS or proceeding to enact legislation relating to UAS operations. In 2015, approximately 45 states have considered restrictions on UAS. In addition, public comments on the Federal Aviation Administration's (FAA) proposed rule, "Operation and Certification of Small Unmanned Aircraft Systems" (Docket No. FAA-2015-0150), expressed concern about the possible impact of state and local laws on UAS operations.

Incidents involving unauthorized and unsafe use of small, remote-controlled aircraft have risen dramatically. Pilot reports of interactions with suspected unmanned aircraft have increased from 238 sightings in all of 2014 to 780 through August of this year. During this past summer, the presence of multiple UAS in the vicinity of wild fires in the western U.S. prompted firefighters to ground their aircraft on several occasions.

This fact sheet is intended to provide basic information about the federal regulatory framework for use by states and localities when considering laws affecting UAS. State and local restrictions affecting UAS operations should be consistent with the extensive federal statutory and regulatory framework pertaining to control of the airspace, flight management and efficiency, air traffic control, aviation safety, navigational facilities, and the regulation of aircraft noise at its source.

Presented below are general principles of federal law as they relate to aviation safety, and examples of state and local laws that should be carefully considered prior to any legislative action to ensure that they are consistent with applicable federal safety regulations. The FAA's Office of the Chief Counsel is available for consultation on specific questions.

WHY THE FEDERAL FRAMEWORK

Congress has vested the FAA with authority to regulate the areas of airspace use, management and efficiency, air traffic control, safety, navigational facilities, and aircraft noise at its source. 49 U.S.C. §§ 40103, 44502, and 44701-44735. Congress has directed the FAA to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1). Congress has further directed the FAA to "prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes)" for navigating, protecting, and identifying aircraft; protecting individuals and property on the ground; using the navigable

airspace efficiently; and preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects. 49 U.S.C. § 40103(b)(2).

A consistent regulatory system for aircraft and use of airspace has the broader effect of ensuring the highest level of safety for all aviation operations. To ensure the maintenance of a safe and sound air transportation system and of navigable airspace free from inconsistent restrictions, FAA has regulatory authority over matters pertaining to aviation safety.

REGULATING UAS OPERATIONS

In § 333 of the FAA Modernization and Reform Act of 2012 (Public Law No. 112-95), Congress directed the Secretary to determine whether UAS operations posing the least amount of public risk and no threat to national security could safely be operated in the national airspace system (NAS) and if so, to establish requirements for the safe operation of these systems in the NAS.

On February 15, 2015, the FAA proposed a framework of regulations that would allow routine commercial use of certain small UAS in today's aviation system, while maintaining flexibility to accommodate future technological innovations. The FAA's Notice of Proposed Rulemaking offered safety rules for small UAS (under 55 pounds) conducting non-recreational or non-hobby operations. The proposed rule defines permissible hours of flight, line-of-sight observation, altitude, operator certification, optional use of visual observers, aircraft registration and marking, and operational limits.

Consistent with its statutory authority, the FAA is requiring Federal registration of UAS in order to operate a UAS. Registering UAS will help protect public safety in the air and on the ground, aid the FAA in the enforcement of safety-related requirements for the operation of UAS, and build a culture of accountability and responsibility among users operating in U.S. airspace. No state or local UAS registration law may relieve a UAS owner or operator from complying with the Federal UAS registration requirements. Because Federal registration is the exclusive means for registering UAS for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval.

Substantial air safety issues are raised when state or local governments attempt to regulate the operation or flight of aircraft. If one or two municipalities enacted ordinances regulating UAS in the navigable airspace and a significant number of municipalities followed suit, fractionalized control of the navigable airspace could result. In turn, this 'patchwork quilt' of differing restrictions could severely limit the flexibility of FAA in controlling the airspace and flight patterns, and ensuring safety and an efficient air traffic flow. A navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system. See *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), and *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); see also *Arizona v. U.S.*, 567 U.S. ___, 132 S.Ct. 2492, 2502 (2012) ("Where Congress occupies an entire field . . . even complimentary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any

state regulation in the area, even if it is parallel to federal standards.”), and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (1992).

EXAMPLES OF STATE AND LOCAL LAWS FOR WHICH CONSULTATION WITH THE FAA IS RECOMMENDED

- Operational UAS restrictions on flight altitude, flight paths; operational bans; any regulation of the navigable airspace. For example – a city ordinance banning anyone from operating UAS within the city limits, within the airspace of the city, or within certain distances of landmarks. Federal courts strictly scrutinize state and local regulation of overflight. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Skysign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002); *American Airlines v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968); *American Airlines v. City of Audubon Park*, 407 F.2d 1306 (6th Cir. 1969).
- Mandating equipment or training for UAS related to aviation safety such as geo-fencing would likely be preempted. Courts have found that state regulation pertaining to mandatory training and equipment requirements related to aviation safety is not consistent with the federal regulatory framework. *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 740 (E.D.N.C. 2008); *Air Evac EMS, Inc. v. Robinson*, 486 F. Supp. 2d 713, 722 (M.D. Tenn. 2007).

EXAMPLES OF STATE AND LOCAL LAWS WITHIN STATE AND LOCAL GOVERNMENT POLICE POWER

Laws traditionally related to state and local police power – including land use, zoning, privacy, trespass, and law enforcement operations – generally are not subject to federal regulation. *Skysign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1115 (9th Cir. 2002). Examples include:

- Requirement for police to obtain a warrant prior to using a UAS for surveillance.
- Specifying that UAS may not be used for voyeurism.
- Prohibitions on using UAS for hunting or fishing, or to interfere with or harass an individual who is hunting or fishing.
- Prohibitions on attaching firearms or similar weapons to UAS.

CONTACT INFORMATION FOR QUESTIONS

The FAA’s Office of the Chief Counsel is available to answer questions about the principles set forth in this fact sheet and to consult with you about the intersection of federal, state, and local regulation of aviation, generally, and UAS operations, specifically. You may contact the Office of Chief Counsel in Washington, D.C. or any of the following Regional Counsels:

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APPENDIX – LIST OF AUTHORITIES

Federal Statutes

- 49 U.S.C. §§ 40103, 44502, and 44701- 44735 (former Federal Aviation Act of 1958, as amended and recodified).
- FAA Modernization and Reform Act of 2012, Public Law No. 112-95 (Feb. 14, 2012), Subtitle B, “Unmanned Aircraft Systems.”

Federal Regulations

- Title 14 of the Code of Federal Regulations, Chapter 1.

The U.S. Supreme Court

- “Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.” *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303 (1944)(Jackson, R., concurring).
- “If we were to uphold the Burbank ordinance [which placed an 11 p.m. to 7 a.m. curfew on jet flights from the Burbank Airport] and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.” *Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973).
- “The Federal Aviation Act requires a delicate balance between safety and efficiency, and the protection of persons on the ground ... The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.” *Burbank* at 638-639.
- “The paramount substantive concerns of Congress [in enacting the FAA Act] were to regulate federally all aspects of air safety ... and, once aircraft were in ‘flight,’ airspace management....” *Burbank* at 644 (Rehnquist, J. dissenting).

U.S. Courts of Appeals

- “Air traffic must be regulated at the national level. Without uniform equipment specifications, takeoff and landing rules, and safety standards, it would be impossible to operate a national air transportation system.” *Gustafson v. City of Lake Angeles*, 76 F.3d 778, 792-793 (6th Cir. 1996)(Jones, N., concurring).
- “The purpose, history, and language of the FAA [Act] lead us to conclude that Congress intended to have a single, uniform system for regulating aviation safety. The catalytic events leading to the enactment of the FAA [Act] helped generate this intent. The FAA [Act] was drafted in response to a series of fatal air crashes between civil and military aircraft operating under separate flight rules In discussing the impetus for the FAA [Act], the Supreme Court has also noted that regulating the aviation industry requires a delicate balance between safety and efficiency. It is precisely because of ‘the interdependence of these factors’ that Congress enacted ‘a uniform and exclusive system of federal regulation.’” *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007), citing *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638-39 (1973).
- “[W]hen we look to the historical impetus for the FAA, its legislative history, and the language of the [FAA] Act, it is clear that Congress intended to invest the Administrator of the Federal Aviation Administration with the authority to enact exclusive air safety standards. Moreover, the Administrator has chosen to exercise this authority by issuing such pervasive regulations that we can infer a preemptive intent to displace all state law on the subject of air safety.” *Montalvo* at 472.
- “We similarly hold that federal law occupies the entire field of aviation safety. Congress' intent to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of control over air safety. This holding is fully consistent with our decision in *Skysign International, Inc. v. Honolulu*, 276 F.3d 1109 (9th Cir. 2002), where we considered whether federal law preempted state regulation of aerial advertising that was distracting and potentially dangerous to persons on the ground. In upholding the state regulations, we held that federal law has not ‘preempt[ed] altogether any state regulation purporting to reach into the navigable airspace.’ *Skysign* at 1116. While Congress may not have acted to occupy exclusively all of air commerce, it has clearly indicated its intent to be the sole regulator of aviation safety. The FAA, together with federal air safety regulations, establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, states.” *Montalvo* at 473-474.
- “[W]e remark the Supreme Court's reasoning regarding the need for uniformity [concerning] the regulation of aviation noise, see *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), and suggest that the same rationale applies here. In *Burbank*, the Court struck down a municipal anti-noise ordinance placing a curfew on jet flights from a regional airport. Citing the ‘pervasive nature of the scheme of federal

regulation,’ the majority ruled that aircraft noise was wholly subject to federal hegemony, thereby preempting state or local enactments in the field. In our view, the pervasiveness of the federal web is as apparent in the matter of pilot qualification as in the matter of aircraft noise. If we upheld the Rhode Island statute as applied to airline pilots, ‘and a significant number of [states] followed suit, it is obvious that fractionalized control ... would severely limit the flexibility of the F.A.A.’ [citing *Burbank*] Moreover, a patchwork of state laws in this airspace, some in conflict with each other, would create a crazyquilt effect ... The regulation of interstate flight-and flyers-must of necessity be monolithic. Its very nature permits no other conclusion. In the area of pilot fitness as in the area of aviation noise, the [FAA] Act as we read it ‘leave[s] no room for ... local controls.’ [citing *Burbank*]. *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989).