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IMLA

THE MUNICIPAL LAWYER MAGAZINE

What Can Municipalities Do About Drones?

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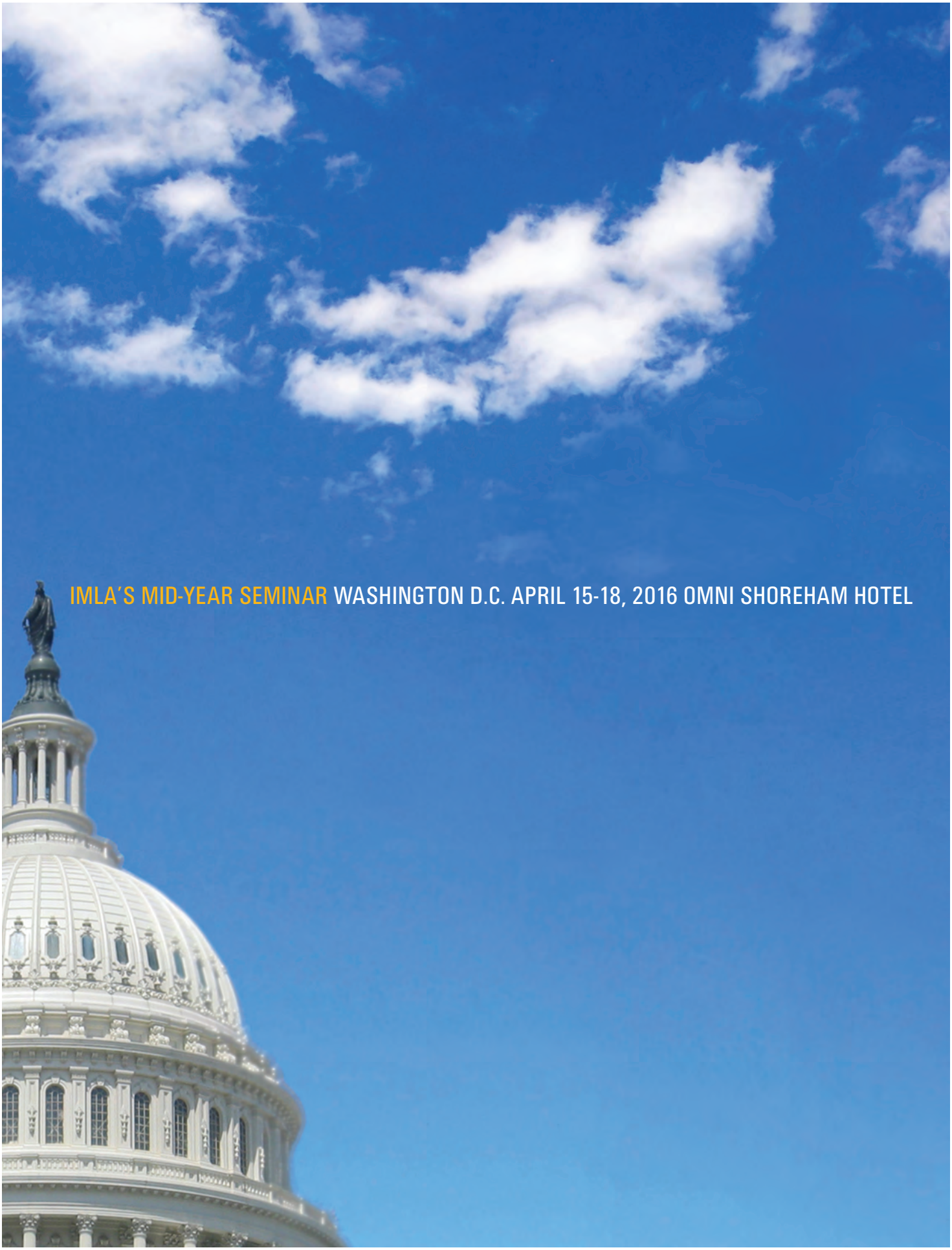
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WHAT CAN MUNICIPALITIES DO ABOUT DRONES?

By: John D. Bakker

Federal law largely governs local usage of drones for governmental and commercial use. But federal preemption of drone regulation is not absolute, and municipalities have a significant role to play—particularly when it comes to recreational use.

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NO GOOD DEED GOES UNPUNISHED: PUBLIC AGENCY LIABILITY FOR FLOOD CONTROL

By: Gene Tanaka

Municipalities manage local waterways to protect their communities from flooding. Regardless, when nature overwhelms man-made controls, public agencies are held to account. Planning and strategy is required to meet the onslaught.

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EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

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EDITOR'S NOTE:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Dear IMLA Reader—

Industry analysts project that upwards of 400,000 drones will be purchased during the last months of 2015, accelerating the need for responsible municipal regulation. Picking up where we left off this summer, *Municipal Lawyer* again focuses on unmanned aerial vehicles. Our trio of drone-related articles begins with "*What Can Municipalities Do About Drones,*" an analysis of the legal leeway for local UAV regulation by John Bakker of Meyers Nave, Oakland, California. In "Ordinances," under the heading "*Second City, First Adopter: Chicago Keeps Drones in Sight and Under Control,*" we present the nation's most comprehensive municipal drone regulation to date, which should prove useful to other localities now formulating their UAV policies. And in "Federal" we discuss the FAA's last-minute mandate requiring immediate registration of all but the lightest of outdoor drones, in *"One Small Step for Unmanned Aerial Vehicles, One Giant Leap for Municipalities?"*

Our focus is not totally on America's skies, however. In *"No Good Deed Goes Unpunished: Public Agency Liability for Flood Control,"* Gene Tanaka of Best Best & Krieger advises local governments on strategies to deal with litigation about water—specifically flooding related to waterways managed by public entities. And in *"Receiverships for the Tough Problems,"* Greg Priamos, Riverside County Attorney and Kevin Randolph of Gresham Savage in San Bernardino, discuss the use of receivers to address the nuisance posed by abandoned and dilapidated structures.

As always, Monica Ciriello provides cases of interest from Canada and our own *Municipal Lawyer* staff adds US case summaries.

IMLA sincerely values its association with each one of you and wishes every IMLA member a happy holiday season and a superlative 2016.

Best regards—

Erich Eiselt

DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



IMLA members are involved in some of the most challenging and interesting legal issues of our time—First Amendment questions, environmental debates, law enforcement policies, taxation and finance, and many others.

Share your experience, insights and practice tips. Our readers include a wide range of government attorneys at the state, city, county and local level, many lawyers in private practice who specialize in municipal law, and law libraries across the country.

To Submit An Article, please contact the **Editor, Erich Eiselt, at eeiselt@imla.org** with a brief description of your topic.

Municipal Lawyer is published 6 times per year, and feature articles should be between 2,500 and 4,000 words in length.

Submitted articles are subject to review by IMLA staff, and IMLA reserves the right to edit articles (for style, clarity, length, etc.).

We look forward to hearing from you!

Questions? Please contact IMLA at info@imla.org.

PRESIDENT'S LETTER

By: Herbert W. A. Thiele, County Attorney, Leon County, Florida



Changing of the Guard: G. Foster Mills, outgoing IMLA President, passes the IMLA gavel to incoming IMLA President Herb Thiele

As 2015 comes to a close, I want to express what a wonderful honor it was to be inducted as the new IMLA President at our Annual Conference held in October in Las Vegas. It is my hope and desire to carry on the strong leadership of our Immediate Past President, Foster Mills, and those who were IMLA Presidents in years past.

Just a glance at the list of past IMLA presidents shows you the extraordinary individuals who have lead our organization to the terrific posture it now occupies in 2015. Local government lawyers representing cities from across North America both north and south, east and west, have given of their time and talents to make IMLA the strong and nationally recognized organization that it is today.

Coming on our 80th anniversary, I want to thank the IMLA Board of Directors and members for their faith in selecting me as the first sitting County Attorney to occupy the IMLA President's office. My tenure, along with President-Elect, Mary Ellen Bench, coming from Mississauga, Ontario, Canada, shows the diversity and international appeal that our organization has for local government lawyers everywhere.

The membership of IMLA is its strength. Not only for the coverage which we provide on an international scale, but also for the comraderie and the knowledge that we glean from individuals representing multi-million population municipalities and counties, as well as municipalities and counties with as little as 1000 citizens. Each of those local government lawyers brings to the table his or her own unique perspective and one that is not found in any other organization anywhere. In my 34 plus years of being a member of IMLA there has been no other organization, whether national or state, that has provided me the kind of knowledge base, the kind of creative input, or collaborative opportunities as IMLA has provided. At a time when many local governments have had to cut back on memberships in professional organizations, as well as travel and training, there can be no greater time than to maintain your membership in IMLA because of the special and unique quality of our organization.

IMLA provides so many quality benefits to its members both tangible and intangible that they are nearly impossible to list. First and foremost, however, is IMLA's national and international reputation for representing local government interests before the highest courts in the land. The ability for a litigant to call upon IMLA to file an amicus brief supporting its position is priceless. We provide this service not only because we represent local government interests, but to be supportive of our IMLA members.

The IMLA mid-year and annual conferences provide untold opportunities for networking with your fellow local government lawyers and learning information which is on the cutting edge of local government issues everywhere. You hear panels and presentations on labor and employment law, construction law, civil rights actions, and all of the basic building blocks of local government law, but also you hear from a range of experts on new issues that are caused by new problems and new technologies, such as UBER, the use of drones, satellite technologies, and many more.

All of that is the foundation of what IMLA provides. In addition, IMLA hosts multiple webinars, issues numerous electronic updates and publishes *Municipal Lawyer*, all of which provide inaudible resource materials.

I would be remiss if I did not give thanks for the financial and technical support of the many vendors which IMLA has formed partnerships with over the years. Not only have these business partners provided support for IMLA, but their own cutting edge technologies are made available to local government offices to likewise enhance our ability to provide services to our clients and the general public.

The staff at IMLA, led by Chuck Thompson, our General Counsel and Executive Director, is one of the hardest working groups of in a local government organization anywhere. Not only do they provide the background information, research, and publications and emails that we all enjoy receiving, but they are there to answer questions.

Finally, let me reiterate that not least of the benefits of IMLA membership is the networking available at our conferences, and during the course of the year. There has not been one single conference that I have attended in which I have not gained information from a fellow local government lawyer during a hallway conversation or at one of the receptions. This in addition to valuable information I have gotten from the conferences themselves: the topics which were covered at our Annual Conference in Las Vegas in October covered such diverse topics as: Code Enforcement; Professional Sports Teams Issues; Qualified Immunity; First Amendment Issues / Sign Codes; Body Cameras; Social Media and Risk Management Strategies, and many more.

Before concluding, let me mention that we take the opportunity to recognize outstanding performance by our members through our Awards program and the local government Fellows program. It is not often that local government lawyers are recognized publically, or even privately, for their accomplishments; thus the importance of the IMLA Awards program.The recipients should be proud of their achievements, and knowing that their peers have acknowledged them. By so recognizing our fellow IMLA members, their clients and cities and counties and boroughs and their respective elected officials know how competent and respected these local government lawyers are in the eyes of their peers. I join IMLA in congratulating our 2015 Award recipients, who are listed in this issue of *Municipal Lawyer*.

There is one other asset of IMLA. That is the hard working group of individuals who act as the IMLA officers and members of the Board of Directors each year. In my many years as a board member and now as an officer, I can tell you that these persons keep IMLA on track to constantly achieve greatness and to continue to be recognized as the foremost local government organization in North America. I applaud their efforts and thank the current Board of Directors and Officers, as well as those who have preceded them, for their timeless hours devoted to the achievement of even better local government law practice, and the continued raising of the IMLA banner.

During the course of this year if there is anything that I can provide to you, or input that you wish to give to me, please do not hesitate to call upon me, or upon the IMLA staff. Best wishes for a happy and healthy holiday season. ML

What Can Municipalities Do About Drones? Restrictions on Municipal Regulation of the Private Operation of Unmanned Aerial Vehicles

By John D. Bakker, Principal Chair,
Municipal and Special Districts Law Practice Group
Meyers Nave, Oakland, California



Small drones,[1] typically with high definition cameras, are being mass produced and can be purchased at affordable prices. Their price, size, and maneuverability make it inevitable that drones will be used in a manner inconsistent with community standards. A recent incident on a beach in San Diego County is illustrative.[2] A drone flew "dangerously low" to a group of beachgoers on a summer evening; one member of the group, concerned about the group's privacy and safety tossed a t-shirt at the drone, the damage from which caused it to fall to earth. The incident led to the beachgoer's arrest for vandalism, although the charges were promptly dropped. Similar incidents have been reported above private property.

When communities deal with the negative impacts of technological change, municipal lawyers are asked "What can we do about this?" With drone use expanding, we have reached that point. So, what can a municipality do when its citizenry desires to do something about the negative effects of drone use by private parties?

Federal Preemption

We all know that:

. . . the laws of the United States . . . shall be the supreme law of the land.[3]

Many commentators have offered opinions on the extent of federal preemption of state and local drone regulation. Some suggest that room exists for state and local regulation.[4] Others offer the view that the permissible scope of state and local regulations is very narrow.[5] None of these commentators, though, has done the kind of preemption analysis necessary to offer a useful opinion to those in the trenches. In the meantime, the states at least have proceeded to plow new ground.[6]

Arizona v. U.S., 132 S. Ct. 2492, 2500-01 (2012) provides a helpful summary of the rules governing preemption analysis. First, *Arizona* puts the Supremacy Clause in the federalism context, noting that "both the National and State Governments have elements of sovereignty the other is bound to respect" but that ultimately the Supremacy Clause gives Congress the power to preempt state law.[7] Congress's intent to preempt state law can take the form of a statute *expressly preempting* state power, or it can be implied. Implied preemption can be found in two ways. The first is *field preemption*, where Congress's "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[8] The second is *conflict preemption*. Conflict preemption includes "those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[9] Most importantly, here, the Court reminds us that "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"[10]

Express Preemption

Express preemption seems unlikely to be a fruitful avenue for challenging state and local regulations aimed at drone usage. The Federal Aviation Act does contain an express preemption clause, but it pertains only to laws "related to a price, route, or service of an air carrier. . . ."[11] One federal court held that the preemption clause's application to routes does not restrict a local agency from determining the siting of air fields.[12] We did not find anything in the FAA Modernization and Reform Act of 2012's UAS provisions expressly preempting local legislation. In fact, we found quite the opposite. In its *Small UAS Notice of Proposed Rulemaking*,

the FAA stated that privacy concerns associated with UAS use are beyond the scope of the proceeding and specifically noted that "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."[13]

Field Preemption

The focus of attacks on local drone regulation will be on field preemption. The federal courts have found that federal law impliedly preempts various aspects of aircraft operations. In *City of Burbank v. Lockheed Air Terminal*,[14] the Court struck down a local ordinance that prohibited flights departing Burbank Airport between 11 pm and 7 am the next day. The Court noted the fact that the Federal Aviation Act declares that the United States has "'complete and exclusive national sovereignty in the airspace of the United States.'"[15] It also noted that the FAA Administrator has been given broad powers to regulate the use of the national airspace.[16] The Court then went on to find that the "pervasive nature of the scheme of federal regulation of aircraft noise" left no room for local curfew ordinances.[17] The Court was particularly concerned about the fact that curfews could limit the FAA's ability to control traffic flow.[18]

The *Burbank* Court suggested that the Federal Aviation Act did not preempt state and local control entirely. In particular, the Court focused on the pervasiveness of noise regulation and the federal control over all aspects of carriers' operations.[19] Noting this, subsequent cases have made it clear that states and localities retain control over the siting of airfields.[20] Those federal courts have noted the specific nature of the FAA Administrator's authority to regulate, which is focused on developing rules on "the use of the *navigable airspace*" as "necessary to ensure the safety of aircraft and the efficient use of airspace."[21] In addition, the Administrator must adopt regulations "on the *flight of aircraft*" so as to protect aircraft and people and property on the ground, use the "navigable airspace efficiently," and prevent collisions.[22] Thus, one court found "the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight . . . distinguishable from the regulation of the designation of plane landing sites, which involves local control of land . . . use."[23]

Clearly, the ability to dictate the permissible locations of drone takeoffs and landings is a broad power. Similarly, criminal enforcement of FAA standards also offers the ability to deal with rogue drone usage. These two requirements will be adequate to deal with many drone operations that impact communities.

Other courts have found room for states and municipalities to regulate conduct that federal law already prohibits. For example, a Maryland court held that a state statute that made it a crime to operate an aircraft in a reckless manner was not preempted because the FAA proscribed the same conduct and because Congress intended to leave criminal sanctions to the states.[24] It is unclear the extent to which such a justification would survive scrutiny, in light of the decision of *Arizona v. U.S.*, where the court struck down an Arizona law that imposed stricter penalties for violating federal law's requirements regarding alien registration than the federal government did.[25] The focus in the case was on the fact that the state might bring criminal charges in circumstances when the federal officials believe prosecution would "frustrate federal policies."[26] Given the FAA's implicit admission that it lacks the resources to deal with enforcement of its own regulations applicable to drones,[27] it will be difficult to establish that the same level of "frustration" could exist with respect to drone regulation as the Court found exists in alien registration.

Clearly, the ability to dictate the permissible locations of drone takeoffs and landings is a broad power. Similarly, criminal enforcement of FAA standards also offers the ability to deal with rogue drone usage. These two requirements will be adequate to deal with many drone operations that impact communities. However, the regulation of the siting of takeoffs and landings would not allow a community to deal with drones that are launched outside of the jurisdiction. In addition, the restrictions might be perhaps too blunt an instrument to properly serve a community's interest in allowing appropriate drone usage, while prohibiting less desirous usage.

So, the key question remains whether there is any ability to regulate drones in flight. There is a strong chance that states and municipalities retain substantial police power authority to regulate drones in flight. For several reasons, commentators' implicit suggestion that "the framework of [UAS] regulation" is "so pervasive . . . that Congress left no room for the States to supplement it" is hard to swallow.

First, Congress, although it has declared "exclusive sovereignty of airspace of the United States," has only given FAA the authority to make policy governing "the use of the navigable airspace" and to regulate the flight of aircraft for the purpose of protecting the public and "using the navigable airspace efficiently."[28] The navigable airspace is defined as "the airspace above the minimum altitudes of flight prescribed by" FAA regulations "including airspace needed to ensure safety in the takeoff and landing of aircraft."[29] Over cities, the minimum altitude for aircraft other than helicopters is at least 1000 feet;[30]; helicopters are allowed at less than the minimums provided that they comply with any routes or altitudes prescribed by the Administrator.[31] Much if not all of the municipal regulatory action with respect to drones will be unrelated to safety, being focused instead on the

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What to do About Drones, Cont'd from page 7

privacy issues associated with drone flights above or adjacent to private property, and the regulations can be appropriately designed to impact only operations within airspace *other than* "the navigable airspace." This view of the local realm is consistent with the United State Supreme Court's takings jurisprudence, which gives property owners the "exclusive control of the immediate reaches of the enveloping atmosphere."[32] It also ensures that the scope of the Aviation Act is consistent with the Commerce Clause.[33]

In addition, the "public right of transit" that might support the view that drones can go where they want is limited to the "navigable airspace."[34] Congress and the FAA have both suggested that UAS operations will be limited to the non-navigable airspace.[35]

Second, Congress has not made a policy statement of any kind suggesting that drones can operate in the non-navigable airspace without interference. At this point in time, Congress has merely directed the FAA to incorporate UAS into the national airspace.[36] Congress's focus to date has been on encouraging the FAA to make the effort necessary to allow UAS to share the skies with traditional aircraft. This is unlike federal policy with respect to commercial aviation at issue in *Burbank* where there is a clear federal interest in ensuring the flow of travel.[37]

Third, Congress exempted model aircraft entirely from federal regulation, severely blunting field preemption arguments with respect to model aircraft. Section 336 of the FAA Modernization and Reform Act of 2012 prohibits the FAA from promulgating any rule or regulation regarding model aircraft, provided that they meet certain criteria including a weight of less than 55 pounds and use strictly for non-commercial purposes.[38] This provision reflects Congress's view that model aircraft operated in accordance with the criteria will not interfere with the national airspace system. The utter lack of federal regulation gives states and municipalities even wider berth to regulate model aircraft.

Finally, the FAA itself has made clear that it has no present intention to regulate the privacy issues raised by commercial UAS operations.[39] It also notes that state and other laws may provide recourse to those harmed by another's drone use. It is strange to suggest that states and locals are preempted from regulating issues that the FAA has indicated are (a) a problem, (b) not a subject of its present regulatory activities, and (c) subject to state regulations.

Much if not all of the municipal regulatory action with respect to drones will be unrelated to safety, being focused instead on the privacy issues associated with drone flights above or adjacent to private property, and the regulations can be appropriately designed to impact only operations within airspace *other than* "the navigable airspace."

In simple terms, federal regulation of drones at present is far from pervasive. In fact, it is very limited, focusing entirely on avoiding conflict with the existing national airspace system. We therefore think that the suggestion that there exists broad field preemption on municipalities' ability to address drone privacy issues is wrong.

Conflict preemption

Conflict preemption, for the same reasons, is unlikely to serve as a viable basis for displacing local regulation of drones. Under conflict preemption, "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."[40] Since as was noted in the previous section, Congress has not given any suggestion that drone operations within the non-navigable airspace is to remain free from regulation we think that substantial room exists for local regulation of drones.

First amendment issues

Mass market drones have cameras affixed to them. Because they can be used for communications purposes, some have suggested that there might be First Amendment restrictions on the regulation of drones. The First Amendment applies to the written and spoken word and when one engages in "expressive conduct."[41] Several cases have recognized that photography can involve expressive conduct that is subject to the First Amendment.[42] The federal courts have begun to develop a nascent right to make recordings under the First Amendment.[43] In *ACLU v. Alvarez*, which struck down an Illinois statute that prohibited all forms of audio and video records of oral communications without the parties' consent, the court stated stated as follows:

> The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected, as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.[44]

Ultimately, the *Alvarez* court's concerns were with the statute's interference "with the gathering and dissemination of information about government officials performing their

duties *in public*."[45] The other cases also focused on public officials and on activities taking place on public property.[46] It seems unlikely that the principle will extend beyond that narrow context to provide a general right to record activities from the air, but those crafting municipal drone regulations should review how the "right to record" develops.

Notes

1. The industry refers to drones as unmanned aerial vehicles or UAVs, while Congress and the FAA place them in the broader category of unmanned aerial systems or UAS. The FAA anticipates lightly regulating UAS of less than 55 pounds and refers to them as small UAS or sUAS. *See* Federal Aviation Administration, Notice of Proposed Rulemaking, Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (Feb. 23, 2015).
2. Kristina Davis, *Drowning drone at beach leads to jail*, San Diego Union-Tribune (August 20, 2015), http://www.sandiegouniontribune.com/news/2015/aug/19/man-jailed-beach-drone-confrontation/
3. U.S. Const., art. VI, cl. 2.
4. John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 Harvard Journal of Law & Public Policy 457, 514 (2013) (suggesting space for state and local regulations related to privacy abuses); Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry,* The Circuit, Paper 8, http://scholarship.law.berkeley.edu/clrcircuit/8; Henry H. Perri Jr., *One centimeter over my back yard: where does federal preemption of state drone regulation start?*, (2015). Available at: http://scholarship.kentlaw.iit.edu/fac_schol/845.
5. Jol A. Silversmith, *You Can't Regulate This: State Regulation of the Private Use of Unmanned Aircraft*, 26 The Air and Space Lawyer (2013), http://www.americanbar.org/content/dam/aba/publications/air_space_lawyer/2013_december/ASL_V26N3_WINTER13_Silversmith.authcheckdam.pdf (suggesting that "local regulation of activities conducted in-flight by UAVs to be impermissible" as impliedly preempted by authority given FAA by Congress); Peter Sach, Esq., Current U.S. Drone Law (Revised March 26, 2015), www.dronelawjournal.com (asserting that local agencies may only regulate locations on the ground from which drones may be launched, landed, and operated)
6. See, e.g., Cal. Civ. Code § 1708.8 [applying paparazzi statute to drone usage]; Fla. Stat. § 934.50 [creating a private right of action for surveillance of person or private property by drone].
7. *Id.* at 2501.
8. *Id*. citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)
9. *Id*. citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
10. *Id*. citing *Rice, supra* at 230.
11. See 49 U.S.C. § 41713.
12. See Hoagland v. Town of Clear Lake, 415 F.3d 693, 697; accord Condor Corp. v. City of St. Paul, 912 F.2d 215, 219 (8th Cir. 1990); Gustafson v. City of Lake Angelus, 76 F.3d 778, 783 (6th Cir. 1996).
13. Federal Aviation Administration, Notice of Proposed Rulemaking, Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544, 9552 (Feb. 23, 2015) ("sUAS NPRM").
14. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).
15. *Id.* at 627, citing former 49 U.S.C. § 1508(a), now 49 U.S.C. § 40103(a).
16. *Id*. citing former 49 U.S.C. 1348, now 49 U.S.C. § 40103(b).
17. *Id*. p. 633.
18. *Id*. p. 639. The Court cited its earlier aviation preemption case, Northwest Airlines v. State of Minnesota, 322 U.S. 292, 303 (1944), where the court noted the pervasive nature of federal control over air commerce:

> 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 taxies 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 (U.S. 1944). As is discussed *infra*, current federal statutory and administrative regulation of drones, particularly as to model aircraft, is a far cry from the level of intensity perceived in *Northwest Airlines*.
19. See footnote 14.
20. Gustafson v. City of Lake Angelus (6th Cir. 1996) 76 F.3d 778; Hoagland v. Town of Clear Lake, 415 F.3d 693, 697;(7th Cir. 2005) Condor Corp. v. City of St. Paul, 912 F.2d 215, 219 (8th Cir. 1990).
21. 49 U.S.C. § 40103(b)(1), (emphasis added).
22. 49 U.S.C. § 40103(b)(2), (emphasis added).

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John Bakker chairs Meyers Nave's flagship practice group, Municipal and Special District Law, overseeing the work of more than 30 attorneys who collectively serve as city attorneys to 20 municipalities. John's areas of focus include government finance,), Political Reform Act compliance (lobbying, conflicts, campaign finance), elections (initiative and referendum), the Cortese-Knox-Hertzberg Local Government Reorganization Act (annexations, incorporations, and reorganizations), land use, and telecommunications, energy and public utilities.. Currently, John serves as City Attorney for the City of Dublin, Chief Assistant City Attorney of Walnut Creek, and General Counsel for the Bayshore Sanitary District, the Moraga Orinda Fire District, the Kensington Fire Protection District, the Napa Sanitation District and the Tamalpais Community Services District.

No Good Deed Goes Unpunished: Public Agency Liability For Flood Control

By Gene Tanaka, Partner, Best, Best & Krieger, Walnut Creek, California



Beginning the afternoon of April 3, 2006 and continuing through the next, the rains came to Merced County. They were unprecedented. For a six-hour period in the worst hit area, the rainfall was a one-in-445-year event, and for a 12-hour period, the rainfall was a one-in-113-year event. Nevertheless, for 12 hours, the creeks and canals handled the storm flows, which caused the water levels to rise from 157 feet above sea level to more than 164 feet above sea level. But on April 4, at approximately 7:30 a.m., after more than five hours of overtopping, the levee on one of the canals washed out and the waters flooded an adjacent neighborhood.

By September 2007, more than 2,000 residents of the adjacent neighborhood sued the Merced Irrigation District and the City of Merced and Merced County. Together, these public agencies were an informal group called the Merced Streams Group that, for many years, worked together to maintain the streams and canals so that they would not flood adjacent properties and, also, carry irrigation water. After approximately 200 depositions, dozens of experts and more than four years of litigation, the City settled for less than it would have cost to try the case. This experience highlights the complexity of flood cases and the breadth of the laws governing liability for flood control facilities.

Liability for Floods – It Doesn't Take Much

If a public agency substantially participates in the planning, approval, construction or operation of a public project or improvement that causes injury to private property, it may liable for its involvement. It does not matter whether an agency's involvement ended years ago or if another agency owns and has always been primarily responsible for the project. In California, this liability arises from inverse condemnation, dangerous condition of public property and nuisance. These claims differ in terms of the standard of liability and the remedies available to a plaintiff.

For inverse condemnation, the California provision requires that, when private property is taken or damaged for public use, the public agency must compensate the owner for the property damages. An inverse condemnation claim alleges that the flood control improvement served the public use and flood damages require just compensation, as established in Article I, section 19 of the California Constitution. Because inverse condemnation is a strict liability claim, a plaintiff must only prove that an agency's public improvement substantially caused the property damage, even if it was only one of several concurrent causes. By contrast, a plaintiff with a negligence claim must prove that his or her injury was reasonably foreseeable to the defendant.

However, this strict liability rule is balanced by the reasonableness rule, which requires a plaintiff to prove that the pubic agency's design, construction or maintenance of a flood control project posed an unreasonable risk of harm. (*Belair v. Riverside County Flood Control District*, 47 Cal.3d 550, 565, 559 (1988)). While a reasonableness analysis can be complicated, an agency will likely be liable if the flood control protection does not perform as designed or if the facility is not properly operated or maintained. In that event, a plaintiff will recover his or her property damages and attorney's fees.

Although a plaintiff is not entitled to personal injury damages for inverse condemnation, a plaintiff may obtain personal injury damages with a claim for dangerous condition of public property. This is a form of negligence addressed in Government Code section 835 that makes a public agency liable for property it owns or controls if there was:

> a dangerous condition that created a reasonably foreseeable risk of the

injury that occurred; the agency created the dangerous condition or was aware of the condition in time to prevent it; and the condition caused plaintiff's harm.

A plaintiff may also recover personal injury damages for a nuisance claim. A nuisance is anything that "is injurious to health . . . offensive to the senses . . . or [interferes] with the comfortable enjoyment of life or property," according to California Civil Code section 3479. A plaintiff may bring a civil action for an injunction, damages or both.

As the Merced case described above shows, what often begins as a well-intentioned effort to protect residents from flooding can become a continuing obligation to maintain and operate those facilities. Also, facilities that serve as streets, irrigation canals or creeks may be viewed as flood control facilities which the agency must operate and maintain to protect against floods. Or a limited effort to solve a problem, such as designing a fix or assisting with maintenance, may draw the public agency into responsibility for a flood long after its involvement ended. In each of these circumstances, if the flood control improvement did not perform up to standard and caused flooding of a plaintiff's property, there is a pretty good chance the public agency will be liable.

Preventing and Defending Claims – Prevention is Cheaper

As public agencies are all too aware, avoiding litigation is always preferable - and almost always cheaper. Here are some steps to avoid litigation:

Preventative maintenance. If it has not already done so, an agency should develop and follow a maintenance plan. This could include an inspection schedule, clearing channel obstructions, repairing weak spots in levees and dams, and making sure that flood control gates, grates and other facilities are in proper working order.

Analyze the performance of the flood improvement. A consultant can inspect the agency's facilities to ensure they are up to standard. Also, with computer modeling, the consultant can evaluate the structures' ability to perform under different rain events.

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Insurance policies. The agency may purchase insurance for inverse condemnation claims and flood damages and keep any old policies. Although most recent policies exclude inverse condemnation and flood damages, older policies may not have exclusions and may apply to old facilities that fail.

Flooding easements. Some agencies have paid property owners for easements that allow them to flood the owners' properties. However, the courts have severely limited their effectiveness, so this should be used with caution, if at all. (*Salton Bay Marina, Inc. v. Imperial Irrigation District*, 172 Cal.App.3d 914, 935-36 (1985)) (Cal. Ct. App. 1985))

When faced with litigation, an agency should consider several approaches:

Experts. It is important to involve experts at the outset to avoid missteps in discovery and assess whether early settlement is advisable. This may involve hydrologists to evaluate the movement of the flood waters and performance of the flood protections; engineers to consider the reasonableness of the public agency's design, construction and maintenance of its facilities; and architects or contractors to measure the harm to a plaintiff's property. If personal injuries are involved, the agency will need medical professionals to examine the alleged injuries.

Insurance coverage counsel. Insurance coverage attorneys can see whether the claim is insured. If the agency has flood insurance, those attorneys can make sure the insurer steps up, and defense counsel does not make decisions in litigation that bar coverage. As mentioned above, old insurance policies that pre-date the flood may provide coverage. For the Merced Stream Group, insurance companies paid a significant share of their settlements.

Organizing plaintiffs into classes. Cases with a large number of plaintiffs can be a logistical challenge. Typically, the plaintiffs will fall into different classes according to how they were affected by the flood water and the nature and extent of their damages. Defense counsel should consider these classes as he or she frames pretrial motions and discovery

Obviously, flood control improvements serve a vital public service and laws protect residents from unreasonable risk or defects from those improvements. For the public agencies trying to help their residents, flood claims may seem unfair. However, knowing the requirements and remedies enable the agencies to manage the risks. If the predicted El Nino arrives this winter, it is worth thinking about these issues. **M.**



Gene Tanaka is managing partner of Best Best & Krieger's Walnut Creek, California office and a member of the firm's executive committee. He focuses on toxic torts, land use and municipal litigation. He has represented Los Angeles County and many other municipal clients in cases for cleanup or damages under the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), nuisance and trespass law. For the past 20 years, Gene has taught trial advocacy and deposition skills. He holds a J.D. from Columbia Law School.



Receiverships for the Tough Problems

By: Gregory P. Priamos, County Counsel, Riverside, California and Kevin K. Randolph, Shareholder, Gresham Savage, San Bernardino, California

Introduction[1]

Long before the foreclosure fallout from the Great Recession of 2007-2009, California legislators adopted a statutory framework that specifically targeted blighted properties and their attendant ills. This statutory scheme, found in California Health & Safety Code section 17980.7, enlarged the already significant powers held by local enforcement agencies by allowing the agencies to petition a court to appoint a receiver over seriously substandard properties.

Many states have similar (and not-so-similar) statutory schemes intended to address the very real and substantial impacts related to substandard homes and commercial structures. And receivership is by no means the only tool available to communities to redress the problems caused by vacant, abandoned structures. Traditional remedies – such as civil injunction and criminal prosecution continue to serve as bolts in the code enforcement quiver. Yet receivership oftentimes brings a level of control over the property that other remedies cannot. The receiver, although not taking actual title to the property in most instances, exercises dominion over the property to the exclusion of all others, including the owner and existing lienholders. And although a receiver's authority will vary from state-to-state and court-to-court, the following are some of the more commonly-held powers:

- to assume exclusive possession and control of the property;
- to secure the property against further intrusion
- to displace and relocate any occupants if needed to carry out the rehabilitation
- to insure the property
- to prepare a rehabilitation plan and obtain super-priority private financing to pay for the costs
- to sell the property and distribute proceeds as directed by the court.

The Scope of Potential Code Enforcement Receivership Cases

Depending upon the jurisdiction, receivership can address a host of different problems and types of properties. In California, as one example, the authors – one a former city attorney and current county counsel and the other a receiver – have tackled many different types of problem properties through the receivership process. Although a majority of those cases involved single and multi-family residential properties, the remedy has also been very successfully applied to commercial properties and other non-residential uses.

The following examples demonstrate the breadth of the receivership remedy:

- a single-family home that served as a pipe bomb-making factory and in which the owner confined his bedridden mother in a rear bedroom. The city became involved when the owner, after a few too many beers, stepped out into the front yard and began firing a handgun into the air.
- a former gas station whose shuttered mini-mart was being used by a transient population as a party spot. The receivership was complicated by a pre-existing regulatory order and agreement arising from the presence of leaking underground storage tanks.
- a rural lot with three abandoned homes that were being used by the locals for impromptu raves. The city took action after one of the partygoers killed another in a dispute over a drug debt.
- an abandoned trailer located on property contiguous to a national forest. The owner, who had been convicted of child molestation based on acts occurring on the property, actively participated in the proceedings from prison.
- a property located in a commercial retail area that served as a storefront medical marijuana dispensary. The city's land use ordinances prohibited the use of property for medical marijuana clinics and, under California law, an illegal land use can serve as the basis for the appointment of a receiver.

Brief Overview of Select Code Enforcement Receivership Laws in the United States

Being California-based lawyers, the authors are most familiar with that state's version of code enforcement receiverships. But California is by no means the only state with a code enforcement receivership statute. In addition to the California framework, we have set out below (in necessarily-brief detail) key points from code enforcement receivership (or receivership-like) statutory schemes from Illinois; Massachusetts; Michigan; Missouri, New Jersey; Ohio; Pennsylvania; and Texas.

1. California (Health & Safety Code § 17980.7)

- Requires seriously substandard properties (as defined by statute).
- Properties include any property used for human occupancy, including single-and multi-family residential and commercial structures.
- Owner must be given a due process opportunity for self-correction

within a "reasonable time."

- Process:
  - —Municipality issues notices of violation and abatement orders.
  - —Non-compliance is referred to legal counsel for preparation of complaint and receivership petition.
  - —Counsel files litigation and requests the court to appoint a receiver, who is nominated by the municipality and who must demonstrate the ability to complete the repairs. May be an individual, most corporations, or a tenant/housing entity.
  - —Receiver relocates occupants (if any) if needed.
- The receiver is nominated by the municipality but approved, appointed, and supervised by the court.
- The receiver is not the agent or representative of either the municipality or the owner. The receiver acts independently and with the court's approval as to all major actions.
- The receiver is paid from proceeds of property's sale or by the owner or lenders. Technically, the municipality may be held accountable for shortfalls but this rarely occurs.
- Provides three primary approaches to rehabilitation:
  - —The receiver prepares rehabilitation scope of work, borrows funds, and contracts for the work. Unless the owner or lender elects to redeem the property following completion of the rehabilitation, the receiver markets and sells the property.
  - —The receiver sells to a qualified investor buyer, who uses its own funds and contractors to complete the work; receiver supervises the work's progression.
  - —The owner or lender funds and/or uses its contractors to perform the work; receiver supervises the work's progression.

- From the sales proceeds, receiver pays:
  - —taxes;
  - —the rehabilitation loan;
  - —escrow costs and sales commission;
  - —municipality's administrative fees and legal fees;
  - —the receiver's fees and expenses; and
  - —the balance to lender and owner.

2. Illinois (65 Ill. Comp. Stat. Ann. 5/11-31-1 – 31-2.3)

- Used as a very last resort.
- Process:
  - —The municipality may petition the court to have a receiver appointed for a property that violates the minimum standards of health and safety under the applicable municipal ordinances.
    - The law allows other entities such as non-profits or community development corporations to bring receivership actions but the law gives more flexibility to municipalities.
    - A receiver may be appointed even if the property is in foreclosure.
  - —The municipality must provide notice of the petition to the owner.
  - —The judge decides if a receiver is needed.
  - —Once appointed, the receiver is given broad authority to make necessary repairs.
  - —To pay for the repairs, the receiver can obtain loans evidenced by a receiver's certificate. The lender certificates are repaid at an interest rate fixed by the court.
  - —If the owner does not pay off the certificate, the certificate becomes a first lien on the property and is superior to all other encumbrances, except taxes.

- **Chicago Troubled Building Initiative (TBI)**
  - —In addition to other methods, Chicago uses receivership to prevent the deterioration and loss of housing stock.
  - —Chicago authorized Community Investment Corporation (CIC), a nonprofit, to administer the TBI and to act as a receiver for troubled buildings.
  - —Chicago and CIC work together to identify deteriorated buildings that are public health and safety risks.

3. Massachusetts Receivership

- The State Attorney General's Office (AGO) implements the state's Abandoned Housing Initiative (AHI).
- The AGO seeks out delinquent owners of abandoned residential property and encourages them to voluntarily repair their properties and make them secure.
- If the owners refuse, then the AGO petitions the court to appoint a receiver.
- Process:
  - —Municipalities share residential property addresses with the AGO.
  - —The AGO notifies the real parties in interest to make repairs.
  - —The AGO requires documentation that the owner can finance the repairs and will use a licensed contractor; if not, a receivership petition may be brought (under the State Sanitary Code) by either the AGO or the municipality.
  - —The receiver is appointed by the court.
  - —The receiver may lien the property for costs incurred.

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Gregory Priamos has served as County Counsel for the County of Riverside, California–the 10th largest county in the United States by population–since 2014. In that capacity, he acts as the legal advisor to the Board of Supervisors and represents the County and the County's officers and employees in their official capacities. He is the former President of the City Attorneys' Department of the League of California Cities and was responsible for the 2014 publication of "Practicing Ethics: A Handbook for Municipal Lawyers, 2nd Edition. Prior to his appointment as County Counsel, Greg served as City Attorney for the City of Riverside for 13 years. He is a graduate of Loyola Law School and has an undergraduate degree in political science from the University of Southern California.



Kevin Randolph is a shareholder in the San Bernardino, California office of Gresham Savage Nolan & Tilden PC, where he specializes in complex transactions involving real estate, land use, affordable housing, and public-private partnership development projects. His roster of clients includes both public and private agencies. Kevin is a member of the California Receivers Forum and has served as a court-appointed Health and Safety Code receiver for numerous cities and counties throughout California. He is a graduate of Loyola Law School in Los Angeles, Order of the Coif, and holds a BS in Business Management Sciences from California State University, Pomona.

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—Once repairs are completed, the owner may reimburse the receiver for costs and clear the lien.
—If the owner cannot or will not pay the costs, then the receiver may foreclose on the lien and the property sold at auction to the highest bidder.

4. Michigan (Mich. Comp. Laws Ann. § 125.535)

- Receivership may be used when an owner or occupant fails to correct a violation that creates an imminent danger to the health and safety of the occupants or the public.
- When the court finds that there are adequate grounds for the appointment of a receiver, it will appoint the municipality, a local agency or officer or other competent person as receiver.
- The receiver repairs, renovates and rehabilitates the premises as needed and, where ordered by the court, may demolish a building.
- When payment for receivership expenses are not otherwise paid for by another party, the court may enter an order approving the receiver's expenses and permitting the receiver to lien the property for payment.
  —The court may establish the lien as a senior lien, except as to tax and assessment liens and a recorded mortgage of first priority. The court may also order the time and manner for foreclosure if the lien is not satisfied.
- **Detroit's Nuisance Abatement Program**
  —Detroit Land Bank (Bank) identifies nuisance properties within target neighborhoods.
  —The Bank posts highly visible 3 foot by 4 foot posters on substandard buildings to give notice that it will seize the property if owners do not respond within 72 hours.
  —If the owner contacts the Bank, the Bank and the owner attempt to enter into a rehabilitation agreement by which the owner pledges to complete repairs within 30 days.
  —If owner doesn't contact the Bank within the 72 hours, or if the owner agrees to repair but doesn't complete, the Bank may file a nuisance lawsuit.
  —If the owners do not respond to the nuisance complaint within 28 days, the Bank may seek a default judgement to give the Bank title to the property. The owner loses all rights and interest in the property.

5. Missouri (Missouri Revised Statutes 441.510-441.645)

- A complaint seeking the appointment of a receiver may be brought by any county, municipality, local housing corporation or neighborhood association.
- The property must be in violation of building or housing codes and threaten public health and safety.
- Process:
  —Entity files application for appointment of a receiver and gives written notice to interested parties of its intent to file the application.
  —If, following the application for appointment of a receiver, the interested parties elect to correct the property's substandard conditions, the interested parties must post security for the completion of the repairs.
  —If no interested party elects to correct the property's conditions, the court may make a determination that the property is in an unsafe or unsanitary condition and appoint a receiver to complete the rehabilitation.
  —The receiver may lien the property if necessary to recover receivership costs and expenses for rehabilitation of the property.
    - The lien is superior to all other liens, except taxes, assessments, receiver's certificates, and mortgages recorded prior to October 13, 1969.

6. New Jersey (NJSA 55:19-84 through 97)

- Abandoned Properties Rehabilitation Act.
  —Applies to property that has not been legally occupied in the previous six months.
- Process:
  —Identify property.
  —The municipality either brings the action or designates a representative to bring the action.
  —The municipality/representative identifies parties in interest (owners and lenders) and files complaint.
  —Owner/lender submits/doesn't submit rehabilitation plan.
  —If no party submits an acceptable rehabilitation plan, then the municipality/representative submits its own rehabilitation plan.
  —Court awards possession to the municipality/representative and the municipality/representative rehabilitates the property.
  —The owner may petition the court for reinstatement of control and possession but no later than 30 days after the municipality has filed a notice of completion with the court.
    - The petition for reinstatement must include a plan for completion and reuse of the property.
    - Provide legally binding assurances that the owner will comply with all conditions of any grant or loan secured by the municipality or repay them in full.
    - The petition must be accomplished by payment of all liens and costs incurred.
  —The municipality/representative takes title and sells the property if owner isn't reinstated.
  — The proceeds of sale are distributed as follows:
    - Costs and expenses of sale;
    - Other governmental liens;
    - Repayment of principal and interest on any borrowing or indebtedness incurred by the municipality/representative and granted priority lien status;
    - A reasonable development fee to the municipality/representative consistent with the standards for development fees established for rehabilitation programs by the New Jersey Department of Community Affairs or the New Jersey Housing and Mortgage Finance Agency; and
    - Other valid liens and security interests, in accordance with their priority.

7. Ohio (Ohio Rev. Code Ann. § 3767.41)

- A receivership may be used to enforce any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code regulation. A receivership petition may be brought by a municipal-

ity, neighbor, tenant or a nonprofit organization.
- The entity that brings the action is not liable for the costs, expenses, and fees of any receiver.
- If the property includes subsidized housing, the entity must give written notice to the landlord regarding the defective conditions and the landlord has 60 days to remedy the conditions.
- For all other properties, the complaint and a notice of the hearing must be served on the property owners.
- The court must conduct a hearing within 28 days after service.
- If the court finds that the owner had a reasonable opportunity to repair the conditions but refused or failed to do so, the judge will offer the mortgagee, lienholder or other interested party associated with the property, in order of priority of interest in title, the opportunity to undertake the work.
- If the judge finds no interested party willing or able to undertake the work, only then will a receiver be appointed.
- The rehabilitation costs constitute a first priority lien on the building.

8. Pennsylvania (68 P.S. § 1101- 1111): Blighted & Abandoned Property Conservatorship Act

- Four Conditions Necessary:
  - —Property not legally occupied for 12 months;
  - —Property not actively marketed for sale for previous 60 days;
  - —Property not subject to existing foreclosure action; and
  - —Property owned by current owner for 6 months.
- The property must exhibit three of the following conditions:
  - —public nuisance;
  - —attractive nuisance to children;
  - —attractive nuisance for illicit purposes;
  - —substantial rehabilitation is needed and no rehabilitation has taken place within the previous 12 months;
  - —the property is unfit for human habitation, occupancy or use;
  - —the property condition and vacancy creates a material risk of fire;
  - —the property is subject to unauthorized entry leading to potential health and safety hazards;
  - —the presence of vermin, debris, uncut vegetation or physical deterioration creates health and safety hazards; or
  - —the property's dilapidated appearance negatively affects nearby properties.

- Process:
  - —A party in interest (lienholder, resident or business within 500 feet, nonprofit, redevelopment agency, municipality, or school district) files a petition for a conservator over the property.
  - —The court appoints a conservator, who takes possession and control of the property.
  - —The conservator's rehabilitation plan is submitted and approved by the court.
  - —The conservator implements the plan and submits status reports.
  - —The conservatorship is terminated upon the completion of the rehabilitation plan, when a party in interest redeems the property, or when the property is sold.
  - —The order of distribution of sale proceeds.
    - All court costs.
    - Liens of the Commonwealth, liens for unpaid property taxes and properly recorded municipal liens.
    - Costs and expenses of sale.
    - Principal and interest on any borrowing or other indebtedness granted priority over pre-existing liens and security interests.
      - The court may grant priority status to a lien given to secure payment of conservator's expenses if the conservator first sought financing from senior, nongovernmental lienholder but the lienholder declined and the lien priority is necessary to induce another lender to provide financing.
    - Costs incurred by the petitioner in preparing and filing the petition.
    - Costs of rehabilitation and any fees and expenses incurred by the conservator in connection with the sale or the safeguarding of the property for which the lien authorized.
    - Other valid liens and security interests in accordance with their priority.
    - Any unpaid obligations of the conservator.
    - The owner.

9. Texas (Tex. Loc. Gov't Code Ann. § 214.003)

- A home-rule municipality may bring an action against a property owner whose property is not in substantial compliance with fire protection, structural integrity, zoning or trash disposal ordinances.
  - —Texas has general law cities and home-rule cities. A home-rule city is a city with more than 5,000 people and where the citizens adopted a home-rule charter. A home-rule city can pass any regulations or laws it deems necessary unless in conflict with state law.
- After notice and hearing, the court may appoint a receiver.
  - —The receiver may be a non-profit corporation or an individual with demonstrated abilities.
  - —A lienholder may request to be appointed as a receiver.
  - —A receiver cannot be appointed for owner-occupied, single family residences.
- After restoration of the property, the receiver must file an accounting of costs and expenses, including reasonable costs for labor and supervision, income received from the property and (at the receivers discretion) a receivership fee of 10 percent of those costs and expenses.
- the total of the rehabilitation costs and expenses and the receivership fee exceeds the income received during the receivership, the receiver may maintain control of the property and lien the property for the amount of the unrecovered costs.
- The receiver may petition the court to sell the property if the receiver has been in control of the property for more than one year and the owner has failed to pay the receiver's costs and expenses.
- The order of distribution of proceeds is:
  - —court costs;
  - —municipal costs and expenses,
  - —any lien held by the receiver; and
  - —other valid liens.

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One Small Step for Unmanned Aerial Vehicles, One Giant Leap for Municipalities?

by Erich R. Eiselt, Assistant General Counsel

As described in the cover article of this issue of *Municipal Lawyer*, the federal government has been largely precluded by Congress from regulating the recreational use of Unmanned Aerial Vehicles or drones. But is certainly not without a significant role.

In September, shortly before the much-anticipated visit of Pope Francis to the United States, the Federal Aviation Administration (FAA) announced that the three cities the Pope would visit—Washington DC, Philadelphia and New York—were all "No Drone Zones" from September 22 through 27.[1] While that announcement was somewhat duplicative, in that drones of any sort have been prohibited for some time in the District of Columbia, it illustrated the continuing interplay between the FAA and municipal authority.

In the commercial and governmental arena, the FAA's voice continues to reverberate in municipalities, as evidenced most recently by its proposed $1.9 million fine against SkyPan International, a provider of "bird's eye" views to commercial purchasers. The FAA alleges that SkyPan made repeated unauthorized forays in the airspace over Chicago and New York City, acting "recklessly" and endangering property and people below.[2]

In late November, the FAA issued a press release specifically oriented to recreational use, cautioning the public that every operator of a drone is potentially a "pilot" in public airspace:

> You're heading to the stores on Black Friday to buy that shiny new camera-equipped drone you've been yearning for. You can't wait to get into the sky and let loose your inner high-flying aerial photographer, right?
> Did you know you're also going to become a pilot?
> When you fly your drone anywhere in the nation's airspace, you automatically become part of the U.S. aviation system. Under the law, your drone is an aircraft. So while the rules for drones may be different, you have the responsibility to operate safely, just as a Cessna or 747 pilot does.[3]

That proclamation came on the heels of the federal government's much more impactful pronouncement one month earlier—that it would be requiring the registration of most drones. On October 19, 2015, U.S. Transportation Secretary Anthony Foxx and FAA Administrator Michael Huerta announced the creation of a task force to develop recommendations for a registration process for Unmanned Aircraft Systems (UAS).

The task force included "25 to 30 diverse representatives from the UAS and manned aviation industries, the federal government, and other stakeholders" and was to provide advice about exempting some UAS from registration due to "low safety risk, including toys and certain other small UAS," as well as exploring options for "a streamlined system that would make registration less burdensome for commercial UAS operators."[4]

Citing a rapid rise in reported sightings of drones in public airspace,[5] many which occurred thousands of feet in the air, as well as above major sporting events and emergency operations, FAA Administrator Huerta stated "These reports signal a troubling trend. Registration will help make sure that operators know the rules and remain accountable to the public for flying their unmanned aircraft responsibly. When they don't fly safely, they'll know there will be consequences."[6]

In addition to governmental representatives, stakeholder groups included The Association for Unmanned Vehicle Systems International, the Academy of Model Aircraft, the Air Line Pilots Association, the American Association of Airport Executives, the Helicopter Association International, PrecisionHawk, AirMap/ Small UAV Coalition, and the Consumer Electronics Association. The FAA announced receipt of the task force report on November 20.

On December 14, 2015—in the nick of time, as some would phrase it, to require Yuletide compliance by hundreds of thousands of incipient drone owners—the FAA released its Interim Final Rule (IFR) regarding UAV registration requirements. The action was noteworthy not only for its substance, discussed below, but also for its rapidity. As the FAA discusses in a 211-page exegesis in the Code of Federal Regulations,[7] time pressures required that the normal choreography of agency rulemaking be drastically curtailed. First, the notice and comment period had to be reduced:

> Therefore, the FAA has determined that it is impracticable and contrary to the public interest in ensuring the safety of the NAS [National Airspace System] and people and property on the ground to proceed with further notice and comment on aircraft registration requirements for small unmanned aircraft before implementing the streamlined registry system established by this rule. As more small unmanned aircraft enter the NAS, the risk of unsafe operations will increase without a means by which to identify these small unmanned aircraft in the event of an incident or accident. The public interest served by the notice and comment process is outweighed by the significant increase in risk that the public will face with the immediate proliferation of new small unmanned aircraft that will be introduced into the NAS in the weeks ahead.[8]

Similarly, the normal hiatus between rulemaking and publication would have

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to be trimmed, given current circumstances. The Administrative Procedures Act requires agencies to delay the effective date of regulations for 30 days after publication unless the agency finds "good cause" to make the regulations effective sooner. Here, the FAA posited that "good cause exists for making this regulation effective less than 30 days from the date of publication," in part due to "the immediate and ongoing safety risk identified in the discussion above regarding good cause for foregoing notice and comment."[9]

The speed in codifying the IFR appears to have been matched by equally rapid technical implementation. Although the system has yet to endure the coming deluge over the next few months weeks, it is promoted as an effective online registry, allowing rapid and cost-efficient usage—and far superior to the paper-only drone registration process the FAA had utilized until now. The cost to build the new online tool and the time spent by users to input data is estimated at $56 million, while the expense to society and the government if all million-plus recreational drone users were to slog through the current paper input system is estimated by the FAA at nearly $383 million, demonstrating a clear societal benefit.[10]

More than 4,700 comments were received by the Task Force from various segments of the drone community between October 19 and early November. While some commenters requested a lower cap on the permissible weight of drones, warning of the potential for significant damage from unmanned overhead flying machines weighing as much as small children, others pushed to allow even greater weight. For example, DJI, the world's largest producer of recreational UAVs, requested that the 55 pound maximum refer to the drone itself not including fuel or payload.[11] The FAA declined, holding to its position that the 55 pound limit applies to the total weight of the UAV "at liftoff"—which includes any additional elements.

Additional comments related to the possibility of exemption from registration based on size and capability. Model airplane enthusiasts cited the fact that most of their craft are very light, have a short range and generally cannot be reliably flown unless in direct line of sight from their operators. Others argued for exemption based on more practical parameters, given that manned aircraft are presumed to be capable



of withstanding a mid-air collision with a medium-sized bird:

> Some individuals based their recommendations on a comparison between the risks to aircraft from bird strikes and the risks from collisions with unmanned aircraft. One commenter said that any aircraft over the weight of a mallard duck should be registered… Another individual commenter said a threshold weight of 2 pounds is 'entirely reasonable' because crows weigh between 0.7 and 2.6 pounds.[12]

Despite the presumed ornithological accuracy of these arguments, the FAA adopted the Task Force recommendation to exclude only the smallest of UAVs: those under 250 grams, or about .55 pounds, which should exempt many of the least expensive, "toy" drones.

The FAA declined to tackle the issue of drone-related privacy concerns, leaving that task to the National Telecommunications and Information Administration, which is "leading a multi-stakeholder engagement process to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private use of UAS in the NAS."[13]

The elements of the registration requirement are relatively straightforward and are summarized in the FAA' UAS Registration Q&A."[14] As noted above, registration is mandatory for all drones that weigh more than 250 grams and will be used outdoors. The IFR creates a small incentive to purchase a UAV without further ado: anyone buying a drone prior to December 21, 2015 has two months (until February 19, 2016) to register the UAV. New owners—those who take possession of a drone on December 21, 2015 or thereafter-must register it before their first flight outdoors.

Although all registrants may use the FAA's legacy paper-based registration process, only registrants 13 years of age or older may use the new streamlined, web-based system (www.faa.gov/uas/registration). The fee for registration is a modest $5, but in an effort to promote compliance over the holiday season, the FAA is waiving registration fees for the first 30 days, until January 20, 2016.

Registration lasts three years.

Registrants will need to provide their name, home address and e-mail address. Upon completion of the registration process, the web application will generate a Certificate of Aircraft Registration and Proof of Ownership that will include a unique identification number for the drone owner. That number must be marked somewhere on the drone (which can include inside a battery compartment or other enclosure, so long as it is easily opened).[15] Users may apply the same single registration number to all drones used recreationally.

FAA management is optimistic. "We expect hundreds of thousands of model unmanned aircraft will be purchased this holiday season," said FAA Administrator Huerta. "Registration gives us the opportunity to educate these new airspace users before they fly so they know the airspace rules and understand they are accountable to the public for flying responsibly."[16]

The online registration system does not yet support registration of small drones used for any purpose other than hobby or recreation – for example, commercial use. The FAA is developing enhancements that will allow such online registrations by spring of 2016.

While hardly a panacea, the FAA's move to require a national drone registry should be a valuable piece of the architecture that municipalities will require to enforce their own UAV regulations. Obviously, those intent on using drones for malevolent purposes can hardly be expected to register them on a federal database. But as indicated in Chicago's ground-breaking recreational drone measures reproduced in the "Ordinances" section of this issue of *Municipal Lawyer*, registration—coupled with tagging to allow easy identification of the drone—is at the heart of effective regulation. In that regard, the federal government's initiative —if it facilitates local access to registration data—could be a major step forward in

Continued on page 26

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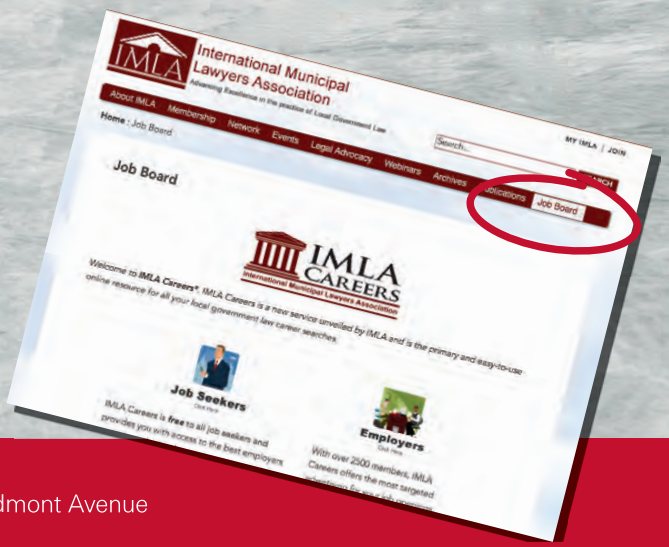

IMLA

Phone: 202.466.5424
Fax: 202. 785.0152
E-mail: info@imla.org
Website: www.imla.org

7910 Woodmont Avenue
Suite 1440
Bethesda, Maryland 20814



ORDINANCES

Second City, First Adopter—Chicago Keeps Drones in Sight and Under Control

by Erich R. Eiselt, Assistant General Counsel

As recreational drone usage proliferates exponentially across America, communities are looking to governments to craft laws that will balance the interests of hobbyists and those seeking safety, quiet and privacy. Earlier this year, the New York City Council proposed an ordinance that would have greatly restricted drone usage anywhere in the City, while requiring registration and tagging of the drone and the obtaining of insurance to cover possible drone-related damage or injury. That measure stalled.

Chicago lawmakers, however, were more successful. Herewith is what is believed to be the nation's most comprehensive drone ordinance to date, enacted in November 2015:

Regulating the use of small unmanned aircraft in City airspace.

WHEREAS, The City of Chicago is a home rule unit of government pursuant to the Illinois Constitution, Article VII, Section 6(a); and

WHEREAS, Pursuant to its home rule power, the City of Chicago may exercise any power and perfom1 any function relating to its government and affairs, including the power to regulate for the protection of the public health, safety, morals and welfare; and

WHEREAS, A recent *Washington Post* investigation found that law enforcement agencies, universities and other registered drone users have reported 23 accidents and 236 unsafe incidents since November 2009; and

WHEREAS, Chicago has witnessed an increase in "flyaways", which occur when drones go rogue and fly off from their users; and

WHEREAS, Last August, Federal Aviation Administration (FAA) officials criticized a Chicago man for being "reckless and careless" after he sent a drone over the Lollapalooza music festival and posted videos from it on You Tube; and

WHEREAS, Videos have recently surfaced of a handgun-firing drone built by an 18-year-old Connecticut student for a college class; and

WHEREAS, On May 5, 2014, a DJI Phantom 2 Quadcopter crashed into the 30th floor of the Metropolitan Square building, the tallest building in St. Louis, Missouri; and

WHEREAS, Pilots have reported dozens of cases in which drones flew too close to their aircraft, and the FAA has stated that our Nation's air-traffic system is not equipped to handle thousands of small devices flying at low altitudes; and

WHEREAS, Chicago's airspace is among the busiest in the world. In 2014, Chicago O'Hare International Airport handled nearly 882,000 flights and 70 million passengers, while Chicago Midway Airport handled approximately 250,000 flights and 21 million passengers; and

WHEREAS, On July 21, 20 I 5, a drone crashed into the runway at Chicago Midway Airport while the United States National Guard was conducting a Blackhawk training mission there, causing a breach of security at the airport; and

WHEREAS, Drones can be equipped with highly sophisticated surveillance technology that threatens privacy; and

WHEREAS, Last December, the FAA launched a public awareness campaign urging novice operators to pay attention to safety and to avoid reckless and unsafe activities, such as flying too close to passenger planes, buzzing crowds or operating drones or unmanned aircraft while under the influence of alcohol or drugs; and

WHEREAS, The prevalence and unregulated use of drones throughout the City of Chicago poses a threat to the public health, safety and welfare and has created public health, safety and welfare concerns, including, but not limited to, privacy, nuisance and trespass concerns; and

WHEREAS, On the other hand, responsible and safe drone use is an increasingly popular recreational activity, particularly among amateur photographers, and promotes technological innovation, economic growth and job creation; and

WHEREAS, The use of drones for hobby and recreational purposes will enable Chicagoans of all ages to familiarize themselves with this exciting new technology, and will undoubtedly inspire a whole new generation of entrepreneurs and innovators to pursue careers in this field and in related high-tech industries that are flourishing in Chicago; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. The above recitals are expressly incorporated into SECTION 2 of this this ordinance and made part thereof as though fully set forth therein.

SECTION 2. Chapter 10-36 of the Municipal Code of Chicago is hereby amended by inserting a new Article IV, and a new Section 10-36-400, as follows:

ARTICLE IV. SMALL UNMANNED AIRCRAFT

10-36-400 Small unmanned aircraft.

(a) *Definitions.* As used in this section:

"Aircraft" means any contrivance invented, used or designed to navigate or fly in the air.

"City airspace" means the airspace above the land, water and waterways within the jurisdiction of the city.

"Firearm" has the meaning ascribed to the term in section 8-20-010.

"Hobby or recreational purposes" means a pursuit engaged in for relaxation, and not for business purposes and not for compensation or hire.

"Open air assembly unit" means any

structure, enclosed area or other demarcated space used for the assembly of persons in the open air, including, but not limited to, amusement parks, stadiums, athletic fields, automotive speed ways, aviation fields, band stands, beach enclosures, grandstands, observation platforms, outdoor public swimming pools, outdoor theaters, race tracks, reviewing stands, street festivals or parade routes.

"Operate" means to pilot, steer, direct, fly or manage a small unmanned aircraft through the air whether from within the aircraft or remotely. The term "operate" includes managing or initiating a computer system that pilots, steers, directs, flies or manages a small unmanned aircraft.

"Public aircraft" has the meaning ascribed to the term in Section 401 02 of Title 49 of the United States Code.

"Small unmanned aircraft" means an aircraft that (1) is operated without the possibility of direct human intervention from within or on the aircraft, and (2) weighs less than 55 pounds at the time of the operation, including the weight of any payload or fuel. The term "small unmanned aircraft" does not include "toy aircraft" or "public aircraft" as defined herein.

"Surveillance" means the gathering, without permission and in a manner that is offensive to a reasonable person, of visual images, physical impressions, sound recordings, data or other information involving the private, personal, business or familial activities of another person, business or entity, or that otherwise intrudes upon the privacy, solitude or seclusion of another person, business or entity, regardless of whether a physical trespass onto real property owned, leased or otherwise lawfully occupied by such other person, business or other entity, or into the airspace above real property owned, leased or otherwise lawfully occupied by such other person, business or other entity, occurs in connection with such surveillance.

"Toy aircraft" means (1) a glider or hand-tossed small unmanned aircraft that is not designed for and is incapable of sustained flight; or (2) a small unmanned aircraft that is capable of sustained flight and is controlled by means of a physical attachment, such as a string or wire.

"Weapon" means any instrument, article or substance that, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury.

(b) *Operating regulations.* Except as otherwise provided in subsection (c) of this section, no person shall operate any small unmanned aircraft in city airspace:

(1) except for hobby or recreational purposes only and in conformity with this section;

(2) directly over any person who is not involved in the operation of the small unmanned aircraft, without such person's consent;

(3) over property that the operator does not own, without the property owner's consent, and subject to any restrictions that the property owner may place on such operation;

(4) at an altitude higher than 400 feet above ground level;

(5) outside the visual line of sight of the operator. The operator shall use his or her own natural vision (which includes vision corrected by standard eyeglasses or contact lenses) to maintain at all times an unobstructed view of the small unmanned aircraft, without the use of vision-enhancing devices, such as binoculars, night vision goggles, powered vision magnifying devices, goggles designed to provide a "first person view" from the model or similar devices;

(6) within five miles of any airport;

(7) in a manner that interferes with, or fails to give way to, any manned aircraft;

(8) between dusk and dawn;

(9) whenever weather conditions impair the operator's ability to operate the small unmanned aircraft safely;

(10) over any open air assembly unit, school, school yard, hospital, place of worship, prison or police station, without the property owner's consent, and subject to any restrictions that the property owner may place on such operation;

(11) within 500 feet of any water intake facility or any electric generating facility, substation or control center, or within 100 feet of any electric transmission facility, or within 25 feet of any electric distribution facility or of any overhead wire, cable, conveyor or similar equipment for the transmission of sounds or signal, or of heat, light or power, or data, upon or along any public way within the city, without the facility or equipment owner's consent, and subject to any restrictions that the facility or equipment owner may place on such operation;

(12) for the purpose of conducting surveillance, unless expressly permitted by law;

(13) while under the influence of alcohol, or other drug or drugs, intoxicating compound or compounds or any combination thereof, as those terms are defined in 625 ILCS 5/11-501, as amended;

(14) that is equipped with a firearm or other weapon;

(15) with intent to use such small unmanned aircraft or anything attached to it to cause harm to persons or property;

(16) in a reckless or careless manner; or

(17) in violation of any Federal or State law.

(c) *Construction of section.*

(1) *Operations authorized by the FAA- Exception.* Notwithstanding the prohibitions set forth in this section, nothing in this section shall be construed to prohibit, limit or otherwise restrict any person who is authorized by the Federal Aviation Administration to operate a small unmanned aircraft in city air space, pursuant to Section 333 of the FAA Modernization and Reform Act of 2012 or a certificate of waiver, certificate of authorization or airworthiness certificate under Section 44704 of Title 49 of the United States Code or other Federal Aviation Administration grant of authority for a specific flight operation(s), from conducting such operation(s) in accordance with the authority granted by the Federal Aviation Administration.

(2) *Operations prohibited by the FAA-Clarification.* Nothing in this section shall be construed to authorize the operation of any small unmanned aircraft in city airspace in violation of any Federal statute or rules promulgated thereunder, including, but not limited to, any temporary flight restrictions or notices to airmen issued by the Federal Aviation Administration.

(3) *Operations authorized by the State of Illinois- Exception.* Notwithstanding the prohibitions set forth in this section, nothing in this section shall be construed to prohibit the use of a drone by a law enforcement agency in accordance with Section 15 of the Freedom from Drone Surveillance Act, codified at 725 ILCS 167/1 et seq., or its successor provision.

(d) *Violation -Penalty.* Any person who violates this section or any rule promulgated thereunder shall be fined not less than $500.00 nor more than $5,000.00

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IMLA AWARDS

At IMLA's 2015 Annual Conference in Las Vegas, IMLA members honored these attorneys for their contributions, dedication and excellence in the practice of municipal law. We congratulate each of you!

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Former IMLA President Cheryl King Benford congratulates Bill Kearns (left) and Bill Zimmerman (right) on their reciept of Charles S. Rhyne Lifetime Achievement in Municipal Law Awards for 2015.



Lawton Langford, a Charles S. Rhyne Lifetime Achievement in Municipal Law Award winner for 2015



Jim Elliott, Jr. (center) received a James Epps III Award for Longevity of Service to a Community



David M. Savu (center) received a James Epps III Award for Longevity of Service to a Community



Larry Baer (center right) was recognized as IMLA's 2015 Outstanding State League Counsel



Doug Haney accepts the 2015 IMLA William I. Thornton, Jr. IMLA Faculty Award



Joseph F. Messina, a 2015 Joseph I. Mulligan, Jr. Distinguished Public Service Award recipient



Chuck Thompson, IMLA Executive Director, and G. Foster Mills, outgoing IMLA President, congratulate new IMLA Local Government Fellows (from left to right) Beth Anne Wilkering, Alan Zimmet, Robert Widner and Andrea Lynn Chism

IMLA AWARDS



Steve Meyers receives IMLA's 2015 President's Award for Most Outstanding Associate



David Grant Boghosian, Recipient of IMLA's 2015 Bruce A. Noble Distinguished Canadian Municipal Lawyer Award



Jessica Sangsung, winner of IMLA's 2015 Daniel J. Curtin Young Public Lawyer Award

SESSIONS




















SHERYL




BRAD






JOHN



Code Enforcement, Cont'd from page 15

Summary of Code Enforcement Receivership (or Similar) Laws Under the 9 States Surveyed

1. All 9 states require some level of violation of a health, safety, or welfare code or regulation.
—Pennsylvania is more specific than most.
2. In all 9 states, a petition may be brought by the municipality.
—Massachusetts allows the Attorney General to also file.
—Illinois, Missouri, Ohio, and Pennsylvania allow a non-profit or other community housing corporation to file.
—New Jersey, Ohio, and Pennsylvania allow other interested parties to file.
3. First Priority Lien.
Illinois, Massachusetts, Texas, Ohio, and California.
—In Michigan, the court may establish the receiver's lien as a senior lien, except as to tax and assessment liens and recorded mortgages of first priority.
—Missouri allows receiver's liens to be superior to all other liens except for taxes, assessments, receiver's certificates, and mortgages recorded prior to October 13, 1969.
—New Jersey has an order of priority with costs and expenses of sale first in line, then other governmental liens, then repayment of principal and interest on any borrowing or indebtedness incurred by the municipality to fund the receivership.
—Pennsylvania has on order of priority with court costs first, then state tax or municipal liens, then principal and interest on any rehabilitation indebtedness. Rehabilitation costs are 6th out of 9 places in order of priority.
4. Some states have specific rules regarding properties in foreclosure.
—In Pennsylvania and Missouri, no receivership may be allowed if property is in foreclosure.

Benefits, Drawbacks, and Conclusion

Code enforcement receiverships can be a useful tool for communities that are grappling with vacant, abandoned, or dilapidated structures. In many cases, a receivership enjoys certain advantages over other forms of abatement actions, such as criminal prosecution and civil injunctive relief. Receivership can be a speedier remedy than a civil injunction and more certain, since a third party (the receiver) assumes control over the property and is motivated to move forward with the repair work quickly. Receivership can also avoid the unnecessary use of law enforcement staff (who often view code enforcement as a low priority) and a criminal justice system that is often impacted. A receivership is self-funding and does not constitute the drain on public finances that other remedies can.

Yet code enforcement receiverships are, like any other approach, not suitable in every instance. Structures that are severely damaged may not be repairable and must be demolished; although a receiver usually has the power to abate through demolition, it is often quicker and less expensive for the municipality to demolish. Perhaps the most frequently-encountered hurdle is extraordinarily low resale values for homes that require an extraordinarily high level of repair. In those cases, unless the property is generating significant income, the receiver may not be able to obtain financing for the repairs. In some of these types of cases, a receiver can approach the rehabilitation from a different angle. However, in a few cases, some remedy other than receivership must be employed.

In sum, code enforcement receiverships can and are used to great effect in situations where more traditional enforcement avenues have proven to be a dead end. Once the court confirms the receiver's appointment, the municipality's day- to-day involvement is greatly diminished. In those jurisdictions that allow it, the municipality can recover its attorneys' fees and administrative enforcement costs. Most importantly, a successfully-implemented code enforcement receivership can serve as a catalyst to encourage other stakeholders to invest in and improve the community in which they live and work.

Notes

1. Acknowledgment: The authors wish to acknowledge the efforts of Tempestt Garland, who helped research and draft this paper.

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Federal, Cont'd from page 17

municipal control over recreational drone use.

Notes

1. "Cities Hosting the Papal Visit are No Drone Zones" http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19474 (last accessed Nov. 29, 2015).
2. https://www.washingtonpost.com/local/trafficandcommuting/faa-wants-to-fine-skypan-19-million-for-reckless-drone-operations/2015/10/06/2050ca2e-6c34-11e5-aa5b-f78a98956699_story.html (last accessed Nov. 30, 2015).
3. "FAA-Fly Safe with Your Drone" http://www.faa.gov/news/updates/?newsId=84326 (last accessed Nov. 30, 2015).
4. "U.S. Transportation Secretary Anthony Foxx Announces Unmanned Aircraft Registration Requirement" http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19594 (last accessed Nov. 12, 2015).
5. On August 21, 2015, the FAA released a report documenting more than 650 drone sightings in public airspace during 2015, far eclipsing the prior year's numbers. "FAA Releases Pilot UAS Reports" http://www.faa.gov/news/updates/?newsId=83544 (last accessed Nov. 19, 2014).
6. "U.S. Transportation Secretary Anthony Foxx Announces Unmanned Aircraft Registration Requirement" http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19594 (last accessed Nov. 12, 2015).
7. http://www.faa.gov/news/updates/media/20151213_IFR.pdf (last accessed Dec. 15, 2015).
8. *Id.* at 19.
9. *Id.* at 20.
10. *Id.* at 9.
11. *Id.* at 44.
12. *Id.* at 52.
13. Id. at 70.
14. http://www.faa.gov/uas/registration/faqs/#cov (last accessed Dec. 16, 2015).
15. *Id.*
16. http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19856 (last accessed Dec. 15, 2015).

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Cases



By IMLA Editorial Board

Employment: County Prison Employees Not Entitled to Pay for Uncompensated Portion of Lunch Break Where They Received "Predominant Benefit" of the Break *Babcock v. Butler County, No. 14-1467 (3d Cir. Nov. 24, 2015).*

SUMMARY: The Third Circuit has declined to require that prison employees receive compensation for an unpaid 15-minute portion of their one-hour lunch break where, despite being required to remain in close proximity in the event of an emergency, they received the "predominant benefit" of a break during such period.

FACTS: Butler County, Pennsylvania (County) and its county prison employees have a Collective Bargaining Agreement (CBA), under which the employees work for a total of eight and one-quarter hours per day, which includes a one-hour mealtime. The mealtime is unpaid for fifteen minutes and paid for forty-five minutes. However, for the entire meal period, including the unpaid fifteen minute segment, no employee may leave without permission, must remain in uniform, be in close proximity to emergency response equipment, and be on-call to respond to an emergency. As a result, prison employees complained that they could not smoke a cigarette, run errands, sleep, or go outside for fresh air.

Some employees filed suit against the County, arguing that under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-209, *et seq.*, they should be compensated for the entire mealtime. The County moved to dismiss the complaint, arguing the employees should not be compensated because they get the "predominant benefit" of the mealtime break. The district court agreed with the County and dismissed the case. The employees appealed, arguing not about the standard, but that they had in fact posited a plausible claim for relief and that summary judgment was inappropriate.

HELD: The Third Circuit agreed with the district court that the "predominant benefit" test applies and affirmed the lower court's factual analysis.

DISCUSSION: The FLSA does not directly address whether a portion of an employees' mealtime should be compensated and thus two competing test have been developed in the circuit courts. The first, and less popular, examines whether the employee is relieved of all duties during mealtime, and the second looks at whether the employee receives the "predominant benefit" of the mealtime. The Third Circuit had yet to confront this question, and ultimately sided with the majority of its sister circuits.

The crux of the predominant benefit test is "whether the officer is primarily engaged in work-related duties during meal periods." The court thus looked to the totality of the circumstances to determine whether the officers in question were, on balance, the party benefited by the mealtime. Other precedents provided useful comparators. Compensation was paid for every lunch break minute where officers required permission to take lunch and were prohibited from reading "nondepartmental publications." Here, lunch breaks were not a matter of permission. So long as they were ready to respond to an emergency, the Butler County correctional officers could eat away from their desks and were not restricted as to what they could do.

The court also found the CBA helpful because, though not determinative, it did provide that the officers were paid for forty-five minutes of the mealtime and were required to be paid overtime if they were required to work the final fifteen minutes. Given that the CBA assumed that the officers were not working during that time, the majority found the predominant benefit was going to the workers. The majority thus affirmed the lower court.

DISSENT: The dissent would have reversed the lower court as to the application of the test, but also agreed the predominant benefit test was the appropriate standard. As for the facts, the dissent disfavored the majority's consideration of the CBA, the fact that the employees are paid for forty-five minutes, paid if called upon to work, and could even request permission to leave the premises. Instead, the issue for the dissent was that the essence of the employees' complaint was that they had to be prepared to work at a moment's notice during the whole hour, thus depriving them of any real "mealtime" during which they were not working. The dissent focused on cases that highlight the Supreme Court's definition of "work," which the Court has concluded under FLSA means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Under the totality of the circumstances – being restricted to the premises, restricted to wearing a uniform, not sleeping, being near emergency equipment, and working immediately if called upon – the employees should have been compensated for the fifteen minutes. In the dissent's mind the plaintiffs set forth enough facts to, at minimum, raise the issue of compensability for the fifteen minutes, and the majority erred in dismissing the case and limiting further discovery.

Employment: Temporary Worker Can Sue Third Party Employer for Employment Discrimination Under Title VII Faush v. Tuesday Morning, Inc., No. 14-1452 (3d Cir. Nov. 18, 2015).

SUMMARY: The fact that a company was using a temporary worker did not insulate it from being sued for employment discrimination under Title VII.

FACTS: Matthew Faush is an African-

Continued on page 28

What to do About Drones, Cont'd from page 9

23. *Gustafson, supra* at 783; *accord Hoagland, supra* at 697; *Condor Corp., supra* at 219.
24. Ward v. State, 374 A.2d 1118, 1125, 280 Md. 485, 498 (Md. 1977) (Stating "the Maryland law enhances the Congressional purposes and objectives by deterring through criminal sanctions the operation of an aircraft in such manner as to endanger the life and property of others. It would be incongruous indeed, in light of the federal purposes and objectives, if Maryland were to be constitutionally precluded from the criminal prosecution of a person for such conduct because a federal regulation authorized civil penalties'").
25. Arizona v. U.S., 132 S.Ct. 2492, 2502 (2012) (stating that "[e]ven if a State may make violation of a federal law a crime in some instances, it cannot do so in a field . . . that has been occupied by federal law.")
26. *Id.* at 2503.
27. Federal Aviation Administration, Law Enforcement Guidance for Suspected Unauthorized UAS Operations, https://www.faa.gov/uas/regulations_policies/media/FAA_UAS-PO_LEA_Guidance.pdf (noting that local police are "often in the best position" to deal

Continued on page 34

Cases, Cont'd from page 27

American who was employed by Labor Ready, a temporary employment agency. Labor Ready sent him to work at Tuesday Morning, Inc., where he was subjected to racial slurs and racially-motivated accusations that he was a thief. Faush sued Tuesday Morning under Title VII, claiming he suffered employment discrimination. The district court rejected the claim, granting summary judgment to Tuesday Morning after holding it was not Faush's employer and thus could not be liable for employment discrimination. Faush appealed.

HELD: The Third Circuit reversed the lower court, holding a reasonable jury could find Faush was Tuesday Morning's employee for Title VII purposes, making summary judgment inappropriate.

DISCUSSION: The court began by noting the standard rule that to prevail Faush had to show an "employment relationship" with Tuesday Morning. The Circuit held that the appropriate test for this is the Supreme Court's *Darden test* under which the Court interpreted "employee" in ERISA, which, like Title VII, is circular, and held that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."

Applying this test, the court looked to the hiring party's control over the "manner and means by which the product is accomplished," and noted that the Third Circuit has generally focused on who pays the employees, who hires and fires them, and who controls the daily activities. The court then disagreed with the lower court. It found, first, that though Labor Ready set the employee's pay rate, paid the wages out, and maintained worker's comp, Tuesday Morning was obligated to pay Labor Ready the minimum wage for each employee and had the "primary responsibility" to comply with the minimum wage law. It found the payments from Tuesday Morning to Labor Ready were functionally equivalent to direct employee pay – it paid a set, agreed-to salary to workers via Labor Ready, was obligated to pay overtime, and, if Labor Ready suffered increased tax or insurance costs, it had to pay those increases as well. Second, while Labor Ready initially hired Faush, Tuesday Morning had ultimate control over whether Faush was permitted to work at the store. Third, Tuesday Morning directly controlled Faush's daily activities – the store's personnel directly supervised him, provided training on-site, furnished equipment and materials necessary for his work, and tracked the number hours he worked per day.

Moreover, Tuesday Morning agreed

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Expert Witness Services: Employment Litigation Cases (Selection & Promotion–Test, Development, Validation and Implementation)

Fred M. Rafilson, Ph.D. (Industrial/Organizational Psychology)

As the former owner and CEO of I/O Solutions, Inc., the nation's largest public safety employment consulting firm, Dr. Rafilson led the development and implementation of assessment processes for federal, state and county/municipal agencies for20 years. Some of the federal agencies with which Dr. Rafilson has worked include the U.S. Department of Justice–Employment Litigation Division, U.S. Secret Service Uniform Division and the U.S. Capital Police. Dr. Rafilson has also worked with many state law enforcement agencies and organizations including the Massachusetts State Police Department, Illinois State Police Department, Pennsylvania State Police Department and the Florida Department of Law Enforcement. In addition, Dr. Rafilson has led the implementation of assessment programs for numerous county and municipal public safety agencies, including the Chicago, IL Police and Fire Departments, the Washington D.C., Police and Fire Departments, Omaha, NE, Police and Fire, Indianapolis IN, Police and Fire and the San Diego, CA Police Departments.

For more information, please contact Dr. Rafilson at:

FredRafilson@gmail.com Rafilson Group, Inc. 19275 Green Lakes Loop Bend, OR 97702



Recent Cases of Interest

By: Monica Ciriello, Ontario, 2015

City Denied Leave: Court Finds Appeal Is Destined To Fail

***Moose Jaw (City) v. Temple Hotels Inc. and Sasco Developments Ltd.,* 2015 SKCA 123 (CanLII) http://canlii.ca/t/gm8jh**

Parcels of land in the City of Moose Jaw ("City") were assessed by the Saskatchewan Assessment Management Agency ("SAMA") for the purpose of a 2013 revaluation for municipal taxes. The assessor examined numerous properties in the process of developing the capitalization rate ("CAP rate") for the parcels that resulted in a CAP rate of 7.5%. After SAMA made its assessment, the parcel owners appealed the assessment to the Board of Revision ("BOR").

In its decision, the BOR held that the properties used to arrive at the CAP rate were not sufficiently verified, and ordered SAMA to provide a CAP rate using a different method. The City appealed the BOR decision to the Assessment Appeals Committee ("Committee"). The Committee found that was no error in the BOR decision. The City now applies for leave to appeal.

HELD: Application denied.

DISCUSSION: The City is entitled to apply for leave to appeal under s. 33.1 of the *Municipal Board Act ("MBA")* on a question of law or a question concerning the jurisdiction of the Committee. The test set out in *Rothmans, Benson & Hedges Inc. v. Saskatchewan* requires the City to demonstrate that the grounds of the proposed appeal have sufficient merit and are of sufficient importance to warrant the granting of leave.

With regards to the merit of the appeal; the City argues that the Committee erred by holding that the SAMA order was not properly before it because it was not part of the record of the BOR. However, the City simultaneously acknowledges that even if the Committee made an error by such refusal, it is unclear whether the error would have made a difference in the decision of the Committee or even if it was relevant to the proceedings. The Court relies on the general rule that a Court does not grant leave in relation to a question that would make no difference to the result. The Court is therefore not satisfied that the City's argument has sufficient merit. The City also argues, that the decisions of the BOR and of the Committee have resulted in inequity. However, inequity was not discussed in SAMA's written submissions and the Committee did not address the issue. The Court is satisfied that this ground of appeal is destined to fail.

Appealing the Building Code Act: An Appeal on the Record or a Hearing *de novo?*

Ajax (Town) v LaPierre, 2015 ONSC 6951 (CanLII) http://canlii.ca/t/gm1ps

Allen LaPierre and Doreen Parks ("Respondents") appealed a decision of the property standards committee of the Town of Ajax ("Town"). The Town requests an order determining whether an appeal to this court under s.153(4) of the *Building Code Act, 1992* is an appeal on the record or a hearing *de novo*. The question arises as a result of two conflicting decisions of this court: *Swanson v. Whitechurch-Stouffville (Town)* and *Anderson v. Hamilton (City)*.

HELD: Appeal will proceed as a hearing *de novo*.

DISCUSSION: In *Swanson,* it was held that an appeal under s. 15.3(4) of the Act is a hearing *de novo* on which the parties may introduce evidence not before the committee, including evidence relating to events occurring subsequent to the committee hearing, and oral evidence. In *Anderson,* it was held that an appeal under s. 15.3(4) is an appeal on the record before the property standards committee. In *Anderson,* the court interprets s. 15.3 as providing for "a summary, inexpensive review process of generally minor decisions of a municipal officer as to minimally accepted community standards of property maintenance." The court reasons that property owners "who allow their picket fence to fall down are not likely wanting to retain counsel and call expert witnesses to a formal hearing before the Superior Court."

However, this Court finds that not all property standards disputes relate to minor decisions of the type referred to in *Anderson.* In fact, in the present case, both sides to the dispute have retained counsel and the respondents have obtained an engineering report, upon the direction of a by-law enforcement officer, pursuant to s. 15.8 of the Act. Therefore, the appeal will proceed as a hearing *de novo.*

Should A City Be Given The Surplus Generated By A Tax Sale, Without Making Reasonable Efforts To Ensure That The Former Owners Were Notified?

Municipality of Northern Bruce v Kerry, 2015 ONSC 7361 (CanLII) http://canlii.ca/t/gm88d

In 2012, the Corporation of the Municipality of Northern Bruce Peninsula ("Municipality") moved without notice, for an order on the former property owners that the $16,345.09 surplus generated by the tax sale, which had been paid into court in 2011, plus accrued interest, be paid out of court to the Municipality. The Municipality claimed the funds as forfeit pursuant to s. 380(6) of the *Municipal Act*, 2001 ("*Act*") because, according to the Municipality, the owners were given notice of the payment of the funds into Court and did not, although apparently entitled to the funds, apply for them within the ensuing year.

This Court in 2012 was astonished that persons who formerly owned land sold by tax sale would not want to receive the surplus that was generated by the sale, if indeed they received notice and understood that they were entitled to the funds. The

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Municipality asserts that the Treasurer complied with the notice requirements outlined in sub-sections 379(1) and 380(3) of the *Act*; although details of compliance are not set out. Therefore, the funds were deemed forfeited to the Municipality because the owner had not applied within a year for the funds.

This Court in 2012 held that the Municipality provided inadequate evidence that notice was given. The Notice referred to does not inform the owners that a surplus was generated by the sale, or that the surplus was paid into court, or that the owners have one year to claim the funds. The issue raised by this motion is whether the Municipality, which sold this property to satisfy property tax arrears owed to it, should be given the surplus generated by the sale, without making reasonable efforts to ensure that the former owners were notified that the sale generated a surplus and were given a fair opportunity to claim the surplus.

HELD: Municipality shall send registered mail to persons who formerly owned land; in the event the Municipality does not receive notification it may forthwith file a motion in Form 14B, directing payment of the funds in court to the Municipality.

DISCUSSION: The position of the former owners of the property is not before the court. The Court infers from the evidence that this is because they did not receive notice that there was a surplus generated by the sale, and that they are entitled to the money. The Court finds that there is no satisfactory evidence that the Treasurer notified the owners of the property that the surplus funds were paid into court and that the owners have one year within which they may apply to the court for payment of the funds to them. The Court is not satisfied by the evidence of the Municipality that the requirements of the *Act* were complied with. The Court finds that s.98 of the *Courts of Justice Act* gives this Court a wide discretion to grant relief from forfeiture in order to bring fairness and justice to the parties. Therefore, the Municipality is ordered to serve notice on the former property owners, as was required in the 2012 order by this Court.

Guides Are Not the Same As Directions

Young v Okotoks (Town), 2015 ABCA 345 (CanLII) **http://canlii.ca/t/gm5fp**

Jeff Young ("Appellant") owns a house in a neighbourhood zoned Residential - Small Lot Detached District (R-1S). That zoning generally permits only residential housing. The Council of the Town of Okotoks ("Town") placed Direct Control zoning, which would permit the construction of a daycare facility, on one larger site in that neighbourhood. The Direct Control zoning included a provision that the development regulations of the R-1S District "shall be used as a guide when considering a development permit on the site".

The general requirements of the R-1S provide that parking is to be in the rear. When the operator of the daycare facility applied for a development permit, it proposed to have the parking on the sides of the building. The Municipal Planning Commission ("Commission") approved the permit, and the Appellant appealed to the Board. The Board dismissed the appeal. The Appellant now appeals the Board decision.

HELD: Appeal dismissed.

DISCUSSION: Appeals of development permits in Direct Control districts fall under the provisions found in s. 641(4) of the *Municipal Government Act*, ("*Act*"). Since the Commission granted this permit, the appeal fell to be decided under s. 641(4)(b). As such, the Board was "limited" to deciding if the Commission had "followed directions."

The first issue is framed as whether the Commission failed to follow the "directions" of Council. It is apparent that the Council knew it could give binding "directions" in the Direct Control bylaw. Therefore, the Board's first task was to decide if the parking requirements in the R-1S were "directions." The Board concluded that "guides" were not the same things as "directions." The Board noted that the Direct Control bylaw indicated that those provisions were to be used "as a guide", and thus it determined that they were not "directions." Other provisions of the bylaws support this interpretation, and it is also consistent with the ordinary meaning of those words.

The fundamental question before the Board was whether the parking requirements in the R-1S District were a mandatory "direction" by the Council. The Board correctly concluded that they were not, and accordingly had no jurisdiction to inquire further. In this case the Board concluded that the R1-S provisions were only "guidelines," and that there were no "directions" that had not been followed.

Constitutional Law: Language Rights

Caron v. Alberta, 2015 SCC 56 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15629/index.do

C and B ("appellants") were charged with traffic offences under the Alberta *Traffic Safety Act* and the *Use of Highway and Rules of the Road Regulation*, which were enacted in English only. Both claimed that the law and regulation were unconstitutional because they were not enacted in French, and further that the Alberta *Languages Act* was inoperative to the extent that it abrogates what they claimed was a constitutional obligation on the part of Alberta to enact, print and publish its laws and regulations in both French and English.

In 1870, the vast western territories including most of what is now Alberta, was annexed as a new Canadian territory under federal administration by the 1870 *Rupert's Land and North-Western Territory Order* ("1870 Order"). The 1870 Order did not expressly provide for legislative bilingualism. The appellants argument rests on an assurance given by Parliament in 1867 (the "*1867 Address*") that it would respect the "legal rights of any corporation, company, or individual" in the western territories must be understood as a promise of legislative bilingualism. And that promise is an entrenched constitutional right because the *1867 Address* became a schedule to the *1870 Order*, which is part of the Constitution of Canada by virtue of s. 52(2)(*b*) and the Schedule to the *Constitution Act, 1982* . The appellants' challenge was successful at trial, but was rejected by the summary conviction appeal court and by the Court of Appeal. The Supreme Court of Canada ("SCC") dismissed the appeals.

HELD: Appeal Dismissed

DISCUSSION: The province of Alberta's *Languages Act*, provides that laws may be enacted in English only. The appellants claim that this is unconstitutional. While they take no issue with the general rule that the language of provincial legislation is a matter for the Province to decide, they say that an exception to this general rules applies here: there is a constitutional right, from which the Province may not derogate, to have Alberta laws enacted in both English and French. The SCC refers to this as a right to legislative

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with Labor Ready that it would "provide a workplace free from discrimination and unfair labor practices and to comply with all applicable federal, state and local laws and regulations concerning employment, including but not limited to: wage and hour, breaks and meal period regulations, the hiring and discharge of employees, Title VII and the FLSA." Lastly, the Court noted its position aligns with the EEOC – the agency charged with interpreting Title VII – because the agency's guidance provides that "[a] client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment [for purposes of Title VII] . . . . because the client usually exercises significant supervisory control over the worker."

Thus, the Court found Faush made a plausible argument, certainly one strong enough to survive summary judgment, that Tuesday Morning and not Labor Ready, was his employer for Title VII purposes and ultimately held that a reasonable jury could so find.

Police: Officer Could Not Assert Qualified Immunity in Section 1983 Action Brought By Arrestee Who Was Tased While on the Ground and Offering No Resistance

Claridy v. Golub, No. 14-15319 (11th Cir. Nov. 30, 2015).

SUMMARY: A Florida police officer could not avail himself of qualified immunity under federal or state law where he tased a compliant, non-threatening arrestee a second time and submitted an offense report containing unsubstantiated allegations about the arrestee's behavior.

FACTS: In May 2009, Jason Golub and a fellow officer from the Lake City, Florida Police Department assisted animal control authorities in capturing three pit bulls that were running loose outside the Claridy residence and allegedly terrorizing a neighbor, Ronald King. The officers helped to impound the dogs and left the scene.

Johnny Claridy was not at home when the impounding occurred, but soon returned. An argument ensued between Claridy and King, and King called police. Officer Golub received a call that there was a disturbance at the Claridy residence, that Claridy was threatening his neighbor, and that there might be a gun in Claridy's car.

Upon arrival, Golub informed Claridy that he was under arrest for disorderly conduct and ordered him to put his hands up. Claridy complied. Claridy's wife advised Golub that Claridy had just been released from the hospital following knee surgery.

With his hands up, Claridy moved backwards towards his car and leaned against it. Golub believed there was a gun in the car and that Claridy was trying to get to the weapon. He deployed his taser, causing Claridy to fall forward, striking his knees, stomach, and face on the sidewalk. Because he was momentarily "out" after the tasing, it took Claridy some time to respond to the officer's order to put his hands behind his back—but he eventually did so. Nevertheless, Golub tased Claridy a second time and handcuffed him. Because Claridy could not stand after re-injuring his knee, Golub dragged him down the sidewalk by his handcuffs.

Golub completed a report indicating that Claridy had committed battery of a law enforcement officer and disorderly conduct, charges that were reduced and subsequently dismissed.

Claridy filed a § 1983 excessive force claim and state malicious prosecution and loss of consortium claims against Officer Golub in his individual capacity. The district court granted qualified immunity as to the first tasing, but otherwise denied Golub's motion, finding that Golub was not entitled to qualified immunity as to the second tasing, and that he was not entitled to immunity under Florida law for the state-based claims. He appealed.

HELD: The Eleventh Circuit affirmed.

DISCUSSION: Qualified immunity "protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). The Circuit Court found that it was "undisputed" that Golub was engaged in a discretionary function when arresting Claridy. Therefore, Claridy had to show that the officer's conduct during the arrest (1) violated a constitutional right that (2) was clearly established at the time of the incident.

The court held that both prongs of the test were satisfied as to the second tasing, which constituted excessive force in violation of the Fourth Amendment. Under the "objective reasonableness" standard cited in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) the court viewed the circumstances "from the perspective of a reasonable officer on the scene."

The district court had concluded that Golub had arguable probable cause to arrest Claridy for disorderly conduct. But in making the arrest, Golub could only constitutionally use such force as "necessary in the situation at hand," which required the court to consider "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officer[] or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight."

Here, Claridy was lying face-down on the sidewalk, with his hands behind his back while submitting to arrest. The crime for which he was being arrested was not serious. He did not present a threat to Golub or anyone else when he was tased a second time. The Circuit agreed with the district court's determination that the use of the taser under such circumstances violated the Fourth Amendment.

In several decisions issued prior to May 2009, the Eleventh Circuit had held that the "gratuitous use of force when a criminal suspect is not resisting arrest" was unreasonable and violated the Fourth Amendment. These cases gave defendant Golub fair warning that the second tasing, which allegedly occurred while Claridy was lying face-down on the sidewalk, complying with Golub's instruction to put his hands behind his back, and submitting to arrest for, at most, a minor offense, was unconstitutional. Qualified immunity was denied on the federal claim for the second tas-

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for each offense, or may be incarcerated for a term not to exceed 180 days, or both. Each day that a violation continues shall constitute a separate and distinct offense.

(e) *Seizure for unlawful use.* If the mayor, superintendent of police, commissioner of aviation, fire commissioner or their duly authorized enforcement officers or designees have a reasonable basis to believe that any small unmanned aircraft is or has been operating in violation of this section, said small unmanned aircraft may be seized by such duly authorized enforcement official, followed by an opportunity for an administrative hearing, with notice to the owner within seven calendar days of such seizure, for the purpose of reviewing the appropriateness of the seizure, and shall be held by the city until such time that the owner of such small unmanned aircraft reimburses the city for the actual cartage costs incurred in connection with the seizure and pays to the city $20.00 for each day, or part of a day, that the small unmanned aircraft is in storage. If criminal charges involving the use, condition or operation of the small unmanned aircraft are pending, the small unmanned aircraft shall be held until disposition of the criminal charges. If it is determined at an administrative hearing, by a preponderance of evidence, that the seized small unmanned aircraft was not operated in violation of this section, such small unmanned aircraft shall be returned to its owner without charge.

(f) *Rules.* The commissioner of aviation, in consultation with the corporation counsel, is authorized to promulgate rules necessary or appropriate to implement this section. Such rules shall be posted by the commissioner on the City of Chicago's rule web portal.

Section 10-36380 of the Municipal Code of Chicago is hereby amended by inserting the language underscored, as follows:

10-36-380 Helicopter operations- Prohibitions- Exception for governmental entities.

(Omitted text is unaffected by this ordinance)

.As used in this section, the term "other rotary wing aircraft capable of vertical landing and takeoff' does not include small unmanned aircraft, public aircraft or toy aircraft, as defined in section 10-36-400.

SECTION 4. This ordinance shall take full force and effect 10 days after its passage and publication. ML

Cases, Cont'd from page 31

ing.

The Florida statute cited by Golub protects an officer from personal liability for acts within the scope of his employment, unless the officer "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Here there was sufficient evidence to raise a question of fact as to whether Golub acted willfully or with malice. His offense report appeared to contain fabrications about Claridy's behavior, which the State Attorney relied on in deciding to prosecute Claridy. The Circuit also denied Golub's state law immunity request.

Speech: Ban of Protestor from Arizona Senate Building Due to Potential for Future Disruptive Behavior Violates First Amendment *Reza v. Pearce, No. 13-15154 (9th Cir. Nov. 19, 2015).*

SUMMARY: Reversing the district court, the Ninth Circuit has found that a state senator's indefinite ban of a previously disruptive protestor from the Arizona Senate Building based on the possibility that the protestor might again be disruptive was a violation of the First Amendment.

FACTS: In February 2011 Salvador Reza, along with other members of Tonatierra, a community organization in Maricopa County, Arizona, attended a legislative hearing on the Omnibus Immigration Bill. The bill attracted a lot of attention, requiring the use of an overflow room in the Arizona Senate Building to accommodate the public. Reza was in the overflow room, which included both supporters and opponents of the bill. State Senator Pearce claimed that noise from the overflow room was interfering with the legislative debate. He told an officer who, in turn, approached Reza and told him to silence the audience. Reza refused to do so.

At the end of the day-long hearing, the sergeant-in-arms asked the crowd in the overflow room to stop applauding because it violated the Senate rules of decorum. This was reported to Senator Pearce who, as President of the Senate, was responsible for such rules. The Senator claimed, later, that this event took place just after the shooting of Gabriel Giffords in Arizona, leaving everyone on "edge," and as a result of that nervousness he asked the sergeant-in-arms to "handle" the protestors. The sergeant responded that since the hearing was ending shortly it would be better to just limit the disturbances as much as possible, and not arrest any protestors. Senator Pearce followed this advice, but after the hearing asked for the names of the disruptive protestors and directed the officers to deny those people entry to the building. No time limit was placed on this ban. Reza was put on this list of banned individuals.

Two days after the hearing Reza returned to the Building for a meeting with a senator and was denied entry. When he tried to enter the building anyway, he was arrested for trespassing and placed in the Maricopa County jail. Reza filed suit after the arrest, alleging a violation of his First Amendment rights. The district court granted summary judgment to Senator Pearce and to the two arresting officers, holding that they were protected by qualified immunity. Reza appealed.

HELD: The Ninth Circuit reversed the lower court grant of summary judgment to Senator Pearce, holding that he had violated of Reza's First Amendment rights and that at the time the law was clearly established, thus stripping Senator Pearce of qualified immunity protection. The grant of immunity to the officers was upheld.

DISCUSSION: The Circuit Court began by determining that the Arizona Senate Building is a limited public forum since it is a place where the public has the opportunity to address local government officials. The court noted that Reza's role in the Building at the hearing – e.g. as an audience member as opposed to a testimonial witness – had no bearing on the classification and that speech of spectators is protected by the same constitutional rules as the speech of those addressing the chamber. Thus, the government can impose time, place, and manner restrictions and may "reserve the forum for its intended purposes, communicative or otherwise, as long

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as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Reza argued Senator Pearce targeted him because of his support for pro-immigrant legislation and because of his Mexican ancestry. The court found no evidence in the record to support such a contention. It instead found Senator Pearce ordered the officers to identify any person who was loud in the overflow room – no matter why or what was being advocated for – and thus the regulation on speech was viewpoint neutral.

However, the Senator ran into trouble with the second prong of the analysis. For one, there were material issues at play as to whether Reza disrupted the hearing at all and whether Senator Pearce legitimately believed he would do so again if permitted back in the Building. In support of this, the court noted that the hearing continued to the end, that the officers told Senator Pearce that there was not a reason to arrest or remove people from the overflow room, and that there were conflicting affidavits about Reza's behavior. Moreover, the Court found it troubling that Senator Pearce's action foreclosed all avenues of communication for Reza because it banned him entirely from the Building indefinitely.

The court then moved on to determine whether Reza's right was clearly established in the Ninth Circuit at the time of the incident. The issue was presented by the Court as whether it was clearly established that an "individual could express disagreement in a limited public forum, but that the government could restrict the individual's speech to safeguard the purpose of the forum as long as the restrictions were reasonable and viewpoint neutral." It found that on February 22, 2011 the Ninth Circuit clearly held an individual could only be removed from a limited public forum by a government official if the person *actually* disrupted the proceedings. This was fatal for Senator Pearce because Reza was not disruptive when he was barred from entering the Building two days after the hearing – he had a scheduled meeting with a senator. The Circuit Court thus reversed as to Pearce.

The arresting officers' qualified immunity survived. They had arrested Reza for criminal trespass acting on an objectively valid order from Pearce as President of the Arizona Senate.

Trials: Corporate Owner of Sexually-Oriented Business Lacked Standing to Contest Public-Posting Ordinance on Behalf of Individual Owners, Employees and Entertainers

***Keepers, Inc. v. City of Milford,* No. 14-1581 (2d Cir. Nov. 20, 2015).**

SUMMARY: Where a corporate owner of a sexually-oriented business brought a First Amendment challenge to an ordinance requiring the public posting of the names of its management, it could not act on behalf of the individual owners, employees and entertainers under the doctrine of "prudential standing" and lacked standing to bring the action.

FACTS: In 2003 Milford, Connecticut amended its sexually oriented business ordinance, adding more restrictions to the law. Keepers, Inc. filed suit shortly after the ordinance was amended, prompting Milford to not enforce the ordinance while the litigation was pending. In 2007, the ordinance was replaced again, staying mostly the same but including some changes. In particular, the 2007 ordinance included a much more demanding public-posting rule, requiring the business license and the name of every individual who had any control or management position with the establishment to be posted. Keepers filed suit again, this time challenging the new ordinance for violating Keepers' owners', employees', and entertainers' First Amendment right to anonymity while engaging in constitutionally protected activities.

Milford answered that it had a substantial interest in regulating the business and that the posting requirement allowed law enforcement and city officials to identify those responsible for the business operations. The district court found most of the 2003 law valid, but found the posting requirement of the 2007 law "unconstitutionally broad." Both parties appealed the district court's order, but Keepers did not appeal the ruling on the 2007 ordinance. The Second Circuit, meanwhile, *nostra sponte* identified two issues not addressed by the lower court proceedings – whether Keepers had standing and if so whether the public-posting requirements violated the First Amendment – and had the parties brief the issues.

HELD: The Second Circuit remanded the case with an order to dismiss for lack of jurisdiction, holding Keepers lacked both prudential and constitutional standing.

DISCUSSION: The Second Circuit did not address whether the public-posting requirement violated the First Amendment; it instead focused on the prudential standing issues before it. The court pointed out that throughout its briefs Keepers referred to the right of its officers, shareholders, employees, owners, and entertainers to anonymity – but not its own right to anonymity. Keepers first tried to ward off the standing issue by noting that courts generally dispense with the rule that parties must assert their own legal rights when First Amendment rights are at stake. The court found, however, that such a general doctrine exists for overbreadth arguments – a characterization of its position Keepers only adopted in its supplemental brief to the court. In order to succeed in a third-party claim of that nature, moreover, Keepers would have had to show a close relationship to an injured party and a reason why the injured party could not assert its own rights. Keepers did neither and, perhaps critically for the court, Keepers' owner had already been publically identified and had suffered no harassment or reprisal, leading the court to see no reason why the case could not be brought by the owner.

Next the court held that, even if prudential standing was relaxed, Article III standing was also absent. Keepers argued the public posting requirements injured its constitutional and economic interests, but never alleged how the lack of anonymity harmed the owners' and/or shareholders' interests. The closest argument the court found was Keepers' statement that the public posting law might "chill" Keepers' expression, but the court found that purely conjectural.

Finally, Keepers argued, for the first time on appeal, that the public-posting requirement violated its right to be free from government-compelled speech. Thus, it posited, the Circuit could uphold the lower court even if it lacked standing to pursue its claim based on the right to anonymity. Keepers ran into further trouble with this argument though under the mootness doctrine. The prohibition on mootness requires a "live" dispute at every stage of the proceeding. When Keepers began its litigation in 2003 the Milford municipal code required it to post names it did not want to. The 2007 ordinance, however, required only the names

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bilingualism. The Province maintains that there is no such right.

There is no question that linguistic duality and linguistic rights with respect to French and English are deeply rooted in our history and reflect our fundamental principles of constitutionalism and the protection of minorities. The Court must, as it has often affirmed, "take special care to be faithful to the spirit and purpose of the guarantee of language rights" *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549. The Court must also be mindful that federalism — another fundamental constitutional principle — recognizes a large measure of autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. We must be equal to the purpose of all of these fundamental constitutional principles. We therefore cannot, as the appellants ask us to do, allow the pursuit of language rights to trample on areas of clear provincial legislative jurisdiction. Rather, we must examine the text, context and purpose of our Constitution to see whether there is a constitutional constraint on the power of the province of Alberta to decide in what language or languages it will enact its legislation.

In summary, at its most basic the appellants argument is as follows: the inhabitants of the territories demanded legislative bilingualism in the negotiations with Canada, and we must hold that Canada acceded to this demand and granted a constitutionally protected right throughout the territories, either because Parliament assured the inhabitants in the *1867 Address* that their "legal rights" would be respected and this was attached to the *1870 Order*. We note that these arguments have far-reaching consequences. They would require holding that bilingualism has been constitutionally entrenched not only for Alberta, but also for Saskatchewan, Ontario, Quebec, Yukon, Nunavut and present-day Northwest Territories. This reasoning would also require holding that this Court's decision in *Mercure* is erroneous because bilingualism has been protected in Saskatchewan since 1870. Absent some entrenched guarantee, a province has the authority to decide the language or languages to be used in its legislative process. Clearly, a province may choose to enact its laws and regulations in French and English. But we cannot simply infer a guarantee of legislative bilingualism that would override this exclusive provincial jurisdiction absent clear textual and contextual evidence to support an entrenched right.

The words in the *1867 Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the *1867 Address*.

COSTS: While costs typically follow the outcome of the case, this Court has the discretion, in appropriate circumstances, to award costs on appeal and in the courts below regardless of the outcome (*Supreme Court Act*, R.S.C. 1985, c. S-26 , s. 47). Here, we would exercise our discretion to depart from the normal practice: despite their lack of success, we would award the appellants their costs on a party and party basis. ML

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with unauthorized drone use and that FAA inspectors are often "unable to immediately travel to the location of an incident.")

28. 49 U.S.C. § 40103(a)(1), (b).
29. 49 U.S.C. § 40102(a)(32).
30. 14 C.F.R. § 91.119(b).
31. 14 C.F.R. § 91.119(d)(1).
32. United States v. Causby, 328 U.S. 256, 264 (1946)
33. See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (striking down statute that regulated conduct that did not substantially affect interstate commerce).
34. 49 U.S.C. § 40103(a)(2).
35. sUAS NPRM at 9562
36. FAA Modernization and Reform Act of 2012, § 332(a)(2), Pub. L. 112–95, 126 Stat. 11, 73 (directing FAA "to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system").
37. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 639 (1973).
38. Concerned about safety and enforcement issues, the FAA recently announced that it would soon be requiring all UAS, including model aircraft, to be registered and marked. Federal Aviation Administration, *Clarification of the Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems (UAS) and Request for Information Regarding Electronic Registration for UAS*, 80 Fed. Reg. 63912–63914 (Oct. 22, 2015). This action is not subject to the special rule in section 336 because FAA proposes to merely enforce an existing statutory registration rule. FAA historically has exercised its discretion not to enforce that requirement for model aircraft.
39. *See* footnote 11 *supra* and accompanying text.
40. Crosby v. Natl. For. Trade Council, 530 U.S. 363, 373 (2000), citing *Savage, supra,* at 533, 32 S.Ct. 715, quoted in *Hines, supra,* at 67, n. 20, 61 S.Ct. 399.
41. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 *U.S.* 47, 65-66 (2006).
42. *See* Gilles v. Davis, 427 *F.*3d 197, 212, note 14 (3d Cir. 2005).
43. Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); ACLU v. Alvarez, 679 F.3d 583, 586-87 (7th Cir. 2012) cert. denied, 133 S. Ct. 651, 184 L. Ed. 2d 459 (2012).
44. American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) cert. denied, 133 S. Ct. 651 (2012).
45. *Id.* at 600, emphasis added.
46. *Glik v. Cunniffe*, *supra,* at 82 (holding that one has a First Amendment right to record the police "carrying out their duties in public"). ML

Cases, Cont'd from page 33

of those with "actual power" for operating the business be posted. The district court found for Keepers on the 2007 ordinance and thus it is not subject to the appeal. Looking at the record, the Court found that Keepers now has one, sole owner and that only that name would be posted and that must occur *no matter the outcome* of the appeal, and as a result, the entire argument of compelled speech was moot. The court remanded with instructions to dismiss the case. ML


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