IMLA
THE MUNICIPAL LAWYER MAGAZINE

July/August 2015
THE JOURNAL OF LOCAL GOVERNMENT LAW

The Buzz About Bees: Effective Municipal Beekeeping Regulations

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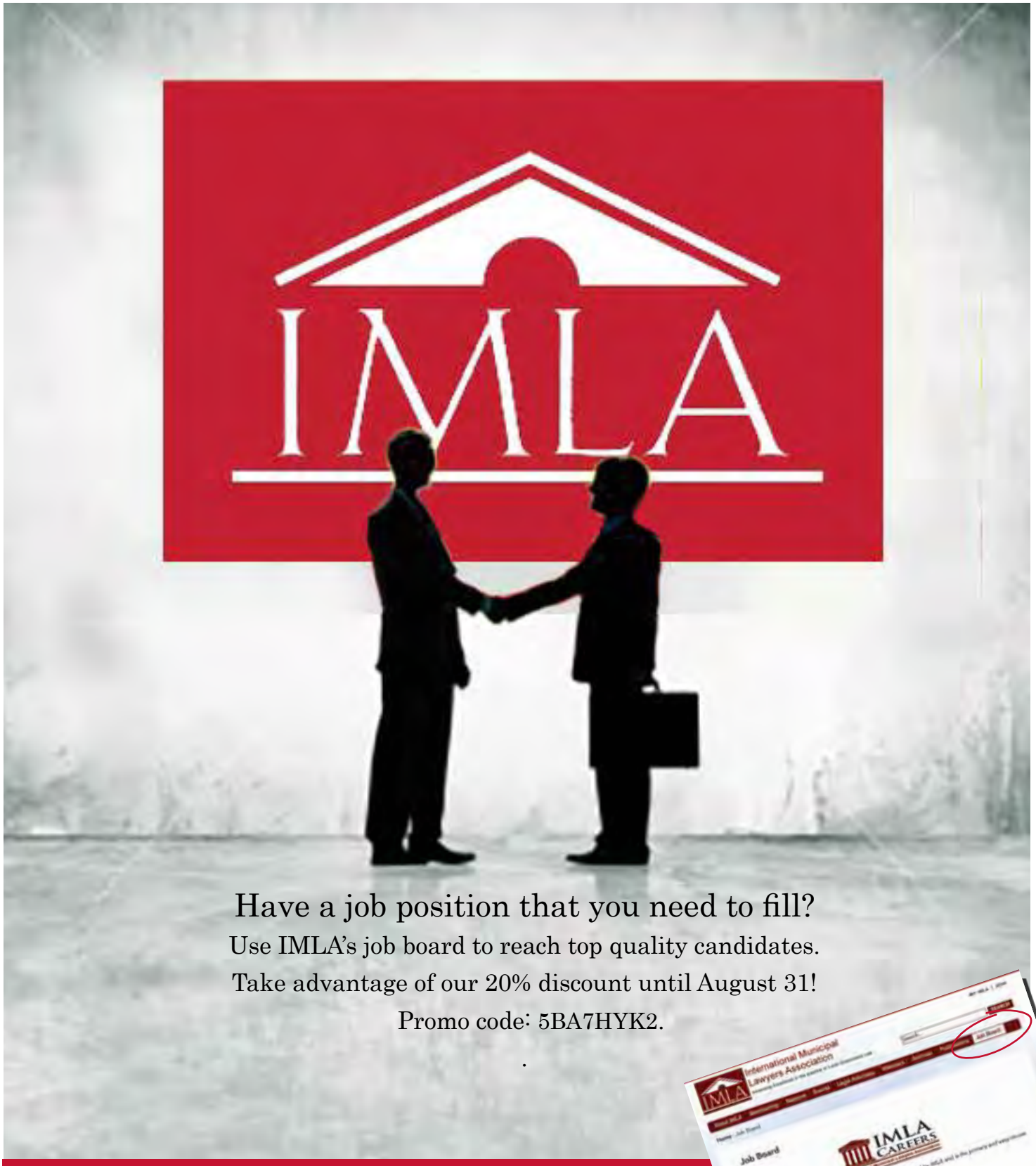

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"APPS IN THE CITY": REGULATING TNC'S IN NYC

By Matthew Daus and Phillip Hom, Windels, Marx, Lane and Mittendorf LLP, New York, NY

Gotham continues to lead the way in dealing with the dynamic and unpredictable challenges posed by Uber and other Transportation Network Companies.

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By Helen Clemens

Home apiculture is flourishing in cities and suburbs across the nation. Municipalities have a spectrum of options to best reconcile the interests of backyard beekeepers and their neighbors.

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INTO UNCHARTED AIRSPACE: HERE COME THE DRONES

By Erich Eiselt, IMLA Assistant General Counsel

The benefits of unmanned aerial vehicles are too great to ignore. Federal law preempts much of the discussion, but localities play a key role in protecting fundamental rights of those on the ground.

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STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

ART DIRECTION & PRODUCTION
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EDITOR'S NOTE:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Dear Reader

Two of *Municipal Lawyer's* July-August feature articles are connected, at least peripherally. "The Buzz About Bees," by recent George Washington Law School grad Helen Clemens, surveys a spectrum of local apiary regulations, weighing the concerns of at-risk neighbors against the benefits of back-yard queens, drones and workers to agriculture and mankind.

Discussing a different winged species, IMLA's Erich Eiselt contributes "Here Come the Drones," profiling yet another new transformative technology that will soon require thoughtful action by municipal attorneys across the nation. (We do not cover in these pages a third definition of "drone"--a common synthetic drug--which may well be grist for a future ML article).

Matt Daus and Philip Hom, of New York's Windels, Marx, provide "Apps in the City" an update on the continuing fracas as New York City battles Uber *et al* for control of the city's streets.

In Inside Canada, we are pleased to present "National Issues in Municipal Law"--from council prayer to sales tax revenue to community mailboxes and, yes, former Mayor Rob Ford--courtesy of Bill Buholzer at Young Anderson, Vancouver, BC.

Our regular departments include Pete Haskel's Second Look, bringing to light in "The Secret Bankruptcy Code" the little-known prerogative accorded to state courts under various provisions of federal bankruptcy law.

And IMLA's Amanda Kellar tallies municipalities' wins and losses from the Supreme Court's recently-concluded 2014 Term, distilling a "SCOTUS To-Do List" now facing local attorneys.

Enjoy the balance of your summer. At IMLA, we are putting the finishing touches on our Vegas Conference. Taking flight October 4, it is certain to meld outstanding education, networking and entertainment. We'll see you there.

Best regards-
IMLA Editorial Board

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.

EXECUTIVE DIRECTOR'S LETTER

The Mission is Clear

By Chuck Thompson, IMLA General Counsel and Executive Director



This past year has been exciting as IMLA has moved forward on several projects. Most of you know that we unveiled a model city attorney contract for in-house local government attorneys in June. That project offers our members a negotiating model to use to enable member cities and counties or our special districts to develop a fair and well-thought out contract between themselves and their attorneys. The model is based on the ICMA model contract for city/county managers, but recognizes the distinctions between the two professions and positions. We believe cities and counties across the country can benefit by using this model and hope that they will. As with any model document, it requires updating, review and renewal. To that end, we ask each of our members to let us know what works and what doesn't work in the model and where we need to make refinements. Marion Radson City Attorney (retired), Gainesville, Florida captained this effort with great teamwork from Thomas M. Carpenter, Esq., City Attorney, Little Rock, Arkansas, Thomas Carr, Esq., City Attorney, Boulder, Colorado, and Howard Friedman, Esq. Chief, Contracts and Real Estate, New York City Law Department.

At the Annual Conference in Baltimore last fall, we unveiled our model amendments to several of the AIA Construction Contract documents and our agreement with the AIA to allow use of our amendments with their model documents provided the user held a license from AIA for the underlying document. These amendments provide significant help to smaller communities that need infrastructure improvements and do not have their own form agreements like the larger jurisdictions do. In Las Vegas, we will unveil our model Design Build construction contract following a year long process captained by Steven A. Torres, Partner, Pannone Lopes Devereaux & West, LLC., with the able support of Christopher J. Petrini, Petrini & Associates, P.C. and John Markovs, Deputy County Attorney for Montgomery County, Maryland among others.

The model contract for in-house local government lawyers led to two additional projects that are well underway. A team of volunteers is working on a model retainer agreement for city/county attorneys who fill the role of the public office of city or county attorney through their private practice. Obviously, this project is much more complicated as the office of city and county attorney varies from state to state and community to community as does the practice of law. Nevertheless, IMLA will be working on several options for local governments and their attorneys to consider. This project is captained by Marion Radson and the team who developed the model employment agreement with the addition of Stephen P. Chinn, Stinson Leonard Street LLP and Susan H. Churuti, Bryant Miller Olive.

A second project directly spawned by the model employment agreement has a team of local government lawyers working on a model evaluation process for the chief legal officers of local governments. We are looking forward to being able to discuss both projects at the IMLA Annual Conference in Las Vegas. This project is captioned by Steve Kemp, City Attorney, City of Peoria, Arizona working with the team of Lori Grigg Bluhm, City Attorney, City of Troy, Michigan; Howard Swanson, City Attorney, Grand Forks, North Dakota; Patrick Baker, City Attorney, Durham, North Carolina; Roberta "Robin" Cross, Township Attorney, Township of the Woodlands. This team has been reviewing the wide variety of evaluation forms and processes that exist and will be developing a model that will include several options that communities can use to evaluate their attorney's performance. Options will include processes that work best for evaluations that are publicly conducted and those that conform to the more effective confidential process.

Obviously, we've had a busy year. Yet these projects only tell part of the story. In addition to IMLA's role as a resource and a provider of timely CLE programming, IMLA supports local governments through its legal advocacy program in the courts. This past year IMLA actively supported local governments in the Supreme Court and in state supreme courts and in the federal circuits in many more cases than in the past several years. We've had great success, but at the same time we are seeing trends that do not benefit local government. The Supreme Court this past term did not favor local government in many important cases and threw a wrench in the process of sign regulation when it decided the case of *Reed v. Town of Gilbert*. The result in *Reed* tells us that if we are to be successful in the courts we need to hone our efforts and focus on cases that are pending in the courts long before they get to the Supreme Court docket. *Reed* is the type of case that we need to have our members resolve early. Few local government attorneys saw the city's sign law as one that could withstand Supreme Court review and many of us saw the train wreck ahead when certiorari was granted; but, by then it was too late other than to make the best argument that we could. While our arguments in our Amicus brief in *Reed* seemed to garner some support from three members of the Court in Justice Kagan's concurring opinion and a modicum of support from three more in Justice Alito's concurring opinion, the ultimate result detrimentally limits local governments from protecting the aesthetic values of their communities with little gain from a "free speech" standpoint. Long story short, the more local governments that we can involve in IMLA, the better our chances that we can make a difference in the courts on our members' behalf.

Finally, let me thank those of you who are members of IMLA for your continued support. We are working hard to make your membership valuable and are pushing forward on your behalf to assist local governments and their law departments to become even more effective, and their communities stronger. For me personally, your support is evidence that we can make a difference. ML

The Buzz About Bees: Effective Municipal Beekeeping Regulations

By: Helen Clemens



Introduction

In early 2007, beekeepers and researchers alike began to notice a significant problem of widespread losses of honey bee colonies throughout the country.[1] This problem, termed "Colony Collapse Disorder" (CCD), entailed the failure of more than 30% of hives across the United States during the winter of 2006-2007,[2] without any evidence or symptoms of known causes of colony death.[3] Losses were observed at a slightly higher rate the following year,[4] and by 2009, CCD had become a widely recognized problem not only inside the beekeeping and agricultural research communities, but also in mainstream media coverage.[5] Because the honey bee pollinates 80% of all flowering crops, which equates to one-third of food consumed in the United States,[6] this CCD phenomenon produced much cause for alarm. Several different companies produced educational and fundraising campaigns in support of honey bees[7] and Congress required the USDA to research causes and solutions to CCD.[8] To date, there is no confirmed explanation for this disappearance of honey bees.

Interestingly, in the time since CCD became a known problem for honey bees, there has been an incredible rise in backyard apiculture.[9] In fact, the backyard beekeeper provides an important service in caring for and cultivating bees that allows them to thrive and pollinate throughout the local ecosystem. Not only do bees help to safeguard local food sources, some scientists believe that healthy, strong local bees may help to strengthen the species,[10] which is particularly important in this time of crisis.

In response to this rising interest in beekeeping, many cities have been lobbied to remove bans on beekeeping, or have introduced new regulations to permit beekeeping in residential areas.[11] This paper will survey and analyze different models for municipal beekeeping regulations (looking to examples from Melbourne, Florida; Hillsboro, Oregon; Savannah, Georgia and Baton Rouge, Louisiana) and balance the competing interests of the beekeeper, neighbors, and the municipal government; and will propose a model policy for municipal governments to adopt in order to best protect each of these interests.

Part I: Relevant Facts and Information about Honey Bees

As with any effort to regulate, the local government must first understand what it is regulating and how regulations may affect the activity being regulated. In terms of beekeeping, we need to understand the nature of bees and the art and science of beekeeping.

Beekeeping has been described as, "[an] art... to guide bees' natural behavior into patterns of activity desired by the beekeeper."[12] Beekeepers may induce bees to produce excess amounts of honey or provide them with food sources during nectar dearth, they may inspect hives to notice if the colony is threatened by an infection or parasite, and they may choose to introduce a new queen to ensure quality eggs are being laid.[13] However, bees are largely left on their own. A beekeeper can provide resources, but the beekeeper cannot control the activities of the 60,000 bees that may occupy the hive during the months when the colony is most productive.[14]

Wild, or feral honey bees exist naturally throughout the United States. Honey bees will commonly fly up to four miles away from their hive to forage for nectar and honey.[15] This is significant in terms of making decisions about beekeeping regulations, because bees will continue to move throughout any area in a municipality, whether or not they have keepers in residential areas.

An important component of apiology relevant to the regulation of hives, is that bees create flight patterns ("flyways" or "bee lines") to and from the hive.[16] These patterns can be manipulated by the manner in which the hive is situated on a property and what structures or impediments are near the hive.[17] To an individual who observes a hive for any length of time during the busy nectar season, these patterns are almost immediately obvious, and can be likened to a runway at an airport where planes take off to and land from various locations.

It is a common misconception that bees are dangerous or threatening when they swarm, and will become aggressive and attack an unknowing passerby. Numerous depictions of bees include the image of a killer swarm attacking someone running away. When bees swarm however, they are generally docile,[18] as they have no hive or home to defend when they swarm. An additional concern in the popular conscience is the idea of "killer bees." Killer bees are a name given to the Africanized honey bee, which is admittedly more aggressive than the European varieties, reacting to disturbances ten times faster than other varieties of bees.[19]

In addition to the biological and behavioral aspects of bees, nuisance issues have a tendency to percolate around the keeping of bees—in other words, neighbors with real or perceived reasons to complain require the local government to have some sort of regulatory function for beekeeping in residential areas. Neighbors may lodge various complaints about bees.[20] Of these, the most serious (and perhaps most obvious) are the considerations of those individuals who have an allergy to bee stings. The incidence of immediate systematic allergic reactions to insect stings is estimated to be between 1-7% of the population,[21] and a low estimate of annual deaths caused by anaphylactic shock following a sting published by the World Allergy Organization postulates one per every ten million.[22] Once individuals are aware that they have an immediate reaction to bee stings, they should be certain to guard against future stings by having a plan to use an adrenaline auto-injector (epi pen) in the event that an insect does sting them in the future.[23]

(Local governments will be called upon to address issues of nuisance in terms of regulating beekeeping while the issues of importing and exporting different types of bees and tracking bee borne diseases will most likely be left to the state and federal governments putting the characteristics of bees relevant to that type of regulation outside the scope of this article).

The legal intersection between beekeeping and neighbors seeking to enjoy their respective property rights and local government regulation has a long history. Over one hundred years ago, Arkadelphia, a city in Arkansas, sought to address the issue by prohibiting beekeeping as a nuisance. After being challenged, the city lost when the court concluded that beekeeping cannot be regulated as a nuisance:

> Neither the keeping, owning or raising of bees is, in itself, a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city. It is, therefore, too broad, and is invalid.[24]

However, in 1938, a California court concluded that the City of Los Angeles' regulation of beekeeping, including a prohibition in some areas of the city but not others, survived constitutional challenge:

> The Hadacheck decisions, above cited, sufficiently demonstrate that the facts appearing herein justify the ordinance prohibiting beekeeping within the city except in the designated areas, and that the ordinance is not unconstitutional for any reason. (See, also, Brown v. City of Los Angeles, 183 Cal. 783 [192 Pac. 716]; Reiman v. Little Rock, 237 U.S. 171, 176 [35 Sup. Ct. 511, 59 L. Ed. 900].) [25]

In the same year that the Arkansas court decided the Arkadelphia case concluding that beekeeping cannot be legislatively defined as a nuisance, a New York court confirmed an injunction issued against a beekeeper in a case where a jury found beekeeping to be a nuisance.[26] Close to 70 years later, a Pennsylvania court concluded that beekeeping is not a nuisance per se and denied an injunction that the township sought:

> The keeping of bees in a residential neighborhood is not a nuisance *per se* and the strong arm of the chancellor should not be exerted to eliminate a legitimate business or occupation unless compelling reasons require it, that is, that the injury caused is real and substantial: [cited cases omitted.][27]

These cases illustrate the varying approaches to regulation, geographical and temporal development of judicial philosophy and the continuing likelihood for neighborly (or not) interaction between beekeepers and adjacent property owners. As time has passed, the development of zoning laws and a greater tendency to support governmental police powers no doubt have allowed many communities to regulate beekeeping in various ways that may be at odds with these cases from the distant past. What follows are some examples of different regulatory approaches to beekeeping.

Part II: Municipal Approaches to Beekeeping

Cities and counties have adopted a variety of different approaches to the question of how to manage the presence of beekeepers and their hives within their communities. While this article cannot begin to encompass the entirety of approaches within the approximately 20,000 municipal governments in the country,[28] the following examples provide illustrations of the different general approaches that municipalities may elect to take in the regulation of beekeeping.[29] These include a prohibition on beekeeping, requiring permission of neighbors to be able to keep bees, state preemption of municipal regulation of bees, and a robust regulatory scheme at the city and county government level.

Outright Ban on Beekeeping: Melbourne, Florida

The city of Melbourne, Florida is located on the eastern central coast of the Florida



Helen Clemens is a recent graduate of the George Washington University Law School, where she served as SBA President and was an Associate of the George Washington University Law Review. She has gained legal experience serving as a law clerk for the National District Attorneys Association, the Senate Judiciary Committee, and the Office of the Attorney General of the Commonwealth of Virginia. Prior to attending law school, she received her M.Phil in International Peace Studies from Trinity College, Dublin and her B.A. in Political Science and Romance Languages from the University of Georgia.

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peninsula stretching across to a barrier island. About an hour away from the Kennedy Space Center,[30] Melbourne has a population of 76,354.[31] Melbourne also has an outright ban on beekeeping. The city code states, "It shall be unlawful for any person to operate an apiary or otherwise maintain bees within the city limits, except in an agricultural estate use (AEU) zoning district, or as may otherwise be provided in this article."[32] The exceptions, however, must be related to medical or educational purposes, rendering backyard beekeeping essentially illegal:

> **Sec. 10-53-Exceptions to section 10-52**
> (a) Nothing contained in section 10-52 shall prohibit the maintenance of one hive of bees under the following conditions:
> (1) Upon the premises of any public or private educational institution for use by students for educational purposes.
> (2) Upon such premises as may be required for medical research or scientific purposes.
> (3) Upon the premises of a building or residence, provided that the person seeking to maintain the hive upon the premises shall first make application for permit to maintain such hive. No application for permission to maintain such hive shall be granted unless the use for educational purposes is clearly established.
> (b) The use of bees for educational, medical or scientific purposes, as provided for herein, shall be permitted so long as no hazard or nuisance, public or private, is created.[33]

Thus, the backyard beekeeper, or a resident who is interested in helping the environment by maintaining a beehive has no options in Melbourne. This means the concerns of any individuals with allergies to bees, or neighbors who would prefer not to live near a beehive are almost fully met; should any individual try to keep bees without a scientific or educational permit, the neighbor need only report the instance to the city government, who will rule it illegal. But a prohibition on beekeeping does not necessarily equate to a lack of bees in a city, because feral honey bees require no license or permit to exist anywhere.

As backyard beekeepers can play an important role in helping the local ecosystem, a complete prohibition on the practice during this period of expansive colony collapse could be harmful.

Melbourne's approach does nothing to address the CCD problem. As backyard beekeepers can play an important role in helping the local ecosystem, a complete prohibition on the practice during this period of expansive colony collapse could be harmful. Obviously, each community must measure its regulatory mission by its residents' wishes and in Melbourne, at least so far, instead of balancing the interests of property owners the community has concluded it is best served by a complete ban.

Neighborhood Permission: Hillsboro, Oregon

The city of Hillsboro, Oregon, population 93,340[34] and located about a thirty- minute drive east[35] of the state's largest city, Portland, has adopted a more nuanced approach to the regulation of beekeeping within the municipal limits. The city code includes regulations for the maintenance of beekeeping equipment, total number of hives, and instructions as to where the beehive may be located on an individual's property. Most significantly, before a hive can be registered, any neighbors who live within 300 feet of the residence must be notified of the plan to have a colony near their homes.[36] With adequate medical certification of a bee sting allergy, at-risk individuals may request that hives be removed from a neighbor's property.[37]

The clarity and cohesiveness of this particular portion of the code merits a review of the language itself:

> **6.20.080 Bees**
> A. Keeping Bees. Bees may be kept in the city consistent with the following standards:
> 1. The keeper is in compliance with HMC 6.20.080(B);
> 2. Bee hives / colonies may only be kept on single family residential property;
> 3. No more than three bee hives / colonies may be kept;
> 4. Bee hives / colonies may not be kept when a person who has a medically certified allergy to the sting of bees resides within 300 feet of the hives / colonies and has submitted to the city medical documentation and a written request that the hives / colonies be removed;
> 5. Products generated, such as honey, may not be sold from a residential property;
> 6. Bees must be contained consistent with the following standards:
> a. All portions of the hives / colonies enclosure must be located behind the front building plane of the dwelling; and
> b. All portions of the hives / colonies must either be located a minimum of 10 feet from any property line unless there is no barrier, such as a fence or hedge, that is at least six feet in height on all relevant property lines, in which case a minimum of 15 feet applies.
> 7. Beekeeping equipment must be kept consistent with the following standards:
> a. All portions of the hives / colonies enclosure must be kept and maintained in a clean and sanitary condition at all times to prevent any condition which may be dangerous or detrimental to the health of the public or animals or constitute a nuisance; and
> b. Unused equipment may not be in the open or otherwise accessible to bees.
> B. Notification Process. Prior to keeping bees, a person must:
> 1. Prepare a notice stating intent to keep bees and the type of bee kept and mailing list, utilizing city approved templates;
> 2. Mail notice to adjacent property

owners within 300 feet of the site two weeks prior to commencing bee keeping; and
3. Submit a written declaration to the city of compliance with the notification requirements in HMC 6.20.080(B)(1) and (2).[38]

These regulations have several important implications. First, because a neighbor with a bee allergy can seek relief from the government to avoid living in proximity to beehives, the concerns of those with allergies are entirely met.[39] The notice process is quite clearly stipulated on the city's website; a copy of a form letter that the prospective beekeeper must send out states specifically: "[I am] considering keeping bees on this property. This notice is to allow person(s) with a medically certified allergy the opportunity to submit a written request that hives not be located on this site."[40] This letter, sent with an attachment listing the full text of Hillsboro's code regulating bees leaves no ambiguity. In order to have a beehive on one's property, the individual must alert neighbors to their right to have that action stopped or prevented.

Additionally, the beekeeper does not have full flexibility to use any portion of a property to keep bees: hives must be situated 10-15 feet away from any property lines. This limits a beekeeper's ability make best use of the landscape or situate the bees in the best manner possible. Furthermore, this will do little to contain the bees to the beekeeper's property, as bees will fly as far as four miles away from their hives in the search for nectar.[41]

Examining these regulations from the perspective of the benefits that bees bring to the environment, Hillsboro beekeepers may legally keep bees and help to promote their presence in Oregon, but these interests may be trumped by those of an individual with a bee sting allergy. Furthermore, the restrictions on where a beehive may be placed within a yard may make beekeeping impossible based on the size of the yard and its relation to the home on the property.

State Control: Savannah, Georgia

Savannah, Georgia is a coastal city in the Deep South, with a population of 142,772.[42] A beekeeper in Savannah does not need to apply for registration or be subject to any regulation by the city's government. The State of Georgia preempted local control over beekeeping:

> No county, municipal corporation, consolidated government, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation, or resolution prohibiting, impeding, or restricting the establishment or maintenance of honeybees in hives. This Code section shall not be construed to restrict the zoning authority of county or municipal governments.[43]

Thus, local governments in Georgia cannot address the concerns of their residents about beekeeping.[44]

Although Georgia preempts local regulation, it allows local governments to impose zoning regulations that can help to alleviate nuisance and on one occasion proved problematic for beekeepers. Specifically, the code states, "*This Code section shall not be construed to restrict the zoning authority of county or municipal governments* (emphasis added)." emphasis added[45] This proved problematic for Nicholas Weaver, a hobby beekeeper from the age of 13, residing in Forsyth County.[46] After a decade of backyard beekeeping, with a total of six hives on his own and neighbors' properties, Weaver received a notice from the Forsyth County government stating that he had to remove his bees.[47] Absent any zoning regulations for beekeeping, the county had determined that the bees were livestock,[48] and that Weaver's residence was not zoned for that use. Ultimately the problem was resolved when Weaver worked with the local authorities and was granted a reprieve;[49] yet this illustrates that even when the state law directly preempts local governments from prohibiting bees, a neighbor's complaint (which triggered Forsyth County's response),[50] can still cause some problems for beekeepers.

Permission with Explicit and Nuanced Requirements: Baton Rouge, Louisiana

Baton Rouge, Louisiana, has a population of 229,169.[51] The Baton Rouge Municipal Code includes a variety of incredibly nuanced requirements for backyard beekeepers, based on the state's Model Beekeeping Ordinance for Louisiana Local and Municipal Governments.[52] These provisions on beekeeping, (§§ 6:660- 6:671 of the Baton Rouge Municipal Code) are too lengthy to reproduce here, but include the following regulations: annual registration of all honeybee hives with the Louisiana Department of Agriculture and Forestry;[53] stipulations on what kind of hive beekeepers may use (Langstroth[54] hives);[55] requirements for where the colony may be located on the beekeeper's property (at least 25 feet from the property line);[56] requirements for the creation of a fence or barrier to deflect the bee line;[57] provision of water for the colony;[58] limits to the number of hives that may be on a property based on its size;[59] requirements for signage near the apiary[60] and procedures for non-compliance with the section.[61] Notably, the Baton Rouge Municipal Code does not require notification of neighbors nor does it provide protections for nearby residents with bee sting allergies. Baton Rouge may not include each regulation that other cities have employed, but it demonstrates how a city can provide instruction for beekeepers on how they must conduct their activities.

Other local governments include regulations that address the species of bees that a beekeeper may keep within a municipality[62] and the requirement of a firebreak[63] to address the beekeepers' use of smokers to calm the bees prior to working the hives.[64] While other regulatory features may exist, those discussed in this article highlight regulatory trends and patterns that different municipalities around the country take regarding bees.

Part III: Best Practices for Municipal Regulation of Beekeeping.

After reviewing the practice of bee keeping and how local governments have addressed the issue, this article proposes that in order to best capture the needs of the beekeeper and the community, the following measures should be incorporated into municipal regulations for beekeeping. As the individual needs of each community may require specific tailoring, these are presented as

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principles for best practices. As an initial point, all should adopt measures addressing beekeeping rather than prohibiting it, especially as the popularity of this activity rises; this will help to avoid any gray areas and unnecessary, costly litigation surrounding beekeeping.[65]

1. Legalize Beekeeping.
Little rationality exists in a complete prohibition on beekeeping. Wild honey bees will exist, roam and pollinate in communities despite regulations to prohibit either commercial or hobby bee keeping. Although legalizing beekeeping may make bees more commonplace, the option of prohibition provides only a false sense of security since there is no safe way to completely eradicate the presence of bees. Beekeeping provides many benefits for the environment and local community; if it is not encouraged, it should at least be permitted. Beekeeping can be conducted safely even in the densest of municipalities such as New York City, and laws that prohibit beekeeping ought to be changed to provide a reasonable regulatory environment for the activity.

2. Municipalities should require the registration of beehives with the local government, and make this list available to citizens upon request (in addition to any state registration requirements).
Although bees exist in the wild and cannot be eradicated, both the government and public benefit from knowing where bees are kept. This serves several purposes. First, any individual who suffers from a bee allergy, or has a child who does, clearly benefits from information as to where a bee colony or small apiary exists. This improves the goals inherent in the system enacted by Hillsboro, Oregon, because it looks not only at the immediate area surrounding the residence of someone with a bee sting allergy, but instead at a neighborhood or city as a whole. Children especially are wont to play outside well beyond an arbitrary setback such as the 300 foot radius of their home. Parents can better focus on the areas in which they may instruct their young children to avoid, and may be certain to have Epi pens available at locations at which their kids regularly play that are near beehives (for instance, at a friend's home). For those adults that are affected with an allergy, by noting which properties contain beehives, they can conduct their activities to avoid these locations. Ideally, if the resident is concerned about new hives, the municipality could set up a notification list, such that individuals may request to be informed of any new colony registrations and installations. If a municipality keeps this kind of registry, individuals bear the burden of responsibility for informing themselves about where bee colonies exist, instead of placing an unreasonable burden or prohibition on the beekeeper.

Not only does this system better serve the needs of those with bee sting allergies, it protects the rights of individuals who would like to keep bees on their property. The Hillsboro code provisions that allow individuals with a bee allergy to prevent their neighbors from keeping bees poses a high burden without a clear indication that the measure provides sufficient protection to the allergic individuals. Notably, a feral bee colony may occupy a tree, stump or log—all without the property owners' or the neighbors' knowledge. Those with allergies to bee stings must be alert regardless of whether they live close to a bee keeper's hive or a feral hive, but only the bee keeper's hive will be regulated based on the neighbors' concerns.

Furthermore, though most inspection of beehives relating to disease occurs by a state agency, with the diseases and parasites that plague the American honey bee, it would be helpful to require beekeepers to notify other beekeepers nearby if their hives have been affected by any of these problems through a locally required notification system. A locally maintained register of all bee colonies would help with this goal, and generally to make the beekeeping community aware of all other beekeepers in their vicinity. As some states, like Georgia, do not require registration of bee colonies if they are not commercial entities, this also provides a localized list that is useful outside of traditional state purposes.

3. Avoid stipulations regarding setbacks; make them available to neighbors as a right only on demonstration of need.
A beekeeper should be able to situate a beehive on the beekeeper's property in the area that is best suited for the colony; the mandate that there be a setback rests on a presumption that the beehive is an inherent nuisance to neighbors and that separation from the property line provides some protection. In fact, a prudent beekeeper will not want to keep a hive near a property line that borders a nosy dog, or that allows people to easily interfere with the hive and the bees' activities. And, depending on the set up of a yard, a location close to the property line may be the safest place for the bees to be maintained. However, if a neighbor is able to demonstrate a compelling reason to move or relocate a hive, the local government should be able to impose a setback requirement based on the specific facts including the lot size, location within the neighborhood, bee line and other localized concerns.

While neighbors ideally should be able to work together without municipal intervention, if that cooperation fails, neighbors ought to be able to request a setback based on individualized concerns and specific facts. By requiring individualized and specific facts to govern the decision, the law will not create an unintended prohibition on beekeeping by making it impossible to locate a hive on a small property without much yard space.

4. Enact a Flyway Requirement.
As mentioned above, a particular feature of bees is their "bee line" to and from the hive. This phenomenon is something around which municipalities should provide some regulatory framework, as it poses the most likely reason that regular human-bee interaction can be negative. If the bee line from the entrance of the hive to the flowering plants nearby is situated so that the public or neighbors may regularly interrupt this flight path, the location is not ideal (both for the beekeeper and the people walking between these spaces).

By requiring the beekeeper to have a flyway barrier, this will help to eliminate routine contact that would be out of the ordinary in a feral hive of bees. This can be flexible: a fence, shrubbery or other arrangement can prevent bees from establishing a flight pattern that causes this unnecessary contact. By putting the height requirement at about six

feet, this will eliminate most possibilities for a bee to encounter (and perhaps sting) a human. If the beekeeper can demonstrate that the flight pattern of the bees will cause insignificant public contact based on where the hive sits on their property, this should serve in place of satisfying the flyway requirement. Should a beekeeper violate this flexibility, substantial penalties and abatement orders can apply.

5. Regulations Regarding the Species of Bees.

A municipality should ban Africanized honey bees (especially if the state has not done so). These bees are more aggressive and their prohibition will help to alleviate the neighbors' concerns and provide an added protection against Africanized honey bees mating with the European varieties that occupy most of the United States.

Conclusion

Honey bees add much value to communities and municipalities should adopt an inclusive series of regulations to clarify the rights of beekeepers and their neighbors, following the principles described above. This is particularly important in light of the increased popularity of backyard beekeeping, urban agriculture and in response to Colony Collapse Disorder.

Notes

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2. *Id.* at 7.
3. Hives exceeded losses at this rate, but some of these were reasonably attributed to parasites (such as the Varroa Mite) or diseases (such as American foulbrood). CCD refers to those failures for which scientists have been unable to find a conclusive reason why an otherwise healthy hive has failed. *See id.*
4. CCD STEERING COMMITTEE OF AGRICULTURAL RESEARCH SERVICE (USDA), COLONY COLLAPSE DISORDER PROGRESS REPORT 7 (June 2009), *available at* http://www.ars.usda.gov/is/br/ccd/ccdprogressreport.pdf.
5. *See, e.g.,* Morgan Peck, *Who Killed All the Honeybees? We Did*, DISCOVERY, Oct. 2009, *available at* http://discovermagazine.com/2009/oct/19-who-killed-all-those-honeybees- we-did; Jenna Johnson, *Maryland Dog Sniffs Out Diseased Bee Colonies*, WASHINGTON POST, Mar. 5, 2009, *available at* http://www.washingtonpost.com/wp- dyn/content/article/2009/03/03/AR2009030304296.html; Aaron Hirsch, *Just let them be*, N.Y. TIMES, Feb. 9, 2009, *available at* http://www.nytimes.com/2009/01/29/opinion/29iht-.edhirsh.1.19782494.html?pagewanted=all&_r=0.
6. *See* Maria Boland, *The Importance of Honeybees*, MOTHER NATURE NETWORK, EARTH MATTERS (May 3, 2010, 1:23PM), http://www.mnn.com/earth-matters/animals/stories/the-importance-of-honeybees#ixzz3U62Odztw.
7. Haagen-Dazs and Burt's Bees are two such companies. *See, e.g.*, Honey Please Don't Go, www.haagendazs.us/Learn/HoneyBees/ (last visited Apr. 1, 2015); Press Release, Burts Bees, Burt's Bees Creates Wild For Bees®, (June 2012), *available at* http://demandware.edgesuite.net/aapa_prd/on/demandware.static/Sites-burtsbees-Site/Sites-burtsbees- Library/default/v1427895745932/news/Burt%27s%20Bees%20Creates%20Wild%20for %20Bees_June%202012.pdf.
8. Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246 § 7204(h)(2)(A)(i) (2008).
9. Allison Aubrey, *Healing Honey and the New Queen Bee(keepers)*, NPR (July 19, 2010, 5:30AM) http://www.npr.org/2010/07/19/128574280/healing-honey-and-the-new-queen-bee-keepers.
10. *See Silence of the Bees: How Can You Help The Bees*, NATURE, Mar. 9, 2011, http://www.pbs.org/wnet/nature/silence-of-the-bees-how-can-you-help-the-bees/36/.
11. *See, e.g.*, Mireya Navarro, *Bring on the Bees*, CITY ROOM BLOG, N.Y. TIMES (Mar. 16, 2010 12:16 PM), http://cityroom.blogs.nytimes.com/2010/03/16/bring-on-the-bees/ (New York City lifted ban on beekeeping in March 2010); Bryan Walsh, *Can Urban Beekeeping Stop the Beepocalypse?* Ecocentric Blog, Time (Feb. 13, 20\\14), http://science.time.com/2014/02/13/can-urban-beekeeping-stop-the-beep ocal ypse/ (noting that in February 2014 the Los Angeles City Council ordered a review of the ordinances that prohibited beekeeping in an effort to legalize the popular hobby).
12. E.C. Martin, *The Use of Bees For Crop Pollination*, *in* THE HIVE AND THE HONEY BEE 583 (1975).
13. *See generally* KIM FLOTTUM, THE BACKYARD BEEKEEPER: AN ABSOLUTE BEGINNER'S GUIDE TO KEEPING BEES IN YOUR YARD AND GARDEN (2010).
14. *See Seasonal Cycles of Activities in Colonies*, MID-ATLANTIC APICULTURE RESEARCH AND EXTENSION CONSORTIUM, https://agdev.anr.udel.edu/maarec/honey-bee-biology/seasonal-cycles-of-activities-in-colonies/ (last visited Apr. 10, 2015).
15. *FAQs*, INTERNATIONAL BEE RESEARCH ASSOCIATION, http://www.ibra.org.uk/categories/faq#FAQ_17 (last visited Apr. 10, 2015).
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17. *Id.*
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19. SMITHOSONIAN ENCYCLOPEDIA, *Killer Bees* http://www .si.edu/encyclopedia_si/nmnh/buginfo/killbee.htm_(last visited Apr. 10, 2015).
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> Beekeeping can be conducted safely even in the densest of municipalities such as New York City, and laws that prohibit beekeeping ought to be changed to provide a reasonable regulatory environment for the activity.

"Apps in the City": Regulating TNC's in NYC

By Matthew Daus and Phillip Hom, Windels, Marx, Lane and Mittendorf LLP, New York, NY



New York City (NYC) has always been a bellwether for for-hire transportation regulation approaches around the country. Based upon recent escapades by Uber, the situation in NYC is somewhat comparable to the Iowa caucus and New Hampshire primary in U.S. Presidential elections. The grass roots campaigning and media, political and lobbying approach taken by Uber has been highly effective in many ways. While many supporters welcome it, just as many critics find it reprehensible or unethical. "Is it democracy or a disruption of democracy?" – is the true question. Regardless of where one stands, all of these issues have created legal headaches for municipal and government lawyers caught in the middle of the legislative and litigation fracas involving smartphone transportation applications.

This disruption and the spate of legislative activity around the nation have created quite a learning curve for lawyers who typically have not delved into the arcane world of taxicab and for-hire vehicle regulation. On top of that, add some sleek and sexy "Apps in the City" that do not quite fit into the regulatory structure, and add a generation of Millennial riders (who are social media viewers dissatisfied with traditional taxicab service, loving instant transportation gratification), and you now have quite a few dinner and cocktail party conversations and debates.

Recent events in NYC and the unique way that NYC has handled regulating apps (through legislation, litigation and new administrative agency regulations), provides a wealth of experience and experimentation that government lawyers and policy-makers everywhere can learn from as they attempt to wade through these ongoing and evolving issues. This article will provide an overview of recent events in NYC and track-from the beginning of the app phenomenon up to the present day-how NYC has approached dealing with this issue from a policy, legislative and rulemaking standpoint, and will also provide some predictions of developments to come.

1. The Regulatory Paradigm – Apps Required to Fit Within the Regulatory Framework, With a Few Tweaks

Companies that use apps to connect riders to for-hire vehicles have created regulatory headaches for many municipalities across the United States and the world. These companies add to the confusion by stating that they are not transportation companies, but technology companies that merely connect riders with people willing to provide rides in their own vehicles. There have generally been three models for the regulation of these "transportation network companies" (TNCs). (1) in a very few cases, municipalities have required them to observe the same licensing, insurance and other regulatory requirements as other for-hire vehicles; (2) others have created special laws for TNCs; and (3) some have allowed them to operate unfettered.

New York City requires TNCs to be licensed or operate with licensed drivers, vehicles and businesses. It has a robust on-demand transportation system that includes several classes of for-hire vehicles: (1) taxicabs,[1] which are motor vehicles carrying passengers for hire in the city, designed to carry a maximum of five passengers and which are the only vehicles authorized to accept street hails in Manhattan's Central Business District and nearby airports; (2) liveries,[2] also known as community cars, that provide for-hire vehicle services to the public through prearrangement and mostly accept cash payments; (3) black cars[3] which generally serve corporate clients on a prearranged basis and are mostly paid by credit card or company account; and (4) luxury limousines,[4] which serve the public on a prearranged flat rate, time or mileage.[5] State law, in 2012, created a new class of Street Hail Liveries which are allowed to pick up street hails in certain areas outside of Manhattan's Central Business District and at the airports.

In 2013, the International Association of Transportation Regulators (IATR)

issued model regulations designed to help municipalities address the proliferation of smartphone dispatch applications.[6] The essence of these model regulations is that apps can either be licensed on an even playing field with other sub-modes, or must contract with or only conduct business with licensed for-hire ground transportation companies (as a dispatch software company would). The New York City Taxi and Limousine Commission (TLC) adopted the approach recommended by a peer-reviewed panel of regulators and the federal government as part of the IATR's App Committee recommendations, which were formulated and finalized after an extensive international public hearing and comment period.[7] The NYC TLC's approach, overall, has been more successful than that of most jurisdictions around the world.

An inconvenient truth for many of these smartphone app companies that are claiming they should not be required to obtain driver and business licenses, or otherwise fit within existing for-hire ground transportation regulations, is that NYC required just that, and they willingly complied. The NYC TLC approach included early clarity, subsequent rulemaking and, most importantly, the deterrent effect of a comparatively sizeable number of TLC inspectors or law enforcement officers. While the TLC has not settled every issue to the satisfaction of all stakeholders on smartphone transportation apps, it has taken a bold, firm and very different approach than many other jurisdictions and legislatures around the country.

There are some remaining issues in NYC to ensure that taxicabs and for-hire vehicles (which predominantly use apps like Uber) operate on a level playing field. For instance: taxicabs, black cars and limousines must pay sales taxes, while liveries do not; public transit surcharges (the Metropolitan Transportation Authority) are paid by taxicabs but not by for-hire vehicles; surge pricing (or demand pricing several times ordinary rates) can be applied by for-hire vehicles and not taxicabs; there is no cap or limit to the number of vehicles to be added to Uber's fleet, while taxicabs and green borough taxicabs are limited in number and supply; and wheelchair accessibility obligations apply more rigorously for taxicabs than for for-hire vehicles. Despite the foregoing inconsistencies and uneven playing field that has developed in NYC in many respects, the overall approach has produced more of an even playing field than most cities.

An inconvenient truth for many of these smartphone app companies that are claiming they should not be required to obtain driver and business licenses, or otherwise fit within existing for-hire ground transportation regulations, is that NYC required just that, and they willingly complied.

This article will describe the history of the TLC's regulatory approach and current or pending proposals, and compare New York City's treatment of smartphone apps to the posture adopted by other jurisdictions. While Uber and Lyft have been able to convince some jurisdictions that their operations warrant new regulations, the experience of New York City shows that a TNC can operate under existing regulations, if compelled to do so. As an example, Uber's entry into the New York City market caused the TLC to slightly tweak its rules to ensure that the TNC's vehicles are insured and the drivers safely licensed, like every other licensee. The TLC's approach, while not perfect, deserves the attention of regulators and municipal or government lawyers.

a. The Early Days - TLC Industry Notices, Enforcement and Clarification

On May 3, 2011, Uber announced its entry into the New York City market.[8] As in other jurisdictions, Uber's business model raised some issues and concerns about whether it was operating within the bounds of existing laws. In response to complaints that Uber was contacting for-hire vehicle owners and drivers directly, the TLC issued Industry Notices to clarify how smartphone applications should operate under the existing rules. TLC issued the first industry notice #11-15 on July 1, 2011.[9] In response to inquiries, TLC issued another more comprehensive Industry Notice #11-16 on July 18, 2011.[10] In addition to clarifying when a smartphone application would need a base station license, the Notice warned that bases using smartphone apps must ensure they do not violate laws governing TLC or TLC rules.[11] The TLC advised bases that because they are the licensed entity, they would be held accountable for the breach of any laws or rules. The notice also stated that a smartphone app that provides for-hire transportation directly and not through a base, is itself required to hold a TLC base license.

To ensure compliance, the TLC, when it becomes aware of a smartphone app that may be acting outside the rules, will request the app provider to submit: (1) a list of licensed bases that the smartphone app works with, including effective dates; (2) an attestation that it is not dispatching to any non-affiliated bases; and (3) copies of the agreements.[12] The TLC stated it will presume those smartphone apps that do not comply with its request are violating rules prohibiting unlicensed base stations.[13] The notice also stated the TLC may request trip sheet information from smartphone apps, and if it does not obtain such cooperation, it may decide to

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Matthew W. Daus is a Partner at Windels, Marx, Lane and Mittendorf, LLP in New York City, and Chairs the firm's Transportation practice. He is the former Commissioner/Chair & General Counsel of the NYC Taxi & Limousine Commission, serves as President of the International Association of Transportation Regulators (IATR), and is a Distinguished Lecturer for the United States Department of Transportation's research center for Region 2 (New York, New Jersey and Puerto Rico), at the City University of New York (City College).



Phillip Hom is Special Counsel to Windels, Marx LLP in New York City. He is former Counsel to the NYC Council Transportation Committee, and a former Deputy General Counsel to the NYC Comptroller.

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license smartphone apps directly.[14]

E-Hail Pilot Program for Yellow Taxicabs

While smartphone apps began to be used to dispatch for-hire vehicles, there were no provisions to allow them to hail taxicabs. NYC is the only regulator in the United States that reserves only for taxicabs the exclusive right to accept passenger street hails while prohibiting pre-arranged service in taxicabs (except for wheelchair accessible service). The TLC, citing customer demand, approved an e-hail pilot program for taxicabs in December 2012. The resolution approving the e-hail pilot was amended in February 2013[15] and provided, among other things, that:

- Taxi drivers participating in the e-hail pilot would be exempt from certain TLC rules;
- Participants would be required to enter into a memorandum of understanding with the TLC;
- The pilot would begin on the date the first participant's application is approved and would last for one year;
- Candidates would have to submit materials showing the e-hail app complied with technical standards; that it was tested by a qualified independent third party; and met TLC's security standards;
- E-hail apps would have certain blackout areas, such as airports;
- No information about the passenger, including destination, would be transmitted to the driver;
- No additional fees for use could be charged;
- The app would have to integrate with in-vehicle yellow taxicab credit card systems (the "T-PEP" or Taxicab Passenger Enhancement Program); and
- The Chair of the TLC would approve of the participants.

TLC approved Uber, Ridecharge (a/k/a formerly Taxi Magic, and now known as Curb), Mobile Knowledge Systems Inc. and Verifone, Inc. for the e-hail pilot program.[16] The TLC presented a final report on the findings of its e-hail program on January 28, 2015.[17] Among some of the findings of the final report were:

- There were an average of 7,947 e-hails per day (out of over a half million rides each day based on historical averages);
- E-hails accounted for .45% of all yellow cab pick-ups;
- 65.3% of all e-hailed trips took place outside of the central business district of Manhattan (only 6% of taxi pickups took place in these locations);
- The average farebox increased during the pilot;
- Passenger opinion on e-hail was split, with 25% reporting e-hail was more convenient, while 25% reported that street hails were more convenient and 35% reported convenience varied by trip;
- E-hail apps were evenly used by people between 20 and 34, 35 and 64, and 65 and older;
- Refusal complaints were at similar levels during the pilot; and
- Taxi drivers who participated in the e-hail pilot had a slightly lower rate of collisions (6.0% v. 8.4%).

Based upon findings during the pilot, the TLC decided to make e-hail of taxis and street hail liveries permanent, adopting rules that became effective on March 12, 2015.[18] These rules:

- Create requirements which must be met by drivers who use e-hail apps;
- Require drivers and owners to only use TLC licensed and approved apps;
- Require that the fare be determined by the taximeter;
- Prohibit any additional fees above the TLC-approved rates for an e-hail trip;
- Require integration with T-PEP and L-PEP systems (a similar credit card system for Street Hail livery borough (or green) cabs that operate outside Manhattan's central business district);
- Require app companies to be able to dispatch a wheelchair-accessible vehicle;
- Create licensing standards for e-hail app providers; and
- Create technical and security specifications for e-hail apps.

The result of the process described above is that in New York City, which has some of the strictest and most thorough for-hire vehicle regulations in the world, the TNCs such as Uber and Lyft are required to comply with the TLC's rules governing for-hire vehicle companies.

For-Hire Vehicle Cross-Dispatching Rules

In addition to these e-hail rules, the TLC had also adopted rules in November 2014 which originally prohibited cross-dispatching among classes of for-hire vehicle bases.[19] These rules would have banned black car bases, luxury limousine bases and livery bases from dispatching vehicles from a different class of base. The rationale for these rules was to ensure that Workers' Compensation coverage for drivers is always in effect. The rules also require a dispatching base to reveal the base affiliation of the vehicle it dispatched and to provide dispatch records to the TLC. The TLC amended this rule just two months later in February 2015[20] to allow cross- dispatching between black car bases and luxury limousines. Because most black car and limousine drivers are covered by the same state-mandated insurance fund, known as the New York Black Car Operator's Injury Compensation Fund,[21] the Workers' Compensation issue is not implicated. Companies like Uber benefit from these changes because drivers can be deployed even though affiliated with other bases. These new rules do create challenges for other bases whose drivers are no longer as available to serve the public during peak hours as if they are also working for Uber, they would likely prefer to benefit from surge pricing during peak times to enhance their revenue.

There is No Such Thing as a Transportation Network Company (TNC) in New York City

The result of the process described above is that in New York City, which has some of the strictest and most

thorough for-hire vehicle regulations in the world, the TNCs such as Uber and Lyft are required to comply with the TLC's rules governing for-hire vehicle companies. This has meant that Uber and Lyft have had to open licensed base stations to dispatch vehicles. This inconvenient truth rebuts the rhetoric of so-called TNCs that have sought the passage of special laws with less stringent insurance and background check/vetting requirements than for taxicabs and limousines. What is interesting is that elsewhere in New York State, lobbyists for Lyft are already mobilizing to try and pass a TNC-oriented law to possibly preempt the TLC's approach.[22]

To ensure that the public is protected, the TLC has extensive rules requiring all for-hire vehicles to have adequate insurance.[23] Taxis, liveries and black cars must have liability coverage of $100,000 per person, $300,000 per occurrence, and $200,000 in no-fault or personal injury protection coverage to cover medical expenses and lost earnings, et al.[24] Luxury limousines must have liability coverage for $500,000 per person, $1,000,000 per occurrence, and $200,000 in personal injury protection.[25] This coverage is required at all times (24 hours per day and 7 hours per week), and vehicle owners are required to notify the TLC of any changes in coverage.[26] App-based dispatch companies like Uber and Lyft must dispatch vehicles that maintain for-hire levels of insurance coverage in order to operate in New York City. This is not always required where jurisdictions have promulgated separate TNC laws with less insurance coverage on the primary level than for taxicabs and limousines providing the same exact for-hire service as TNCs.

In New York City, an inconvenient truth for Uber and Lyft is that their affiliated vehicles and drivers have the same insurance as all other taxicabs and for-hire vehicles, despite their efforts to pass different and less stringent regulations for themselves in other cities. However, their legislative agenda around the United States seeks at the same time to keep the higher insurance and other standards in place for taxicabs and limousines (but not for TNCs), creating an uneven and possibly anti-competitive regulatory environment. Basically, TNCs provide the same exact service as taxicabs and limousines with a smartphone application, by using limousines and unlicensed cars to charge the equivalent of taxi type fares on meters that are part of the app, even though taxicabs and many limousines are doing the same exact thing (including using apps themselves). In NYC, that is not the case – and the uneven playing field that exists in NYC is different and less severe.

Driver Background Checks and Drug Testing

All NYC for-hire vehicle drivers must undergo a vigorous criminal background check and pass a drug test.[27] Under the rules, all applicants for a for-hire vehicle license must take and pass a drug test administered by an entity approved by the TLC. If the applicant fails the test, the TLC will deny the applicant's license, which is a final agency decision. Applicants must also be fingerprinted for the purposes of checking the records of the New York State Division of Criminal Justice Services (DCJS). The applicant is required to pay $75[28] for the fingerprinting and, following a conviction for a criminal offense, may be subjected to a licensing fitness hearing to determine whether being licensed is appropriate after the application of New York State laws and standards.[29]

Fingerprint checks are conducted through an outsourced digital system and are administered by and through the TLC and other government entities. These fingerprint results are returned in a few days and the TLC is very quickly informed of all driver convictions. This storage component improves efficiency of fingerprint processing and saves drivers time by not requiring them to resubmit fingerprints.[30] Many other new TNC state laws require only that the TNC driver undergo a non-biometric company (non-governmental) administered criminal background check that is not as accurate as fingerprinting. This form of self-regulation is not the regulatory standard in NYC, where the TLC (and not the TNC) is required to take action and make decisions as to which applicants should be licensed, or whether current drivers should be removed from the road for potentially endangering the public.

The John Jay College of Criminal Justice's Masters of Public Administration Program released a report in May 2015, "One Standard for All: Criminal Background Checks for Taxicab, For-Hire, and Transportation Network Company ("TNC") Drivers"[31] that compared common TNC name-only background checks versus fingerprint-based biometric background checks. This report, examining nine jurisdictions, found that fingerprint-based background checks conducted by government regulatory agencies are more accurate than the name-based background checks used by TNC companies. The report also found that having a different set of background checks for TNCs than the standard for taxis and limousines is likely unconstitutional.[32]

Accessibility Requirements

The TLC requires its licensed for-hire vehicle base stations to provide equivalent accessible service, whether by using their own accessible vehicles or contracting with another base that has accessible vehicles.[33] "Equivalent service" under U.S. Department of Transportation regulations implementing the Americans with Disabilities Act (ADA), means that the service provided to people with disabilities must be equivalent in terms of response time, fares charged, hours and days of service, ability to accept reservations, restrictions based on trip purpose and other limitations on capacity or service ability. App-based dispatch companies are required to provide this equivalent accessible service. A recent study by the TLC found that 90% of livery and black car bases were unable to provide accessible service.[34]

Under a settlement, 50% of the taxicab fleet is to become accessible by 2020. The TLC has said it will be exploring ways to ensure the other for-hire vehicle sectors can do their share to provide accessible service, which include a new mandate (discussed herein) for apps to comply with "equivalent service" requirements. Also, the legislation creating street hail liveries requires 20% of the 18,000 permits to be issued to accessible vehicles. How these other sectors provide accessible service is critical because Uber and Lyft,[35]

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Into Uncharted Airspace: Here Come the Drones

By Erich Eiselt, IMLA Assistant General Counsel



In some respects, municipal lawyering bears a similarity to parenting a middle-schooler. Without much of an operating manual, local government attorneys are challenged by constant societal change which cannot be ignored or circumvented. To be sure, other species of legal practice--ERISA, estate planning, bankruptcy, mergers and acquisitions--undergo change, but not with the velocity and constancy of the leading-edge, disruptive, and completely interesting issues continually confronting the local government law practitioner.

So it is that *Municipal Lawyer*, having recently looked into urban chickens, marijuana, fracking, e-cigarettes, social media, Uber, gay marriage, police body camera's, Airbnb and a stable of other emergent subjects, now explores the brave new world of unmanned aerial vehicles (UAV's), also called unmanned aerial systems (UAS's) and best known as "drones."

The story of UAV's is yet another instance of technology outpacing regulation. The law--whether federal, state or local--is scarcely prepared for the coming onslaught as police, hobbyists, realtors, videographers, naturalists, engineers, farmers and others prepare to send thousands of camera-bearing, hardly-detectible devices hovering through the air.

Species of drones: Unlike the massive winged avatars deployed in military service which ply the stratosphere bristling with top-secret navigation, reconnaissance mechanisms and lethal weaponry, the drones that municipalities will likely encounter are much less the stuff of rocket science. Some are simple "model airplanes" but most consist of an array of propellers mounted on a geometric frame. Commercially available UAV's can weigh as little as one pound and cost less than $30. If outfitted with three rotors, they are called "tricopters;" with four rotors (the most common species) they are "quadcopters." More powerful are six-rotored "hexacopters," and when still more lift is needed, an "octocopter" arrayed with eight propellers may be the ticket. As with many of today's gadgets, battery life is an issue—even UAV's priced well into the thousands of dollars are limited to less than 30 minutes of flight time.[1]

Video capability is enabled by a menu of photographic technologies ranging from elementary cameras to middle-tier GoPro products to sophisticated, super high-acuity offerings from Sony and the like. (To some enthusiasts, the camera makes the drone: without video capability, the device is just a remote-controlled toy). Aerobatic control and range is governed by software, microprocessors and transducers, and varies widely.

The lightest, lowest-end UAV models are relatively unsophisticated, being limited to a range of 200 feet or less from the controller. These hobbyist devices are readily available from familiar sources including Amazon (Costco appears to have discontinued the sale of UAV's). But a quick perusal into the cyber-marketplace reveals a much more robust catalogue of drone choices, offering a broad spectrum of power systems, operational agility, flight distance and video resolution. One such vendor, the inventively-named "UAVdronesforsale.com" lists dozens of products. For example, the "Black Ops Tricopter" is offered by a Tokyo-based company and sells for $150. Constructed of high-impact plastic and featuring carbon-fiber propellers, it weighs less than two pounds. It is described as "An advanced UAS/ Drone / Multicopter platform for FPV Aerial Filming day or night design from the ground up for everyone."[2]

Amazon's drone offerings include the "DJI Phantom 3 Professional Quadcopter Drone with 4K UHD Video Camera" available for under $1300. Manufactured by China's DJI, a leader in the industry, the Phantom 3 features a "UHD video recording with fully stabilized 3-axis gimbal," allowing "live viewing of 720p video (full resolution video is simultaneously recorded on the internal microSD card)." Would-be purchasers are reminded by Amazon of the FAA requirement that "Flying this product is restricted within 15 miles radius (sic) of the White House."[3]

Other commercially-available products are exponentially more capable, weighing up to 55 pounds and priced at $25,000 or more. These high-end UAV's can carry substantial payloads, execute deft maneuvers, produce highly detailed camera feeds and be controlled over great distances. The Penguin B, a 49-pound, single propeller, airplane-shaped drone manufactured by UAV Factory USA LLC of Irvington, New York (with a subsidiary in Latvia), recently set a record for flying more than 54 consecutive hours. It can haul a payload of nearly nine pounds in addition to fuel. This spring, the company demonstrated

its controller functionality by piloting a Penguin at a European UAV conference—from 5,000 miles away.[4]

Who flies drones: The broad spectrum of drone capabilities will attract--and in fact necessitate--a spectrum of operators. At the low-end, hobbyists with little training may be able to pilot inexpensive UAV's over local playgrounds. But where the flying machines cost many thousands of dollars and are deployed in difficult, long-distance missions for governmental or commercial customers, formally trained and certified professionals will be required, not only for their skills but because FAA rules demand it. The incipient drone tsunami will accelerate the growth of institutions such as California-based "Drone Universities" which offers a wide menu of UAV training and certifications, stating on its website that the average drone pilot salary is "$50,000 to $60,000" and that top earners "can make $160,000".[5]

A massive industry: The tri-, quad-, hexa-, octo- and other species of unmanned aircraft and their associated training enterprises add up to a massive and rapidly accelerating commercial juggernaut. Not surprisingly, the industry is already far ahead of the game, with advocacy organizations such as the Association of Unmanned Vehicle Systems International (AUVSI)[6] lobbying on Capitol Hill and at statehouses across the country for minimal restrictions on access to the air. AUVSI has projected that over the next decade, the drone business in aggregate will produce some 100,000 jobs in the US, generating over $80 billion.[7] Other market surveys point to similarly meteoric expansion of the US drone economy.[8]

Pro's and con's: Growth will not be without controversy. On one hand, enthusiasts and industry groups point to the many beneficial uses to which commercially available UAV's can conceivably be put, including locating missing or injured persons in far-away, inhospitable terrain; checking on crops; rushing medical supplies to front-line responders; inspecting or assessing damage to buildings, cell towers, pipelines and other infrastructure; filming movies, sports and newsworthy events; cataloging the spread of wildfires; tracking at-risk game and wildlife; and so on. Even Amazon hopes to reduce its next-day delivery proposition to a mere 30 minutes from distribution centers using drones that can fly up to 10 miles at below 500 feet of altitude for a new Amazon "Prime Air" service.[9]

In some cases these purposes are already being served. For some time, AeroVironment Inc. has been operating its "Puma" drone to monitor oil pipelines, infrastructure, roads and wildlife across hundreds of lonely miles in the Arctic, with full authorization from the Federal Aviation Administration (FAA).[10] Closer to home, on July 17, 2015 the first FAA-sanctioned commercial drone delivery of medicine took place without a hitch, ferrying 24 packages from the Wise County, Virginia airport to local fairgrounds where a pop-up medical facility serves the economically-stricken coal region one weekend per year.[11]

On the other hand, risks of unregulated drone use are obvious. The public and law enforcement alike worry about safety and privacy when propeller-hoisted cameras and payloads can fly indiscriminately through the air, potentially colliding with power lines, interfering with other aircraft, or falling on—or looking into—space previously considered private. These concerns are aggravated by incidents such as the saga of the diminutive UAV which recently traversed the Washington DC secret service security perimeter at 1600 Pennsylvania Avenue NW, undetected in the darkness until it crashed on the White House lawn less than a football field away from the President of the United States.

Unseen drones are hardly the biggest problem. Last month, several unauthorized hobbyist UAV's were observed in airspace above a line of blazing semi-trailers and auto's which had been ignited by a massive wildfire that engulfed portions of California's I-5. The rogue drones hindered firefighting helicopters attempting to subdue the inferno.[12] (That incident sparked a proposal by California legislators that police and first responders be permitted to jam and disable drones that are interfering in rescue operations, without incurring liability to the UAV's owners.)[13] Only days later, national news outlets reported on a Connecticut teenager's video showing a drone equipped with a handgun, clearly firing via remote control as it flew above private property.[14]

More likely for the rest of us perhaps is the experience of a suburban Virginia man who heard a whirring sound and looked skyward in time to witness an out-of-control drone smash against the upper level of his split-level home in broad daylight and spiral to the ground nearby—whereupon he confiscated the runaway device, setting off a legal demand from the owner that it be returned. (No charges were filed because Virginia does not yet regulate the use of private drones).[15]

The coming drone-driven challenges to government lawyers are manifest, at every level.

Federal Authority: Is a "drone" an "aircraft"? The boundaries of most drone regulation at the state and local level will be largely determined by the FAA. It has repeatedly asserted its preemptive authority over UAV's, with particular scrutiny of for-profit drone activities. Sometimes this has resembled the proverbial atomic bomb where a flyswatter would presumably suffice—if in fact any action was warranted.

A case in point arose in January 2014. Hoping to cash in on the spike in beer consumption during Superbowl season, tiny Minnesota-based Lakemaid craft brewery let fly an innovative television ad campaign. The spot featured an octocopter as it deftly lifted a 12-bottle carton of Lakemaid's "Frosty Winter Lager" prominently displaying the company's mermaid logo, whisked the cargo in a straight line above a frozen lake to a specific ice fishing hut, and placed its alcoholic payload at the doorway for the lucky anglers waiting within. The advertisement was a sensation and immediately took its place among "Best Beer Commercials Ever" in YouTube parlance.[16] Presumably Lakemaid beer sales surged and the mermaid gained in popularity.

But one viewer--the FAA--was singularly unimpressed. Even though no one was injured and no property damaged, the agency straightaway notified Lakemaid that its drone activities were illegal and ordered the brewer to cease any further beer flights. The company complied.

Lakemaid was but one of 13 different entities that received cease and desist orders from the FAA over the past three years for what might have seemed to be innocuous commercial uses of small

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SECOND LOOK

The Secret Bankruptcy Code

by Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Every state has a secret bankruptcy code. I do not mean insolvency and receivership laws that some states still have on the books. *See, e.g.*, Title 39, Penn. Statutes (Insolvency and Assignments). The federal Bankruptcy Code (mainly codified in title 11 and parts of title 18 and 28, U.S. Code) does not generally preempt or invalidate these state insolvency proceedings laws. *See Ready Fixtures Co. v. Stevens Cabinets*, 488 F. Supp. 2d 787 (W.D. Wis. 2007); *but see, Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir.2005) (contra)[1]. These state insolvency laws are not "secret," though they are rarely used because they probably provide no protection or other benefits for debtors outside the state, *see King v. Cross*, 175 U.S. 396, 407 (1899), and the state law insolvency cases must immediately halt upon commencement of a federal bankruptcy filing involving the same debtor or property. *See In Re McElwain*, 296 F. 112 (3d Cir.1924) (Pennsylvania state insolvency proceeding "superseded" once federal bankruptcy proceeding commenced).[2]

Instead, the "secret bankruptcy code" arises from provisions of the U.S. Bankruptcy Code that expressly or implicitly vest authority in state courts to decide issues arising under the federal bankruptcy code. Some examples are the applicability and scope of the automatic stay under 11 U.S.C. § 362; *see, e.g.*, *Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1377 [52 Cal. Rptr.2d 417, 421]; whether an individual debtor's bankruptcy discharge applies to a certain debt, 11 U.S.C. § 523[3], *see, e.g.*, *Foley, Inc. v. Fevco, Inc.*, 379 N.J. Super. 574, 586 (App. Div. 2005); whether a bankruptcy trustee effectively abandoned property in accordance with 11 U.S.C. § 554, *Powers v. Dankof*, 2011-Ohio-6180, ¶ 8 (Oh. App., 2d Dist. 2011); *Bailey v. Barnhart Interest, Inc.*, 287 S.W.3d 906, 910 (Tex. App.—Houston [14th Dist.] 2009, no pet.); and who owns property outside the bankruptcy after abandonment by a bankruptcy trustee, *see Green v. McKay*, 376 S.W.3d 891, 895 (Tex. App.—Dallas 2012, pet. denied), *further proceedings, Green v. City of Dallas*, 05-13-01037-CV, 2014 WL 3587464, at *2 (Tex. App.—Dallas July 21, 2014, pet. denied)(not officially published); the meaning and effect of terms in a confirmed plan of reorganization, *see Smith v. Oliver Heights, LLC*, 389, 311 P.3d 1139, 1143 (Kan. App. 2013); and whether a government has impermissibly discriminated against a former debtor as to a license, permit, charter, franchise, or other similar grant, or employment contrary to 11 U.S.C. § 525(a). *See, e.g.*, *Keene v. Bd. of Accountancy*, 894 P.2d 582, 588 (Wa. App., Div. 2, 1995).

On paper, this state law authority sometimes may be concurrent with federal court jurisdiction, but as a practical matter, with the major exception of automatic stay issues, state court authority often becomes exclusive because a bankruptcy court may not get an opportunity to review or revisit the state court decision. This is particularly likely where the bankruptcy case is already over when the bankruptcy issue is first litigated. As one court analyzed the sometimes overlapping state-federal jurisdictions in the context of determining the scope of a bankruptcy discharge:

> When deciding between a state court determination and a bankruptcy court determination of whether a debt is discharged . . . deference should be given to the bankruptcy court's ruling if it was made prior to the state court ruling. However, if the state court had jurisdiction and ruled first, it does not follow that the bankruptcy court can later determine that same question. . . .
>
> Bankruptcy courts do have exclusive jurisdiction to determine dischargeability of claims under § 523(a)(2), (4), and (6). These subsections of § 523(a) refer to claims generated by fraud, defalcation of a fiduciary, and willful and malicious conduct, respectively. But state courts have concurrent jurisdiction to determine all other types of nondischargeability matters under § 523. And state courts have concurrent jurisdiction to determine whether the general discharge of the Code applies to a particular debt, as in this case.

In re Beardslee, 209 B.R. 1004, 1009 (Bankr. D. Kan. 1997)(citation and footnote omitted); *see also*, *Rogers v. McGahee*, 602 S.E.2d 582, 585 (Ga. 2004).[4]

However, especially for automatic stay issues, state judges sometimes lack the courage and confidence to decide sometimes arcane bankruptcy issues, particularly if they are unsure of their jurisdiction. Therefore we often see state trial judges abate proceedings pending a bankruptcy court ruling on the applicability of the automatic stay, even in cases that clearly qualify for an exception to the automatic stay, such as building code enforcement or even criminal prosecution. *See* 11 U.S.C. § 362(b)(4) (police power exception to certain provisions of the automatic stay except for enforcement of money judgment). State judges need to be educated on their authority to press ahead in such cases.

Here is how the "secret bankruptcy code" is created: State court decisions that construe and apply federal Bankruptcy Code provisions can lawfully and validly differ from the bankruptcy law established by the decisions of federal bankruptcy, district, and circuit courts that exercise their federal jurisdiction over the territory where the state court exercises state court jurisdiction.[4] State courts are bound to obey and apply federal law as pronounced by the U.S. Supreme Court; but while state courts often will consult their local federal courts for construction of federal law, the state courts are not bound under *stare decisis* or the Supremacy Clause by lower federal

court decisions. *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring)[5]; *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 47 (1st Cir. 2012). Thus, on bankruptcy law issues that the U.S. Supreme Court has not decided, state courts are free to construe Bankruptcy Code terms without regard to any federal court precedent.

We are starting to see state court cases refusing to give res judicata effect to bankruptcy court judgments in non-core cases, relying on U.S. Supreme Court limits on bankruptcy court power to issue final judgments on non-core claims. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. DiMucci*, 2015 IL App (1st) 122725, ¶ 46.

Every so often, we even see examples of state court bankruptcy law decisions that, perhaps inadvertently but maybe intentionally, do not follow the relevant bankruptcy law prevailing within the associated federal circuit. For example: The Fifth Circuit rule is that actions in violation of the automatic stay are merely voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989). However, although Texas is within the Fifth Circuit, a Texas court of appeals has held that automatic stay violations are void, citing the U.S. Supreme Court and Texas Supreme Court precedents but not the Fifth Circuit *Sikes* decision. *Paine v. Sealy*, 956 S.W.2d 803, 805 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

Here is a fun third-year law school federal courts class final exam question: If a federal bankruptcy issue as to which state courts would have had subject-matter jurisdiction arises in a federal diversity case [***not a federal bankruptcy case***[6]], should the federal court apply state or circuit precedent in deciding that issue? The theoretical answer will not be important if the two jurisdictions agree on the issue, or if the U.S. Supreme Court has ruled on the issue. But what if one or the other jurisdiction's courts have been silent on the point? Or, more fundamentally, what if the U.S. Supreme Court has not ruled, and the state supreme court has held differently than the local U.S. court of appeals on the bankruptcy issue? I suspect the federal court would follow federal circuit precedent if there were any, whether or not theoretically correct. Now the real tough alternative, what if neither the U.S. Supreme Court nor the local federal court of appeals had ever reached the bankruptcy law issue but the state supreme court had done so? Would the federal district court sitting in diversity consult federal court decisions in other federal circuits and districts before looking to state court decisions? Note that I characterized the "question" as "fun." I said nothing about whether I would enjoy trying to find the answer. And I will not, at least for now. But if anyone else feels the urge to research this point – or has a summer intern with time on their hands – please do tell me how you resolved these questions. My speculation is that the federal judge will give scant attention to how state courts construe federal bankruptcy law. But I may be wrong, and regardless this may present a neat appellate issue if properly preserved.

I have thought intermittently about the "secret bankruptcy code" for several years – mainly because it much more fun to say than such expressions as "*Rooker-Feldman* Doctrine." But also because I think that under the right circumstances a practitioner in state court can urge state court precedent for bankruptcy law issues when faced with adverse local federal case law. Also, "secret bankruptcy code" considerations might influence choice of forum when a practitioner has the ability to elect between state and federal court. However, in order to be able to make an informed forum choice, the lawyer must research the local state and federal bankruptcy case law issues either before commencement of litigation or at a very early litigation stage.

Notes

1. *Ready Fixtures* declines to follow and, in my view, convincingly refutes *Sherwood Partners*' holding that federal preference laws preempt California's. Of course some specific federal statutory provisions can preempt specific state law provisions. *Ready Fixtures* presents the unusual situation of a state law insolvency proceedings being tried as a diversity case in federal district court, so that the federal court is applying Wisconsin substantive insolvency law per Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

2. Question, whether a trustee in a federal bankruptcy case can use state insolvency avoidance laws to extend the 90-day reach-back for U.S. Bankruptcy Code chapter 5 avoidance powers. *See, e.g.,* 11 U.S.C. § 547(b)(4)(A) (90-day reach-back period for avoiding preferential transfers not benefiting insiders). One federal district court rejected the attempt to piggy-back on a state insolvency law's longer reach-back period, but in that instance the debtor had not previously commenced a state insolvency proceeding. In re Copter, Inc., 28 B.R. 665, 668 (E.D. Pa. 1983) *aff'd sub nom.* Copter, Inc. v. Gladwin Leasing, Inc., 725 F.2d 37 (3d Cir. 1984). But what if there had been a prior state law proceeding in progress when the federal bankruptcy case was filed, either by the debtor or by creditors?

3. For example, the discharge would not apply to certain debts that the debtor had failed to schedule in his or her bankruptcy case. 11 U.S.C. § 523(a)(3).

4. Of course state courts should give *res judicata* effect to final and non-appealable judgments binding the same parties or those in privity with that that were rendered in prior bankruptcy proceedings. *See* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 138 (2009).

5. As Justice Thomas stated in *Lockhart*, 506 U.S. at 376:

> The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. *See Steffel v. Thompson*, 415 U.S. 452, 482, n. 3 (1974) (Rehnquist, J., concurring); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075–1076 (CA7 1970), *cert. denied*, 402 U.S. 983 (1971); Shapiro, State Courts and Federal Declaratory Judgments, 74 Nw.U.L.Rev. 759, 771, 774 (1979). An Arkansas trial court is bound by this Court's (and by the Arkansas Supreme Court's and Arkansas Court of Appeals') interpretation of federal law, but if it follows the Eighth Circuit's interpretation of federal law, it does so only because it chooses to and not because it must (parallel citations deleted).

6. Whether and when a federal bankruptcy court should follow state choice of law principles has been debated for decades, *see* Michael Steven Green, *The Twin Aims Of Erie*, 88 Notre Dame L. Rev. 1865 (2013); John T. Cross, *State Choice Of Law Rules In Bankruptcy*, 42 Okla. L. Rev. 531 (1989), but that is not my issue. My hypothetical is also distinct from the situation where a federal court sits in diversity over a removed state insolvency proceeding, mentioned above in n.1 and accompanying text. ML



National Issues in Municipal Law

By Bill Buholzer, Young Anderson, Vancouver, B.C.

Is "National Municipal" some kind of contradiction in terms? As a member of the Executive of the National Municipal Law Section of the Canadian Bar Association, I've been asked that question a few times. While generally speaking it's true that municipal law issues are particular to provinces, there are some municipal law issues that transcend provincial boundaries. Often this results from the operation of federal legislation, like the Aeronautics Act, that impinges on municipal powers right across the country. After a particularly informative round-table discussion during our last National MLS conference call, I thought some commentary on the potpourri of issues that my colleagues are dealing with in the other time zones would be worthwhile. (Surprisingly, Health Canada's medical marihuana production licensing program didn't come up!)

Council Prayer

Earlier this year the Supreme Court of Canada ordered the City of Saguenay, Quebec and its mayor to cease reciting a prayer prior to the commencement of council meetings and to pay to the citizen who challenged the validity of the bylaw that required the prayer $15,000 in compensatory damages and $15,000 in punitive damages for discriminatory interference with his freedom of conscience and religion. While the decision was based on the Quebec *Charter of Rights and Freedoms,* it's generally believed that the same result would flow from the *Canadian Charter of Rights and Freedoms,* and those municipal councils across the country that had not yet abandoned this practice have been doing so, reluctantly it seems in some cases. A Saskatchewan municipal lawyer commented that he had just attended a council meeting preceded by the usual prayer, but recited without explicit references to any particular deity – a manoeuver that I think few of us considered a fulsome response to the SCC decision, given that the complainant in the Saguenay case was an atheist. The Quebec lawyer on the call indicated that the *Saguenay* decision had caused little municipal angst in Quebec, and placed that non-reaction within the broader context of the electorate's rejection of the PQ "Charter of Values" in the last provincial election-the common theme being religious neutrality on the part of the state.

Historically, the purpose of prayers recited at the commencement of legislative deliberations at all levels has been to obtain, or at least solicit, the assistance of a higher power in reaching wise decisions. While there are likely a few council procedure bylaws in BC that still call for the recitation of a Christian prayer at the beginning of the meeting, most such bylaws were amended well before the *Saguenay* decision. In view of the Supreme Court's decision on council prayer, the prudent course for those local governments who wish to enable elected officials to seek this type of assistance in their deliberations would be to allow a few moments of silence so that they may do so privately. Other members who prefer to rely entirely on their own judgment in legislative matters may use this private time to silently rehearse their speeches, or check out who's in the public gallery.

Prostitution

Last November, Royal Assent was given to Bill C-36, the federal government's response to the Supreme Court's decision in *Canada {Attorney General) v. Bedford,* the case that dealt with the constitutionality of *Criminal Code* provisions related to prostitution. The Court held that laws, prohibiting keeping a brothel, living on the avails of prostitution, and communicating in public for purposes of prostitution placed sex workers in significant danger and thereby infringed on their right to security of the person under the *Charter of Rights and Freedoms.* The overriding principle behind Bill C-36 is that prostitution is a form of sexual exploitation that needs to be eliminated from Canadian society entirely, and its centrepiece is the criminalization of the purchase (but not the sale) of sexual services-essentially, cutting off the demand for these services. The Canadian Bar Association made submissions to the government last fall, criticizing aspects of Bill C-36 that in its members' view continued to suffer from the same constitutional defects as the legislation it was replacing. Other critics of the Bill have argued that sex workers will not truly be safe until they can provide sexual services legally, in licensed brothels.

Sex work has not historically been subject to overt local government regulation in Canada, but it's likely that local governments could come into the regulatory picture by virtue of their longstanding jurisdiction over land use and business regulation. For example, in a paper published in 2013 by the Canadian Women's Foundation on "Sex Trafficking" laws, the authors note that in New South Wales, "responsibility for regulating the industry lies with municipalities who use a range of licensing and business and zoning bylaws and apply occupational health and safety codes and inspections". In Christchurch, New Zealand, the Christchurch City Council Brothels (Location and Commercial Sexual Services Signage) Bylaw has been enacted to "restrict the location of brothels to certain parts of the district, with no restriction on the location of small owner-operated brothels," "provide for specified existing brothels to remain in their current locations," and "control signage that advertises commercial services that is in, or visible from, a public place".

The bylaw, including maps of "brothel allowed areas" and the addresses of existing and therefore lawfully non-conforming brothels, can be reviewed on the Christchurch City Council website.

Sales Tax Revenue Sharing

The use of provincial sales tax revenue to fund regional transit infrastructure is currently before the court of public opinion in the TransLink referendum. If voters approve, the Province might enact legislation temporarily increasing the provincial sales tax in Metro Vancouver by ½ of 1% to fund a specific list of regional transit improvements costing around $7.5 billion. This is the first time that the use of sales tax revenue to fund local infrastructure has been under serious consideration in British Columbia. In U.S. jurisdictions, local sales taxes contribute heavily to municipal revenues, and I was surprised to learn from a member of the municipal bar in Saskatchewan that his province has for some time been earmarking for its municipalities a significant share (currently 1/5 of about $1.4 billion) of provincial sales tax revenues. This is equivalent to a 1% municipal sales tax. In the period leading up to the release of the most recent provincial budget, the prospect of a provincial claw-back of this revenue had been raised, but in the end the Province decided to leave the revenue sharing formula undisturbed. It's probably just a matter of time before municipal sales taxes are debated generally in BC, given the limitations of the property tax system, and the real question may be whether the Province will, like Saskatchewan, be willing to vacate tax room in favour of the municipalities to which it has steadily been devoting responsibility to provide government services, or insist (as in the TransLink initiative) that any sales tax for local purposes be incremental to the existing provincial sales tax rate.

PILT

Another point of financial contact between senior and local governments, that seems to cause more friction in the eastern part of the country, is federal payments in lieu of property taxes (PILT). Likely this is because a greater number of federal institutions are located in Ontario and eastward, than in the west, though there are federal installations such as Canadian military bases and lands, and airports, in the west as well. A long-running dispute between the federal Minister of Public Works and Halifax Regional Municipality over the valuation of the Halifax Citadel National Historic Site for the purposes of PILT is nearing its conclusion, and will likely have significant consequences across the country. Canada unilaterally reduced the assessed value of the property for PILT purposes about 20 years ago from $20 million to $5.25 million, abandoning its previous practice of following the assessment determined by the provincial assessment authority. HRM exercised appeal rights under the federal *Payment in Lieu of Taxes Act,* culminating in a successful 2011 appeal to the Supreme Court of Canada which ordered the federal officials to make a proper value determination. A dispute advisory panel convened under the federal Act has recently made a recommendation to the Minister of Public Works on the resolution of the dispute between Public Works and HRM on the value of the property, and the municipality awaits the Minister's decision. Principles established in the Citadel litigation, meanwhile, will inform the Administration of the *Payment in Lieu of Taxes Act* throughout the country.

The Continuing Saga of Mayor Ford

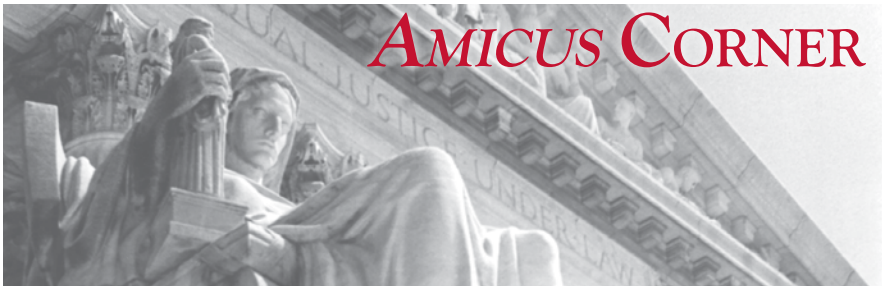
For those who have been missing their regular media reports on the activities of Toronto ex mayor Rob Ford, there is now available on the website of the Ontario Ombudsman an April 2015 report entitled "An Investigation into Toronto City Hall Security." To give the flavour of the incidents that led to the Ombudsman preparing this report, the summary notes the following (under the heading "Security Guard or Bodyguard"):

> *Security had a practice of assigning escorts on a rotating basis. Over time, the Mayor's office began asking for a particular guard, who was soon publicly identified as the Mayor's security guard. Security did not enforce the existing practice, as they did not want to say no to the Mayor.*

The mayor to whom the security staff did not want to say "no" was, of course, Mayor Ford. The Ford era's demands on Toronto civic staff in various fields were without precedent, and are unlikely to be duplicated; few municipal solicitors, for example, are likely to have their in-council advice filmed and broadcast on the CBC National News. Toronto's City Manager in his response to the Ombudsman's report referred discreetly to the Ford era as an "unprecedented time". We have in our practice come across situations where elected officials have lost sight (though perhaps in a less spectacular way) of the fact that civic staff are there to perform public functions only, and not to perform political functions for members of council. Thus the Ontario Ombudsman's key recommendation, "that Security ensure its personnel are properly subject to management's direction and not that of elected officials," is a useful reminder to local governments throughout Canada.

CMBs

An issue of national scale that we *didn't* have time to discuss during the call is Canada Post's "community mailbox" program. As this program penetrates into urban areas, new conflicts are arising with municipalities regarding locations and physical standards for these facilities and the related roadway improvements. The City of Hamilton has recently passed a highway use bylaw (No. 15-091, for those who'd like to take a look online) that effectively establishes a moratorium on these installations, provoking Canada Post into an application to the Ontario Superior Court to quash the bylaw. While regulations under the *Canada Post Corporation Act* clearly authorize Canada Post to install mail receptacles on public highways, it is not at all clear that the federal government's exclusive jurisdiction over the postal service entitles the corporation to do so without obtaining municipal highway use permits, without complying with municipal location criteria for such facilities, or without complying with municipal standards as regards the lay-bys and parking areas that are required to allow safe and convenient access to the mailboxes. The outcome of the Hamilton case will therefore be of great interest to municipalities across Canada. ML



Municipal Lawyers and the SCOTUS 2014 To Do List

By Amanda Kellar, IMLA Associate Counsel and Director of Legal Advocacy

The 2014 Supreme Court Term will be remembered for its landmark decisions in *Obergefell v. Hodges* and *King v. Burwell,* requiring a state to license a marriage between two people of the same sex and upholding the Affordable Care Act's subsidies in all fifty states, respectively. And while those cases are certainly important–and indeed historic—they may overshadow other decisions this Term that will have significant impacts on local governments. At least two cases will require most municipalities around the country to rewrite ordinances, and other cases may require new training for law enforcement and a review of policies at municipal correctional facilities.

Sign Ordinances: Without a doubt, the most significant case for municipal governments this Term was *Reed v. Town of Gilbert.* In fact, this case may have produced the most significant decision for local governments in years, as it will require almost every municipality in the nation to revisit and likely rewrite their sign ordinances.

In *Reed*, after receiving an advisory notice that its signs announcing the time and location of church services were displayed for a longer time period than the Town's Sign Code allowed, the Good News church sued the Town claiming the Sign Code violated the Free Speech Clause of the First Amendment. The Town's Sign Code placed signs in various categories: temporary directional signs related to qualifying events, political signs, and ideological signs. The church did not have its own dedicated building and held services at various locations around the Town. They were categorized under the Sign Code as temporary directional signs and as such received less favorable treatment (in terms of allowable size, location, duration, etc.) than political signs and ideological signs.

IMLA joined an amicus brief submitted by the State and Local Legal Center arguing that the Town's Sign Code was content neutral and further, that if the mere categorization of signs by their function renders them "content-based," then few sign regulations across the country would meet an exacting strict scrutiny test. The Court disagreed and held that the Sign Code's provisions were content-based regulations of speech that do not survive strict scrutiny. The Court found that the Sign Code was content based because it drew distinctions among types of signs "on its face." Accordingly, there was no need to assess the Town's justifications or purposes for enacting the provisions in order to determine what level of scrutiny to apply. After finding that the Sign Code was content-based, the Court had no problem concluding that its scheme of differential treatment of various types of signs could not survive strict scrutiny because, according to the Court, those distinctions were highly underinclusive.

While Justice Thomas, writing for the majority, indicated that this decision may "sometimes" result in "entirely reasonable" laws being struck down because they are content-based," notably, he also states:

An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers -*e.g.*, warnings signs marking hazards on private property or signs directing traffic - might also survive strict scrutiny." (emphasis added).

There were three concurrences filed with the majority, and three Justices concurred in the judgment only, including Justice Kagan. She, and at least two other Justices who joined her concurrence, viewed the ruling as far more sweeping than the majority implied, quipping at one point that the Court "may soon find itself a veritable Supreme Board of Sign Review." She also noted that:

The consequence-unless courts water down strict scrutiny to something unrecognizable-is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

In his separate concurrence, which was joined by two other Justices, Justice Alito offered a non-comprehensive list of sign ordinances that municipalities may now enact, at least in his view, in light of the majority's opinion. However, municipal attorneys would be wise to consider whether his concurrence is truly in line with the majority's opinion before simply crafting a new sign ordinance based on that list. For example, in his litany of potentially acceptable regulations, Justice Alito included the following: "Rules distinguishing between on-premises and off-premises signs." And while local governments may be hopeful that such a distinction would be acceptable, under the majority's ruling, it is difficult to know how one can distinguish between on-premises and off-premises signs without using the sign's content.

Law Enforcement Cases: In addition to *Reed,* there were a number of other decisions that also may require your immediate attention. These include a handful of police cases. In the past, local governments have generally fared well in law enforcement matters before the Court. However, this Term, the victories for local governments were minor. One was *Hein v. North Carolina,* which held that an officer's reasonable mistake of law does not establish a Fourth Amendment

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violation where the officer makes a traffic stop based on that reasonable mistake of law. And while the officers in *City of San Francisco v. Sheehan* were granted qualified immunity after shooting a mentally unstable woman, the Court dismissed the ADA issue in that case as improvidently granted, leaving that question for another day.

The major law enforcement cases this Term were losses for municipalities. *Rodriguez v. United States,* which held that a "police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures," is fairly straightforward and likely only requires some additional training for police officers. However, *City of Los Angeles v. Patel* is more significant as it will require municipal attorneys to go back and review and potentially rewrite not only their hotel registry ordinances, but perhaps other related ordinances as well.

Hotel Registries: The questions presented in *Patel* were as follows: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

This case involved Los Angeles Municipal Code § 41.49, which, like many other ordinances around the country, required hotel and motel operators to keep specific information about their guests like their name, address, room number, and information about their vehicle parked at the hotel. Section 41.49 also states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." In a facial challenge to the ordinance, motel operators objected to § 41.49 authorizing warrantless inspection of guest records.

In a 5-4 opinion, the Court held that facial challenges under the Fourth Amendment are not categorically barred or even especially disfavored. Regarding the ordinance in question, the Court held that the ordinance requiring hotel operators to record and keep specific information about their guests on the premises for a ninety-day period and to make those records available to "any officer of the Los Angeles Police Department for inspection" on demand, is facially unconstitutional because it fails to provide the operators with an opportunity for pre-compliance review. According to the Court, all police officers need to do to make sure that a search of a hotel registry is constitutional is issue a subpoena.

IMLA joined a brief filed by the SLLC, which pointed out that mobile home parks, second-hand dealers like pawnshops, scrap metal dealers, and massage parlors are also subject to registration and inspection laws and ordinances. Whether police inspection of registries for these types of businesses will also require a subpoena in the future is an open question following the *Patel* decision.

Prisoners and Detainees: Two other law enforcement cases this Term, *Kingsley v. Hendrickson* and *Holt v. Hobbs,* both arose in the prison context. The Court held in *Holt* that the prison's grooming policy prohibiting beards violated the Religious Land Use and Institutionalized Persons Act because it prevented an inmate from growing a half-inch beard in accordance with his religious beliefs. In *Kingsley*, the Court held that the proper standard for excessive force claims under the Fourteenth Amendment for pre-trial detainees was an objective standard and that plaintiffs need not show that officers were subjectively aware that their use of force was unreasonable. Unlike *Reed* and *Patel,* neither of these cases will likely require much upfront work for municipal attorneys, however, both will potentially result in more litigation and perhaps require attorneys to review their municipality's policies.

IMLA will be working on model ordinances to help local governments comply with the *Reed* and *Patel* decisions. For more information about those model ordinances, please email cthompson@imla.org. IMLA will also have more than one program addressing the *Reed* decision at our Annual Conference in Las Vegas this fall. So if you haven't already done so, register now!



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combined, operate more vehicles than there are taxicabs. Other states have similar issues because TNCs are not required to provide accessible service across the board like taxicabs and limousines. The accessibility issue for apps is very much in flux at this time, but is on a path to resolution.

Data Collection, Privacy and Security Safeguards

The TLC has demonstrated that it will not treat Uber differently than any other licensed base. TLC adopted rules last year creating a requirement for for-hire vehicle bases to provide trip records. The TLC requested Uber's trip records, but Uber refused to provide them, claiming they were proprietary.[36] At an administrative hearing, the judge suspended five out of six of Uber's bases for not providing the requested data. Uber would eventually provide the data, which would show, among other things, that it dispatched 34,000 rides per day.[37]

Earlier this year, Uber revealed that it had suffered a major data breach in May 2014 affecting 50,000 of its drivers across the United States. This breach was not discovered for four months[38] and highlights the importance of regulators requiring Uber to have security measures to protect sensitive information. In New York City, the TLC currently has security protocols in effect for the information generated by the Taxi Passenger Enhancement Program (TPEP)[39] systems required in all taxis. These security procedures include requiring employee security training, requirements for third-party access, data encryption requirements and access policies, among many other security measures.[40] The protocols also set standards for protecting personal information and protect the driver's privacy by not allowing the dissemination of any information about a taxicab when it is off duty.[41] As discussed more fully below, new TLC rules effective July 29, 2015 will address some of the data compliance and privacy protection issues.

Current Developments – New Proposed Regulations and Legislation

Traffic and Environmental Study and Cap on For-Hire Vehicles

The New York City Council held a hearing on June 30, 2015 regarding two bills affecting Uber. The bills were introduced at the Council a few days before this hearing. One bill would institute a cap on the number of newly licensed for-hire vehicles that can affiliate with a base, depending on the size of the base.[42] The second bill would require a study analyzing the impact of the growth of taxis and for-hire vehicles on traffic and the environment.[43]

There was no doubt about the importance of this legislation to Mayor De Blasio because his office sent two commissioners and the Director of his Office of Sustainability to testify in support of the bills.[44] The panel testified about why a study was needed to examine the increase in traffic and pollution because of the addition of thousands of new for-hire vehicles, and that a cap was needed to keep variables constant. They also testified about the increase in pollution.

Uber's testimony framed the proposed cap as a job destroyer. The company testified that a cap would immediately cause 700 drivers to lose their jobs and eliminate another 10,000 jobs they were planning to add in the next year.[45] Uber also questioned the motives for the study and said that the methodology was flawed and biased. A panel of technology and business advocacy groups testified against the bills stating that they would harm small businesses and stifle innovation. A few companies that lease vehicles to the for-hire vehicle industry also testified against the bills, citing the potential negative effects on their businesses.

A panel of disability advocates testified in support of the bills, stating that for-hire vehicles do not have the same accessibility requirements as taxis and that their explosive growth threatened the City's mandate to require half of all taxicabs become accessible by 2020. Taxi industry advocates also testified in support of the bills, citing the negative effect of uncontrolled growth on taxi driver income.

The Council was expected to vote on both bills on July 23, but late on July 22, the Mayor announced that there would be no cap.[46] Instead the Council just voted to require the study, which would be due by April 1, 2016.[47] The decision to drop the cap came after Uber conducted a multi-million campaign against the Mayor and Council Members, with mailers, ads and the recruitment of allies in the minority community.[48]

b. Surge Pricing

Although it is required to follow all rules and laws governing for-hire vehicle bases, Uber's business practice of "surge pricing," where higher fares are charged during times of high demand and low supply of vehicles (including during natural catastrophes and citywide emergencies such as Hurricane Sandy several years ago), caught the attention of the New York City Council. The Council held a hearing on proposed legislation that would limit the amount that Uber can charge during surge pricing.[49] At the public hearing on the proposed bill, the TLC testified it was not prepared to support the bill as written because of some technical issues, including that the bill may penalize drivers, when it is the base that sets fares. The TLC also testified it was difficult for it to determine what the "normal" fare is unless it has fare data, which it may request from Uber in the future. The sponsor of the bill did indicate a willingness to revise the bill to address the TLC's concerns.

Surge pricing has also caught the attention of the New York State Attorney General and State Legislators. Last July, the New York State Attorney General Eric Schneiderman entered into an agreement with Uber[50] to limit its price increases during emergencies after it raised its prices by up to 800% during a snow storm in 2013. New York State Assembly Member Felix Ortiz has introduced a bill that would penalize Uber $250 for each instance of surge pricing.[51] Neither the City Council bill nor the State bill has passed yet.

The Licensing of Smartphone Apps?

On February 12, the Taxi and Limousine Commission held a fact-finding hearing on licensing dispatch apps.[52] Uber, Lyft and other stakeholders testified and the TLC, using the information it obtained from this hearing, drafted a series of new rules to address the use of for-hire vehicle dispatch apps. The proposed rules distinguish between a dispatch app used by a base and those apps that are sold, leased or otherwise made available to a TLC-licensed

base.[53] The rules create different regulatory structures for the two types of dispatch apps.

The TLC heard public testimony on the proposed rules on May 28 but did not hold a vote. Stakeholders from all segments of the industry testified, including elected officials, base owners, technology advocacy groups, taxi associations, a taxi riders' advocacy group and Uber drivers. Showing how divisive this issue can be, the testimony from the elected officials ranged from opposition to the proposed rules, to not taking a position, to supporting them. Generally, the technology advocacy groups, and Uber and Lyft, testified against the proposed rules stating that they placed too many restrictions on the applications and would hamper innovation. Some groups also stated that TLC should be regulating for-hire vehicles and not technology.

Many of the for-hire and taxi industry groups testified in support of the rules, with some stating that the rules did not go far enough in regulating dispatch apps. The representative for a taxi riders' advocacy group also testified in support of the rules, stating that they improve transparency for the passengers. A few representatives from the taxi industry and base owners did testify against the rules because they do not believe they went far enough to create a level playing field, and would not prevent an app from communicating directly with a driver, eliminating a base's role in ensuring customer safety.

After making some amendments to the rules based upon testimony from its May 28 meeting, the TLC unanimously adopted the new rules on June 22. Under the newly adopted rules, Dispatch Service Provider is defined as an entity licensed by the TLC to provide Dispatch Services for licensed FHV Bases. Dispatch Service is defined as dispatching, reserving, or referring trips to drivers on behalf of TLC-licensed bases through a publicly available, Passenger-facing booking tool.[54] E-Dispatch is a Dispatch arranged through a licensed Dispatch Service Provider. Dispatch is a request made from a base station to a TLC-licensed driver, directing the driver to provide transportation to a passenger who has previously arranged for such transportation.

Some of the key provisions in the rules that apply to FHV Dispatch Apps include the following: [55]

- Smartphone app licensees may be an individual or business and must demonstrate they are fit to hold a license;
- Applicants must hold all rights or licenses to all intellectual property associated with the dispatch app;
- The TLC must approve all dispatch apps;
- Privacy and security policies must be put into place;
- A working customer service phone number or email address must be provided;
- Providers must notify the TLC if it modifies its dispatch app;
- Proof of Insurance – Professional liability insurance at a minimum of $1,000,000 per claim must be in place if professional services will be provided;
- A $5,000 bond to ensure compliance with all laws and rules and payment of fines must be posted;
- A fee of $1,000 for each license for a term of three years or less will be charged;
- The DSP must notify the TLC of any material changes and any suspension or revocation of needed licenses;
- The DSP must notify the TLC of any security breaches if notice is required under State or Federal law;
- Security – DSPs must meet applicable Payment Card Industry (PCI) standards[56] and its security standards must be filed with the TLC;
- The app must be able to collect and transmit trip data to TLC; and
- DSPs must provide a wheelchair accessible option that meets "equivalent service" requirements under the Americans with Disabilities Act.

The rules went into effect on July 29, 2015.

V. What Is In Store for the Regulation of Smartphone Transportation Apps in NYC in the Immediate Future (and for TNCs beyond NYC)?

The recent political, lobbying and media showdown that took place at the end of July 2015 in NYC between the Mayor, the Governor and the NYC Council made national and international news and developed into a major public spectacle. This "spectacle" included celebrity tweets from Ashton Kutscher, Kate Upton, Neil Patrick Harris and others, endorsements and objections by interest groups and elected officials, involved political campaign style direct mail and television advertisements, and a massive "Uber-style" grass roots political campaign not seen in NYC since the showdown between Mayor Bloomberg and Madison Square Garden on the failed NY Jets' West Side stadium proposal several years ago.

Certainly the debate and the fight are far from over. There is still a major environmental and traffic study that may ultimately propose a cap or limitation on for-hire vehicle growth in NYC, with possibly exemptions for ride-sharing, wheelchair accessible vehicles and alternative fuel vehicles as mitigating factors. Most cities around the country do not technically impose absolute caps on the number of taxicabs, and actually have a legal standard for growth and a process for transportation companies to apply for and receive new permits. The standards look at supply and demand, traffic congestion and environmental issues, and it is very possible new legislation may put such standards into place to allow for "checked" ~ instead of "unchecked" ~ growth. The political face saving, retribution, personalities, political supporters and stakeholders will all be mobilizing once again after December 2015 or early in January 2016 after the report is issued, as the report is likely to be a blueprint for proposed legislation by the NYC Mayor's office and NYC Council. It is also possible that Uber may lobby the Governor and the State Legislature intensely to pass a state law preempting any such new laws proposing a cap, moratorium or "growth-check" process for for-hire vehicles.

On other issues, the TLC regulations and the data that may be collected under the alleged "Uber deal" to table the legislation will become part of the study and the TLC will obtain a much better picture of the economic impact Uber is really having on its competitors, traffic and the environment. It is very possible that the "surge pricing" bill could be resuscitated at the local level and that the insurance legislation (making it easier for TNCs to operate in NY State and possibly NYC) could receive new

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life with the Governor looking into the issue following the recent "NYC Uber Spectacle." Also, there are pending lawsuits from the industry[57] that could cause the entire focus to shift, and both the incumbent industry and Uber could bring lawsuits following the passage of any new laws as well.

The battle is actually just beginning in NYC, but it may have a ripple effect on other states. Similarly, due to insurance, accessibility and criminal background check controversies, Texas, Connecticut and Florida all recently tabled and did not pass new TNC statewide laws. The attention focused on NYC may not be good for Uber in some ways as legislators, the riding public and the media around the country now may become more aware of the fact that Uber is licensed like everyone else (taxicabs and black cars) in NYC, dominates the market with more than 18,000 vehicles, and is still fighting to take a further share by adding thousands of more vehicles. Many jurisdictions around the United States (and the world) may follow and replicate what is done in NYC from a transportation regulation standpoint, and despite the unique nature of the NYC market, the recent NYC battle could very well change the debate, direction and the legislative dynamic of what happens in 2016 around the nation. The disruption continues like a hydra, and shows no sign yet of settling down. In fact, the Uber issue may continue to be a major issue in the 2016 Presidential race and debate as part of worker rights and protections for part-time workers in the sharing economy.[58]

"Apps in the City" are alive and well, and getting friskier by the day – and this regulatory television series will likely continue for many more seasons and episodes as a true cultural, media, political and legal phenomenon.

Notes

1. N.Y. Admin Code §19-502(l).
2. TLC Rules §§59A-03(j) & (k).
3. *Id.* at §§59A-03(b) & (c).
4. *Id.* at §§59A-03(l) & (m).
5. Under TLC rules, a Black car is defined as a Vehicle that affiliates with a Black Car Base. Black Car Base is defined as a "central dispatch facility" (as the term is defined in New York Executive Law, §160-cc) and For-Hire Base that operates as follows: (1) All Black Car Vehicles are dispatched on a pre-arranged basis; (2) All Black Car Vehicles are owned by franchisees of the Base or are members of a cooperative that operates the Base; and (3) More than ninety percent (90%) of the Base's business is on a payment basis other than direct cash payment by a Passenger. Luxury Limousine is defined as a For-Hire Vehicle that is affiliated with a Luxury Limousine Base. A Luxury Limousine Base is a For-Hire Base that operates as follows: (1) All Luxury Limousines are dispatched from the Base by pre-arrangement; (2) Luxury Limousine Vehicles have a seating capacity of 20 or fewer Passengers; (3) More than ninety percent (90%) of its business is on a payment basis other than direct cash payment by a Passenger. (4) Passengers are charged "garage to garage" service on the basis of a flat rate, time or mileage.
6. The model regulations can be accessed at: http://www.windelsmarx.com/resources/documents/IATR%20Model%20Regulations%20(10890808).pdf
7. *Id.* Regulators from the following municipalities and countries served on the IATR Smartphone Apps Committee: Austin, TX; Boston, MA; Los Angeles, CA; Denver, CO; San Francisco, CA; City of Montreal, Canada; Chicago, IL; Seattle, WA; Washington DC; Australia; Toronto, Canada; Philadelphia, PA; Houston, TX; and San Diego, CA.
8. http://blog.uber.com/2011/05/03/uber-nyc-launches-service/
9. http://www.nyc.gov/html/tlc/downloads/pdf/industry_notice_11_15.pdf. The notice acknowledged the growing use of smartphone apps to request and dispatch for-hire vehicle trips, but advised that the use must be in compliance with TLC rules. The notice advised that for-hire vehicle owners and drivers must obtain the approval of their "bases" (their existing dispatching company) before contracting directly with a smartphone app provider. The notice further explained that it violated TLC rules if a for-hire vehicle owner or driver was accepting dispatches through a smartphone app that is not authorized by his or her base. The notice also warned taxi drivers that they are prohibited from using smartphone apps and could only pick-up passengers that hail them.
10. http://www.nyc.gov/html/tlc/downloads/pdf/industry_notice_11_16.pdf. This notice clarifies when a smartphone app is required to have a for-hire base vehicle license as required by local law and rules, and to remind licensees of rules that apply when a licensed base contracts with a smartphone app. The notice states that any smartphone app that functions solely as a referral, reservation or advertising service for a licensed base, will not need to be licensed.
11. Among some of the requirements that bases must comply with are; no base using a smartphone app can advertise using the term "taxi", taxicab" "cab", "hack" or "coach," TLC Rules §59B-25(b); bases must file their smartphone app fares with TLC if those fares are different than their existing rates, Id. at §59B-21((a); bases must ensure that trip sheets of trips dispatched through a smartphone app are maintained and available for at least six months after the trip, Id. at §59B-19(b)(2); bases must be able to handle customer complaints, including through a smartphone app, Id. at §59B-17(a); and bases must ensure they are dispatching calls within the hours of operation filed with TLC, Id. at §59B-21(b).
12. http://www.nyc.gov/html/tlc/downloads/pdf/industry_notice_11_16.pdf
13. TLC Rule §59B-11.
14. http://www.nyc.gov/html/tlc/downloads/pdf/industry_notice_11_16.pdf
15. New York City Taxi and Limousine Commission Resolution Approving a Pilot Program to Evaluate Electronic Hail Applications, December 13, 2012, as amended on February 21, 2013.
16. http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml
17. http://www.nyc.gov/html/tlc/downloads/pdf/ehail_q5_report_final.pdf
18. http://www.nyc.gov/html/tlc/downloads/pdf/newly_passed_rules_ehail.pdf
19. http://www.nyc.gov/html/tlc/downloads/pdf/fhv_dispatch_rule_final_11_20_14.pdf
20. http://www.nyc.gov/html/tlc/downloads/pdf/proposed_rule_fhv_

dispatch_amendment.pdf
21. New York State Executive Law §§160-cc, *et seq*.
22. State Senator James Seward introduced a bill that would create TNC group insurance. The Senate insurance committee considered the bill, but the State legislature did not vote on it. http://www.crainsnewyork.com/article/20150629/BLOGS04/150629887/in-albany-uber-hits-a-roadblock
23. TLC Rules §59A-12.
24. *Id*. at §59A-12(c)(1).
25. *Id.* at §59A-12(c)(3).
26. *Id.* at §59A-12(b).
27. *Id.* at §55-04.
28. http://www.nyc.gov/html/tlc/downloads/pdf/new_driver_checklist_partb.pdf
29. New York State Correction Law §752 prohibits denial of any license to any individual by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
30. http://www.criminaljustice.ny.gov/advtech/policy.htm
31. The report is available at the UTRC's link at http://www.utrc2.org/publications/one-standard-for-all , or the John Jay College of Criminal Justice Master in Public Administration (MPA) Program's link at www.mpa.jjconline.net**.** The study was authored by one of the authors of this article, Professor Matthew W. Daus of The City College of New York and Professor Pasqualino "Pat" Russo of John Jay College of Criminal Justice. It was peer-reviewed by the Hon. Michael A. L. Balboni, former New York State Deputy Secretary for Public Safety; Professor William J. DiVello of John Jay College of Criminal Justice; Professor Lawrence Kobilinsky of John Jay College of Criminal Justice; and Professor Philip Zisman of the Association of Inspectors General.
32. *Id.*
33. TLC Rules §59B-17(c).
34. https://www1.nyc.gov/html/tlc/downloads/pdf/testimony_03_05_15.pdf
35. As of March 11, 2015, Uber had 13,946 affiliated cars versus 13, 605 taxicabs.
36. http://media.bizj.us/view/img/4764911/final-decision.pdf
37. http://www.nydailynews.com/new-york/data-uber-driving-competitors-nyc-article-1.2137714
38. http://www.forbes.com/sites/davelewis/2015/02/28/uber-suffers-data-breach-affecting-50000/
39. TPEP is an integrated system of hardware and software that provides credit/debit card processing, text messaging, trip data collection and transmission, data transmission by means of a passenger information monitor and automatic vehicle location system and location services to taxicabs. TLC Rule §51-03.
40. TLC Rules §§76-01, et seq.
41. *Id.* at §75-23.
42. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2364032&GUID=38613BB6-5A68-416E-9C27-9F43E3C60372&Options=ID|Text|&Search=int+842
43. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2364031&GUID=87C7D249-891A-43BC-8127-6617FB856429&Options=ID|Text|&Search=int+847.
44. Commissioner Polly Trottenberg of the New York City Department of Transportation, Commissioner Meera Joshi of the New York City Taxi and Limousine Commission and the Director of the Mayor's Office of Sustainability, Nilda Mesa, testified on behalf of the Mayor.
45. http://nypost.com/2015/07/12/700-uber-drivers-to-be-fired-under-new-bill/
46. http://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html?_r=0
47. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2364031&GUID=87C7D249-891A-43BC-8127-6617FB856429&Options=ID|Text|&Search=int+847.
48. http://www.nydailynews.com/new-york/uber-meets-minority-workers-fight-proposed-car-cap-article-1.2292479
49. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2073899&GUID=0C1C4C28-9D46-4021-BAA6-EAC0D95D5F09&Options=ID|Text|&Search=556.
50. http://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and-natural
51. http://www.capitalnewyork.com/article/albany/2015/02/8562248/bill-would-ban-surge-pricing-uber-rideshare-services
52. http://www.nyc.gov/html/tlc/downloads/pdf/fhv_app_rules_hearing_notice.pdf
53. http://www.nyc.gov/html/tlc/downloads/pdf/proposed_rules_fhv_app_cert.pdf
54. Under the rules, dispatch Service does not include a base dispatching through a Passenger-facing booking tool that uses the same public-facing name in its branding, operations, promotions, or advertisements as the trade, business, or operating name the Base has on file with the TLC. Dispatch Service does not include a Base dispatching or managing its fleet under the trade, business, or operating name the Base has on file with the TLC using commercial dispatching software. http://www.nyc.gov/html/tlc/downloads/pdf/proposed_rules_final_fhv_dispatch.pdf.
55. *Id.*
56. https://www.pcisecuritystandards.org/security_standards/index.php
57. See http://www.crainsnewyork.com/article/20150527/BLOGS04/150529893/taxi-interests-sue-city-predicting-collapse-of-their-industry and http://www.nydailynews.com/new-york/cabbies-claim-tlc-uber-customers-article-1.2169132.
58. Democratic Presidential Candidate Hillary Clinton recently stated she would crack down on companies that misclassify their workers as independent contractors, which many have interpreted as being directed towards Uber and other sharing economy type companies. Republican candidates were quick to criticize her remarks as anti-innovation. http://www.businessinsider.com/grover-norquist-hillary-clinton-uber-2015-7

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drones. The government also grounded Texas EquuSearch, a nonprofit which had been employing UAV's to locate missing people.[17] The communiques, issued by various FAA officials, all followed the same general script, citing an FAA policy prohibiting commercial drone use unless expressly permitted and threatening a $10,000 fine for violation.[18]

Not all recipients of the FAA orders took the matter lying down. In 2013, the FAA issued a Proposed Order of Assessment against a Swiss national named Raphael Pirker and his company, Team Blacksheep. The University of Virginia Medical Center had retained a marketing firm which in turn hired Pirker, a well-known drone videographer, to fly a UAV over the university's pastoral Charlottesville campus and obtain promotional footage. He accomplished the task using a Ritewing Zephyr powered glider with a 54-inch wingspan, was paid for his efforts and posted the footage on YouTube. No damage had occurred; regardless, the flight resulted in the FAA assessing Pirker a civil penalty of $10,000.

Although the agency's Order of Assessment specifically alleged that Pirker had been compensated for his UAV flight (presumably making his flight a "commercial" drone activity), the FAA did not rely upon the fact of compensation for its proposed civil penalty. In fact, they pointed to no federal regulation specifically prohibiting commercial operation of a drone. Rather, the Order was premised completely on the claim that Pirker had flown the UAV "recklessly" by flying "at extremely low altitudes, under personnel bridges, directly over automobiles, and within feet of pedestrians."[19]

> By reason of the foregoing, you violated the following section(s) of the Federal Aviation Regulations:
> a. Section 91.13(a) which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.[20]

Pirker succeeded in having the matter dismissed. In March 2014, Administrative Law Judge (ALJ) Patrick Geraghty held that small drones (which he referred to as "model aircraft") are *not* aircraft under the federal definitions; thus the FAA had no jurisdiction over Pirker's flight. He questioned the FAA's expansive assertion of power to regulate UAV's, saying the agency could have employed the same logic to block "a flight in the air of a paper aircraft, or a toy balsa wood glider."[21]

The FAA rapidly appealed the ALJ's decision to the full National Transportation Safety Board (NTSB).

Late in 2014, the NTSB issued its decision, reversing the ALJ. The NTSB held that drones *are* aircraft as the word is defined under federal law and accordingly are subject to the recklessness regulation. It therefore remanded the matter to the ALJ to decide whether Pirker's flight had been reckless.

As one commentator notes, the NTSB's decision raised as many questions as it answered:

> The NTSB's decision was very *narrow* in one respect: it held that because drones are aircraft, FAR 91.13, the only FAR at issue in the matter, applies to drones. It did not address "commercial use" since that was not addressed by the Judge, and it did not hold that any other FAR applies to drones.
> The Board's decision was very *broad* in another respect: it did not qualify which size drones are aircraft. So both a 1-ounce child's "toy" drone and a 55-pound industrial-sized drone are aircraft, and both are equally subject to FAR 91.13. In fact, given the extremely broad federal definition of aircraft, even paper airplanes are now subject to FAR 91.13. Yes, there is a manufacturer of paper airplane drones.[22]

(As for Mr. Pirker, there was ultimately no decision on remand. Judge Geraghty questioned why the FAA had brought these particular charges against a foreign national, given a prior FAA Order which clearly provides that when that a "foreign person" violates the Federal Aviation Regulations (FAA Order 2150.3B (Chapter 6, paragraph 34(a)), the matter should be handled by the "appropriate foreign aviation authority" through the Department of State.)

Pirker settled the matter by paying $1,100. He did not admit to any violation. The FAA obtained an NTSB decision that drones are "aircraft" as that term is defined under federal statute, and are subject to a single FAR– 91.13 (the recklessness provision.)

Federal Preemption: When/where can drones be operated? Given that drones are "aircraft," they fall within the matrix of three FAA usage categories which govern all aircraft operations. "Public Aircraft Operations" encompass governmental usage; "Civil Operations" are all non-governmental (including commercial) uses; and "Model Aircraft Operations" cover purely recreational drone activities.

Public Operations: "Public Aircraft Operations" are defined under Title 49 U.S.C. § 40102(a)(41) and related provisions. Whether an activity qualifies as public (governmental) aircraft operation is determined on a flight-by-flight basis; the considerations include aircraft ownership, the operator, the purpose of the flight, and the persons on board the aircraft.

In order to qualify for "public aircraft operation" status, the UAV must be owned by, operated by and used for legitimate purposes of a public entity. Qualification is not by right; the qualifying public entity must apply for and receive an FAA Certificate of Waiver or Authorization (COA). The COA is not a blanket authorization. As the FAA website explains, the COA allows qualifying entities "to operate a particular aircraft, for a particular purpose, in a particular area. The COA allows an operator to use a defined block of airspace and includes special safety provisions unique to the proposed operation."[23]

The Public Use COA is obtained via the FAA's "COA Online" system. Before the applicant will even be given access to COA Online, it (or its proponent) will be required to provide the FAA with a "declaration letter" from the city, county, or state attorney's office assuring the FAA that the proponent is recognized as a political subdivision of the government of the State under 49 USC § 40102(a)(41)(c) or (d) and that the proponent will operate its unmanned aircraft in accordance with 49 USC § 40125(b) (in other words, not for commercial purposes).[24]

Once granted, COAs usually have a specific term – up to two years in many cases.

The FAA explains that its goal is to "develop conditions and limitations for

UAS operations to ensure they do not jeopardize the safety of other aviation operations" and to establish a level of safety equivalent to that for manned aircraft: "Usually, this entails making sure that the UAS does not operate in a populated area and that the aircraft is observed, either by someone in a manned aircraft or someone on the ground to ensure separation from other aircraft in accordance with right-of-way rules."[25]

The FAA first issued COA's for public use in 2009; since then hundreds have been granted, to states, municipalities, universities and other public entities.[26] Common public operation uses for which the FAA has issued COA's include law enforcement, firefighting, border patrol, disaster relief, search and rescue, military training and academic research.[27]

Civil Operations: All drone activities that are not governmental or purely recreational are categorized as civil aircraft operations. Under this category, encompassing all commercial usage, the FAA affords non-governmental organizations the opportunity to go airborne provided that their drones engender minimal risk while performing compensated activities.

As the FAA website explains, there are two methods of gaining FAA authorization to fly civil (non-governmental) drones. First, the civil operation permit may be obtained via a COA coupled with a "Section 333 Exemption" (Section 333 of the FAA Modernization and Reform Act of 2012 requires pilots and aircraft to be certified; the Exemption can be obtained with the help of numerous law firms and commercial institutions such as "Drone Universities" mentioned at the outset of this article, which charges between $3,500 and $6,500 for the service).[28] (The FAA notes that "this process may be used to perform commercial operations in low-risk, controlled environments.")[29]

Second, applicants may be able to procure a "Special Airworthiness Certificate" (SAC) by describing "how their system is designed, constructed, and manufactured, including engineering processes, software development and control, configuration management, and quality assurance procedures used, along with how and where they intend to fly."[30] If the FAA determines the project does not present an unreasonable safety risk, it will issue a SAC with operating limitations applicable to the particular UAV in question.

Businesses chafe at the lethargic pace with which the FAA has allowed commercial UAV's to operate. However, the agency has gradually increased grants of civil operation exemptions and SAC's to an expanding range of applicants including movie production groups,[31] utility companies,[32] and surveyors, construction firms and oil industry applicants.[33] The FAA claims to have issued over 850 exemptions to date; analysts find that more than 40 percent of these are for aerial photography, with a strong link to real estate uses.[34] Typical is DividedSky Aerial Solutions, one of the newest recipients of a commercial use exemption. An eight person Richmond, Virginia start-up with 10 UAV's, DividedSky provides aerial footage, often to the real estate industry, at rates from $500 to $5,000 per hour.[35]

Exemption applications still take an inordinate amount of time to process. A law firm specializing in obtaining civil exemptions recently highlighted its success in receiving an exemption less than four months after the Section 333 application was submitted.[36] On Capitol Hill, lobbyists, industry spokespersons and politicians alike continue to militate for a much less restrictive stance on commercial drone use.

Model Aircraft Operations: Purely recreational use is covered under "model aircraft operations." The FAA does not rigorously regulate such UAV use, instead stating that "Individuals flying for hobby or recreation are strongly encouraged to follow safety guidelines" which include the following:

- Fly below 400 feet and remain clear of surrounding obstacles.
- Keep the aircraft within visual line of sight at all times.
- Remain well clear of and do not interfere with manned aircraft operations.
- Don't fly within 5 miles of an airport unless you contact the airport and control tower before flying.
- Don't fly near people or stadiums.
- Don't fly an aircraft that weighs more than 55 lbs.
- Don't be careless or reckless with your unmanned aircraft – you could be fined for endangering people or other aircraft.[37]

Individuals who fly within these parameters do not need federal permission to operate their drones, but any flight outside these parameters (including any non-hobby, non-recreational operation) requires FAA authorization. The agency provides the following example: "[U]sing a UAS to take photos for your personal use is recreational; using the same device to take photographs or videos for compensation or sale to another individual would be considered a non-recreational operation."[38]

The FAA has partnered with several industry associations to promote "Know Before You Fly," a campaign to educate the public about using unmanned aircraft safely and responsibly; it also provides links to a number of informational pdf's and video's for the hobbyist user.[39]

Notwithstanding these educational efforts, it seems obvious that, in the absence of mandatory federal regulations, states and localities will have much work to do as hobbyists take to the skies.

The FAA's Public Relations Campaign: Since at least 2007, Congress has been pressuring the FAA to show leadership on the drone issue, with modest results until recently. Understandably, the common (mis)perception has been that very few "consumer drone" regulations exist. Faced with an uninformed constituency, the agency fired back with a manifesto on its website in February 2014, debunking a number of drone misnomers. As the agency put it:

> There are a lot of misconceptions and misinformation about unmanned aircraft system (UAS) regulations. Here are some common myths and the corresponding facts.
>
> **Myth #1: The FAA doesn't control airspace below 400 feet.**
> Fact—The FAA is responsible for the safety of U.S. airspace from the ground up. This misperception may originate with the idea that manned aircraft generally must stay at least 500 feet above the ground.
>
> **Myth #2: Commercial UAS flights are OK if I'm over private property and stay below 400 feet.**
> Fact—The FAA published a Federal Register notice (PDF) in 2007 that

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clarified the agency's policy: You may not fly a UAS for commercial purposes by claiming that you're operating according to the Model Aircraft guidelines (below 400 feet, 3 miles from an airport, away from populated areas.) Commercial operations are only authorized on a case-by-case basis. A commercial flight requires a certified aircraft, a licensed pilot and operating approval.

Myth #3: Commercial UAS operations are a "gray area" in FAA regulations.
Fact—There are no shades of gray in FAA regulations. Anyone who wants to fly an aircraft—manned or unmanned—in U.S. airspace needs some level of FAA approval. Private sector (civil) users can obtain an experimental airworthiness certificate to conduct research and development, training and flight demonstrations. Commercial UAS operations are limited and require the operator to have certified aircraft and pilots, as well as operating approval.

Flying model aircraft solely for hobby or recreational reasons does not require FAA approval. However, hobbyists are advised to operate their aircraft in accordance with the agency's model aircraft guidelines (see Advisory Circular 91-57). In the FAA Modernization and Reform Act of 2012 (Public Law 112-95, Sec 336), Congress exempted model aircraft from new rules or regulations provided the aircraft are operated "in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization."

* * *

Myth #4: There are too many commercial UAS operations for the FAA to stop.
Fact—The FAA has to prioritize its safety responsibilities, but the agency is monitoring UAS operations closely. Many times, the FAA learns about suspected commercial UAS operations via a complaint from the public or other businesses. The agency occasionally discovers such operations through the news media or postings on internet sites. When the FAA discovers apparent unauthorized UAS operations, the agency has a number of enforcement tools available to address these operations, including a verbal warning, a warning letter, and an order to stop the operation.

* * *

Myth #5: Commercial UAS operations will be OK after September 30, 2015.
Fact—In the 2012 FAA reauthorization legislation, Congress told the FAA to come up with a plan for "safe integration" of UAS by September 30, 2015. Safe integration will be incremental. The agency is still developing regulations, policies and standards that will cover a wide variety of UAS users, and expects to publish a proposed rule for small UAS – under about 55 pounds – later this year. That proposed rule will likely include provisions for commercial operations.

Myth #6: The FAA is lagging behind other countries in approving commercial drones.
Fact – This comparison is flawed. The United States has the busiest, most complex airspace in the world, including many general aviation aircraft that we must consider when planning UAS integration, because those same airplanes and small UAS may occupy the same airspace.

Myth #7: The FAA predicts as many as 30,000 drones by 2030.
Fact—That figure is outdated. It was an estimate in the FAA's 2011 Aerospace Forecast. Since then, the agency has refined its prediction to focus on the area of greatest expected growth. The FAA currently estimates as many as 7,500 small commercial UAS may be in use by 2018, assuming the necessary regulations are in place. The number may be updated when the agency publishes the proposed rule on small UAS later this year.[40]

The FAA's proposed rulemaking: In February of this year, the FAA finally issued its "Small UAS Notice of Proposed Rulemaking." The agency proposes a number of parameters and limitations regarding drones, many of which had been advanced in prior FAA publications. These proposals include:

- The drone must weigh less than 55 pounds (25 kg).
- The drone may be operated only within visual line-of-sight (VLOS) of the operator (no camera or photographic device--other than corrective lenses--can be used to enhance visibility).
- The drone can operate only during daylight hours and only when there is three miles of visibility from the control station.
- The drone may not be flown directly above any person not involved the drone operation.
- The drone may not fly higher than 500 feet or faster than 100 miles per hour.
- The drone operator must be at least 17 years old, must have passed an FAA knowledge examination and be vetted by the Transportation Security Administration (TSA).
- The drone must be maintained and checked for airworthiness prior to each operation.
- The drone must be registered (but an airworthiness certificate is not required).[41]

The 60-day public comment period for the Small UAS Notice of Proposed Rulemaking closed on April 15, 2015.

State drone laws: The FAA's sluggish pace and preemptive ambit have not prevented states from acting. Many states have passed UAV laws, even as they operate in a dynamic legal environment while FAA regulations evolve. According to the National Conference of State Legislatures (NCSL), 26 states have developed their own regulatory schemes and in 2015, 45 states have already considered a total of 153 bills related to drones, with 17 states–Arkansas, Florida, Hawaii, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia and West Virginia having thus far added new drone provisions.[42]

These new laws cover a range of subjects:

Law enforcement: States are increasingly focused on limiting, or at least regulating, drone use by law enforcement:

- **Maine LD 25** requires that law enforcement agencies receive approval before acquiring drones and sets forth standards for law enforcement's operation of drones, including requiring a warrant before using a drone in criminal investigations except under certain circumstances.[43]
- **Nevada AB 239** restricts the use of drones by law enforcement and public agencies and requires all such drones to be listed in a registry.[44]
- **North Dakota HB 1328** limits the use of drones for surveillance purposes.[45]
- **Utah HB 296** permits law enforcement to use drones to locate a lost or missing person in an area in which a person has no reasonable expectation of privacy.[46]
- **Virginia HB 2125 and SB 1301** require that a law enforcement agency obtain a warrant before using a drone for any purpose, except in limited circumstances.[47]

Hunting: Several new state regulatory schemes prohibit the use of drones to assist in hunting; clearly, UAV's can serve as above-ground "fish-finders," scanning miles of terrain to take the inconvenience and guesswork out of tracking elusive prey–or unauthorized hunters. Legislatures in New Hampshire, Michigan, Oregon and West Virginia added anti-hunting provisions in 2015:

- **New Hampshire SB 222** prohibits UAV use by anglers, trappers and hunters.[48]
- **Michigan SB 55** prohibits using drones to hunt game and **Michigan SB 54** forbids drone use to interfere with an individual who is hunting.[49]
- **Oregon HB 2534** likewise requires development of rules to prohibit using a UAV for fishing or hunting or impeding an individual who is lawfully fishing or hunting.[50]
- **West Virginia HB 2515** prohibits hunting via a drone.[51]

Infrastructure: Protection of critical infrastructure is also a focus of the new legislation:

- **Arkansas HB 1770** prohibits using drones to photograph or collect information about critical infrastructure without consent.[52]
- **Nevada AB 239** restricts drone use within a certain proximity of airports or critical facilities without permission.[53]
- **Tennessee HB 153** prohibits using a drone to capture an image over certain open-air events and fireworks displays. It also prohibits the use of UAS over the grounds of a correctional facility.[54]
- **Texas HB 1481** makes it a Class B misdemeanor to operate drones over critical infrastructure (including refineries, power plants, chemical-manufacturing plants, ports, trucking terminals, and water-treatment facilities) at less than 400 feet off the ground.[55] **Texas HB 3628** directs the Department of Public Safety Director to adopt rules to prohibit or limit drone usage in the state capitol complex.[56]

Privacy: Several of the new measures deal with the dangers of drone-enabled intrusion into private spaces:

- **Arkansas HB 1349** forbids using a drone for voyeurism.
- **Florida SB 766** prohibits drone use to obtain images of private property or the owner, tenant, or occupant of such property without consent where a reasonable expectation of privacy exists.[57]
- **Mississippi SB 2022** specifies that use of a UAV for "peeping tom" purposes constitutes a felony.[58]

A Comprehensive Approach: Some of the new provisions above are being grafted into existing state UAV regulatory schemes; others are the first step in a state's nascent drone legislation.

Connecticut is among the states that have devoted significant time and energy to assessing the requirements of new drone laws in light of existing state regulations. Among the findings in the 41-page study by the Connecticut General Assembly entitled "Drone Use Regulation"[59] are:

"Drone," defined: Merely characterizing drones as a subset of "aircraft" may leave open gaps in the law. For example, Connecticut law requires that all "aircraft accidents" be reported to authorities, which makes little sense for a 2-pound quadcopter. Similarly, some provisions regarding use of airports and helipads are inapplicable to drones.[60]

Criminal Use: As is evident from FAA regulations, use of the drone may itself violate federal law, but using a drone to commit crimes implicates state laws. These should be scrutinized to confirm, for example, that a drone could be considered a "dangerous instrument" where appropriate.[61]

Weapons: Where laws regulate the presence of weapons in a "vehicle" they may not effectively proscribe weapons on a drone.[62]

Remote firing: Although current Connecticut law prohibits using "remote devices" to operate firearms, it is not absolutely clear that, except for hunting (which is expressly proscribed) firing from a drone would be covered in all circumstances.[63] (In fact, the Connecticut teenager's pistol-toting drone recently shown on YouTube firing over deserted private property would likely be legal under current Connecticut law).

Trespass: Generally, criminal trespass involves physical intrusion. Although Supreme Court precedent has held that flying aircraft at 83 feet could have a material negative impact on the property owner,[64] the Connecticut study indicates that more specific guidelines are needed: "Without a definition of the upper elevation limits of private property, it would be difficult to argue that a drone had entered the property criminally by flying over it."[65] The same might be said for civil trespass.

Municipal drone laws: Municipal drone laws are just beginning to emerge. A search for "unmanned aircraft" in the MuniCode database returns a handful of examples.

In Seattle, rules for police use of drones and the data derived therefrom are covered under "Acquisition and Use of Surveillance Equipment."[66] Prairie du Chien, Wisconsin signed into law a new ordinance on August 4 adding "Use of a Drone" to a range of "Offenses Against State Laws Subject to Forfeiture."[67] In Bonita Springs, Florida "Parks and Recreation" includes a provision allowing the aerial filming of one's own "special event" in municipal parks, subject to several safety standards, and provides for com-

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mercial and delivery uses, subject to city approval.[68]

Charlottesville, Virginia made news (beyond the *Pirker* matter) when its city council passed the country's first drone resolution in February 2013 in which it "calls on the United States Congress and the General Assembly of the Commonwealth of Virginia to adopt legislation prohibiting information obtained from the domestic use of drones from being introduced into a Federal or State court," and "pledges to abstain from similar uses with city-owned, leased, or borrowed drones."[69]

State Preemption: Obviously any municipal laws regarding governmental or commercial drone use would be largely preempted by federal regulations--and in some case by state law. For example, newly-enacted **Maryland SB 370** specifies that only the state can prohibit, restrict, or regulate UAV's, preempting counties and municipalities.[70] Unless so foreclosed, however, municipalities should have the prerogative to address paramount issues such as voyeurism, First Amendment rights and law enforcement surveillance, each of which is discussed below.

Airborne Voyeurism: An obvious and recurring topic in the drone law discussion is the potential for invasion of privacy. As evidenced in the above list of new state laws, Arkansas, Florida and Mississippi now specifically prohibit using UAV's to peek into private property. In many other jurisdictions, voyeurism, whether at eye level, facilitated by climbing a tree, floating in a balloon or operating a state of the art camera-hauling octocopter, is covered by current "peeping tom" laws. Here, the challenge is not so much in amending laws to add drones to the list of improper voyeuristic vehicles, but in making the existing laws stick.

For example, California's existing privacy laws would seem to cover drone-enabled snooping into a private residence:

> Except as provided in subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
> (j) (1) Any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside.[71]

But the devil is in the details. Penalizing drone-enabled voyeurism–if in fact it is detected at all, given the noise of traffic, air conditioners, sirens and such–is likely to face the same challenges that confront the prosecution of terrestrial peeping. As one enterprising voyeur-defense law firm's site explains:

> Like other California "disorderly conduct" crimes, peeping while loitering and invasion of privacy are quite specific and technical in their requirements. Often, the prosecution will be unable to prove one or more required elements of the crime.[72]

The site provides a litany of loopholes which may thwart prosecution of a potential voyeurism charge; presumably some of these would be just as viable in defending against airborne peeking as they are for standing outside a back yard bedroom window:

> Legal defenses to Penal Code 647(i), peeping while loitering, include (but are not limited to):
> - You weren't on private property;
> - You weren't loitering;
> - You had a lawful purpose for being on the property; and
> - The building you were peeking into wasn't inhabited.

Depending on the specific charge, legal defenses to Penal Code 647(j), invasion of privacy, include (but are not limited to):

- The alleged victim did not have a reasonable expectation of privacy;
- The alleged victim consented to being photographed or recorded;
- You didn't intend to invade anyone's privacy; and
- You didn't intend to arouse or gratify yourself sexually.[73]

The firm is helpful enough to provide some instances of questionable behavior that might avoid legal jeopardy.[74]

The victim's reasonable privacy expectations and the perpetrator's intent will no doubt continue to be argued in drone-based voyeurism cases.

First Amendment Implications: Airborne photography also implicates First Amendment issues. Questions about freedom of expression, journalistic and otherwise, abound. For example, if one has the right to video activity from the ground, why should capturing the same activity from an airborne camera be proscribed?

That question arose earlier this year in a federal court considering *Rivera v. Foley*, no. 3:14 cv00196 (D. Conn. Mar. 23, 2015). Pedro Rivera, a photographer and editor at a Hartford television station, was alerted in February 2014 by his police scanner to a serious traffic accident downtown. He went to the scene and stopped at the perimeter which law enforcement had set up. Wanting a better view, Rivera launched his personal drone. It ascended to a point 150 feet directly above the accident, affording much more compelling photography.

The police officers became aware of the drone. They confronted Rivera, demanded that he cease filming and contacted his employer—with the result that he was suspended from work for one week.

He brought a Section 1983 action against the Hartford Police Department and various officers, alleging violation of his First and Fourth Amendment rights. His Fourth Amendment count failed, given that his drone flight justified a *Terry* stop:

> Plaintiff`s operation of an unusual and likely unidentified device into a cordoned-off area at the scene of a major motor vehicle accident and ongoing police investigation provides arguable reasonable suspicion that Plaintiff was interfering with police activity.[75]

More significantly, the court's First Amendment analysis found that, although the right to photograph police activity was not clearly established in the Second Circuit (in contrast to the First, Seventh, Ninth and Eleventh), even if such right did exist, there was no precedent suggesting that drone-enabled photography was also protected:

> [I]n cases where the right to record police activity *has* been recognized by our sister circuits, it appears that the protected conduct has typically involved using a handheld device to photograph or videotape at a certain distance from, and

> without interfering with, the police activity at issue.... By contrast, here Plaintiff directed a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, effectively trespassing onto an active crime scene.... Even if recording police activity were a clearly established right in the Second Circuit, Plaintiff`s conduct is beyond the scope of that right as it has been articulated by other circuits.[76]

Obviously, cameras are able to film from an angle, permitting footage to be gathered from airspace that is not over a "police restricted area." And where the drone is over public airspace, the First Amendment advocates become more vociferous. As Brendan Shulman, a leading "drone-rights" lawyer who represented drone videographers Team Blacksheep and Texas EquuSearch has opined regarding laws that seek to limit airborne photography:

> The Supreme Court has affirmed that there's no expectation of privacy on a photograph taken from the air in places where planes tend to fly. There's a First Amendment right to take a photograph of someone in a public place and that right is enhanced if the picture is for a journalistic purpose. These laws don't seem to have taken that into account and that's where there are grounds to challenge them.[77]

Fourth Amendment Implications: Drones are clearly poised to shrink the sanctuary known as "privacy" beyond its already-limited boundaries. While drone-enabled voyeurism is an annoyance, implications for expanded search and seizure are even more concerning, given that a search is not likely to be considered "unreasonable" unless it violates a "constitutionally protected expectation of privacy."[78] The "expectation of privacy," at least from aerial intrusion, was downsized long ago, when the Supreme Court upheld law enforcement's using the fruits of warrantless overhead surveillance from an altitude as low as 400 feet.

In *Florida v. Riley*, 488 U.S. 445 (1989), a county sheriff was acting on a tip that a suspect was growing marijuana in a greenhouse on his five-acre rural property. Unable to see the building in question, the officer circled over the premises in a helicopter. The greenhouse was missing two roof panels, allowing the sheriff to see, with his naked eye, what appeared to be marijuana growing inside. A warrant was procured, and an arrest made.

The trial court had agreed with Riley that the flyover violated his reasonable expectation of privacy. That decision was overturned by Florida's Court of Appeals--which was in turn overturned by the state's highest court, again finding a privacy expectation.

The Supreme Court reversed yet again. "Any member of the public could legally have been flying over Riley's property at 400 feet and could have observed Riley's greenhouse. The police officer did no more."[79]

With a UAV instead of a helicopter, the potential for further overreach is obvious. Surveillance will be possible from much lower altitudes, whether looking straight down, at an angle or horizontally. It is therefore not surprising that, as noted earlier in this article and as the aforementioned Connecticut General Assembly study confirms, the single greatest subject matter of state and local drone laws is the limitation of use by law enforcement.[80]

CONCLUSION: The possibilities for beneficial use of drones are seemingly unlimited, and it is virtually certain that UAV deployment, by governments, businesses and hobbyists, will grow exponentially in the near future, transforming society. But critical questions about safety, privacy and constitutionality remain to be answered. Although the FAA has preempted much of what can be done to regulate UAV's, there is still substantial work to be done on the state and local level. Municipal lawyers have a responsibility to understand this new, intrusive technology--and a unique opportunity to play a significant role in crafting local drone laws that provide the right balance between recreational interests, commercial opportunity, law enforcement and the protection of fundamental constitutional rights.

Notes

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2. See more at: http://uavdronesforsale.com/index.php?page=item&id=672#sthash.ZwZd4rMt. dpuf (last accessed July 17, 2015).
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11. http://www.nbcnews.com/tech/tech-news/first-faa-approved-drone-delivery-drops-medicine-virginia-n393986 (last accessed July 23, 2015).
12. http://www.cbsnews.com/news/california-wildfire-motorists-flee-cars-highway/ (last accessed July 20, 2015).
13. California's SB 167 was introduced in February 2015 and amended in July; it would impose jail time of up to six months and fines of up to $5,000 for intentional or reckless drone intrusion that interferes with efforts to extinguish forest fires. *See also* http://www.latimes.com/local/lanow/la-me-ln-anti-drone-legislation-20150721-story.html (last accessed July 26, 2015).
14. http://www.cnn.com/2015/07/21/us/gun-drone-connecticut/index.html (last accessed July 22, 2015).
15. http://www.washingtonpost.com/local/virginia-politics/va-ag-to-drones-not-in-my-backyard/2015/07/15/6465fd58-2b0a-11e5-a250-42bd812efc09_story.html (last accessed July 19, 2015).
16. https://www.youtube.com/watch?v=qmHwXf8JUOw (last accessed July 5, 2015).
17. Aaron Sankin, "The dizzying state of America's drone laws" April 24, 2014, http://www.dailydot.com/politics/us-state-drone-laws-mess/ (last

Continued on page 37

IMLA WEBINAR CALENDAR

These are the IMLA Webinars currently scheduled for the remainder of 2015. Speaker bio's, webinar pricing and registration information is available on the IMLA website (www.imla.org). Please join us!

AUGUST 10

Land Use – 17
The Takings Issue
FREE*
Two titans of takings, who just happen to have profoundly opposing views of the world, have graciously agreed to discuss the latest developments and spar. This will be the Great Debate of 2015.
Speakers: **John Echeverria, Michael Berger, Mike Giaimo,** and **Dan Mandelker**
Date: August 10, 2015
Time: 1PM EST
*Limited availability

AUGUST 19

Personnel
Reasonable Accommodation Revisited and Updated
The Americans with Disabilities Act and the Rehabilitation Act continue to present challenges for municipal employers as to what constitutes reasonable accommodation in employment. ADA expert Jonathan Mook provides guidance from recent court rulings on issues such as telecommuting, schedule adjustments, unpaid leave, reassignment, as well as Young v. UPS and pregnancy accommodation.
Speakers: **Dan Crean** and **Jonathan Mook**
Date: August 19, 2015
Time: 1PM EST

AUGUST 25

New Government Lawyer Series – NGLS1
Local Government 101
FREE*
An introduction to local government law discussing the development of counties and cities, their structure, their functions, their services and their relationship to and interaction with the federal government under the Constitution. The goal of the introduction is to provide an understanding for what local governments do and why and to better understand their authority and limitations on that authority.
Speaker: **Chuck Thompson**
Date: August 25, 2015
Time: 1PM EST
*Limited availability

SEPTEMBER 10

Litigation - LI10 Litigating Pensions
The threat that public employee defined benefit pension plans pose to local government finances is real and only getting worse. The recent economic downturn is forcing local governments to make structural changes to their plans or risk financial crisis. In 2011, the City of Atlanta faced an approximately $ 1.3 billion unfunded pension deficit. Atlanta City Attorney Cathy Hampton and the Law Department were integral to the City of Atlanta's historic pension reform by drafting the reform legislation, facilitating implementation and successfully defending it against a legal challenge. On November 10, 2014, a state court in the class action Stephen Borders et al v. City of Atlanta et al, Case No. 2013-CV-239021 affirmed the pension reform as both constitutional and effective in reducing the projected unfunded pension deficit from over 2 billion dollars to zero dollars within thirty years. The court's comprehensive, 34-page opinion canvassed federal and state law across the country in granting Atlanta's motion for summary judgment. This legal victory in the approximately 5000 employee class action will protect the plan from future legal challenge.
City Attorney Cathy Hampton, Chief Counsel Robin Joy Shahar and Assistant City Attorney Seth Eisenberg will bring a breadth of knowledge for the development and legal defense of strategic pension reform.
Speakers: **Cathy Hampton, Robin Shahar** and **Seth Eisenberg**
Date: September 10, 2015
Time: 1PM EST

SEPTEMBER 16

Personnel Topic TBA
Speakers: **Dan Crean** and TBA
Date: September 16, 2015
Time: 1PM EST

SEPTEMBER 21

Land Use – L18 Wetlands
Rapanos and the federal efforts to add some clarity continue to plague municipal lawyers. How do you tell if it is a wetland, what regulation will survive attack in the courts, and what is the effect on global climate change on all of this? The country's acknowledged leading wetlands lawyer and a wetlands biologist internationally recognized for his work together provide an eclectic view.
Speakers: **Virginia S. Albrecht, Michael Klemens, Dwight Merriam** and **Dan Mandelker**
Date: September 21, 2015
Time: 1PM EST

SEPTEMBER 28

First Amendment – C11 Topic TBA
FREE*
Speakers: **Deborah Fox** and **Margaret (Meg) Rosequist**
Date: September 28, 2015
Time: 1PM EST
*Limited availability

OCTOBER 19

Land Use – L19 Historic Preservation
Learn about the latest developments at the federal, state, and local level, and some of the more important decisions that affect your local practice from two of the country's leading experts. What does it mean to be "historic," how do you regulate at the local level, and what are the emerging issues?
Speakers: **Sara Bronin, Paul Edmondson, Dwight Merriam** and **Dan Mandelker**
Date: October 19, 2015
Time: 1PM EST
October 21

Marijuana - D10 Marijuana Trends & Legal Issues Every Municipal Attorney Needs to Know

Marijuana is coming, are you ready? Legal marijuana, both recreational and medical, is continuing to spread across the country and local governments are assuming significant responsibilities for policy and regulatory decisions, while others are being intentionally limited. Join Chris Halsor, Colorado attorney, and one of the country's experts on legal marijuana where he will discuss such issues as home grows, edibles, "open and public consumption," hemp and dispensary regulation and zoning. He will also address a number of new issues that the marijuana industry is seeking to add to future legislation and ballot measures that municipalities will want to be aware of and anticipating.

Speaker: **Chris Halsor**

Date: October 21, 2015

Time: 1PM EST

October 27

Technology – T14 Drones 2.0 – Regulatory Considerations and Challenges for Municipal Lawyers

This program will follow-up on our popular February discussion on UAVs - unmanned aerial vehicles or drones. While most people focus on long-awaited FAA/national regulations, there is important action at the state and local levels. California Gov. Jerry Brown recently vetoed a bill that would have required police to obtain warrants for surveillance by drones. Since 2013, 20 states have enacted laws on the issue, according to the National Conference of State Legislatures, ranging from how police can use the new technology to the use of drones by the general public. An example of a key challenge includes how to balance concerns over privacy and civil liberties with a technology that police departments say can serve as a powerful law-enforcement tool. The presentation will help municipal lawyers understand and address a broad scope of regulatory complexities.

In this presentation, John Bakker and Kristopher Kokotaylo from Meyers Nave will discuss: the scope of protection **against** government intrusion regarding drones; scope of expectation of privacy against private actors; the fact that the FAA has announced that it does not intend to regulate privacy in connection with UAS and the implications of that announcement; and local regulation of UAVs as exercise of traditional police powers

Speakers: **John Bakker** and **Kristohpher Kokotaylo**

Date: October 27, 2015

Time: 1PM EST

November 9

Land Use – L20 Comprehensive Plans

FREE*

"Make no little plans; they have no magic to stir men's blood and probably themselves will not be realized. Make big plans; aim high in hope and work." said Daniel Burnham. But he didn't say anything about whether local comprehensive planning was mandatory or whether planning and zoning decisions had to be consistent with any local plans. Those issues are front and center in the turbulent legal landscape of local planning. Our two experts will offer you an illuminating debate subject.

Speakers: **Edward J. Sullivan, Carrie Richter, Dwight Merriam** and **Dan Mandelker**

Date: November 9, 2015

Time: 1PM EST

*Limited availability

November 18

Personnel Holidays and Religion in the Municipal Workplace

Municipal workplaces may take on the appearance of a "winter wonderland" as the winter solstice approaches. Not everyone, though, shares in the joys of the season in the same way as everyone else. This webinar looks at the range of actions and displays that occur from the permitted to the prohibited to the uncertain, and seeks to provide assistance in crafting policies to guide municipal actions. Also included is an update on the topic of religious apparel in the workplace.

Speakers: **Dan Crean** and **John Cloherty**

Date: November 18, 2015

Time: 1PM EST

November 23

Land Use - L21 Local Nuisance and Crime-Free Ordinances: Legal Issues and Policy Considerations

Speakers: **David Wesner, Sandra Park, Melody Taylor-Blancher, Barbara Delaney**

Date: November 23, 2015

Time: 1PM EST

December 14

Land Use – L21 Fracking Redux

Hydraulic fracking continues to dominate the news in many parts of the country, including areas which don't have such extraction but may become disposal sites. Learn what the latest developments are to better meet the needs of your local governments.

Speakers: **Erica Levine Powers, Sorell E. Negro, Dwight Merriam** and **Dan Mandelker**

Date: December 14, 2015

Time: 1PM EST

December 16

Personnel – P13 FLSA: A Moving Target

U.S. Supreme Court and appellate cases and the Obama administration's directives to the Department of Labor regarding overtime rules may make significant changes in application of the Fair Labor Standards Act. The decisions and rule amendments and other recent developments will be analyzed and dissected in this webinar.

Speakers: **Jeanne Phelan** and **Dan Crean**,

Date: December 16, 2015

Time: 1PM EST

The Buzz About Bees Cont'd from page 11

It's All the Buzz: Regulating Neighborhood Beehives, 39 B.C. ENVTL. AFF. L. REV. 55, 71 (2012).
21. Robert Heddle and David Golden, *Allergy to Insect Stings and Bites*, WORLD ALLERGY ORGANIZATION, November 2008, http://www.worldallergy.org/professional/allergic_diseases_center/insect_allergy/ (last visited Apr. 10, 2015).
22. *Id.*
23. *Id.*
24. Arkadelphia v. Clark, 52 Ark. 23, 25, 11 S.W. 957, 1889 Ark. LEXIS 4, *4-5 (Ark. 1889).
25. In re Application of Ellis, 11 Cal. 2d 571, 575, 81 P.2d 911, 912, 1938 Cal. LEXIS 331, *7 (Cal. 1938).
26. Olmsted v. Rich, 6 N.Y.S. 826, 1889 N.Y. Misc. LEXIS 805 (N.Y. Sup. Ct. 1889).
27. Whitemarsh Township v. Cummings, 1956 Pa. Dist. & Cnty. Dec. LEXIS 229, *6, 7 Pa. D. & C.2d 557, 561 (Pa. C.P. 1956).
28. National League of Cities, *Number of Municipal Governments & Population Distribution*, NATIONAL LEAGUE OF CITIES, http://www.nlc.org/build-skills-and- networks/resources/cities-101/city-structures/number-of-municipal-governments-and- population-distribution (last visited Apr. 9, 2015).
29. This paper will only explore the keeping of bees within a city, and none of the related legal regulations: including sales of honey, regulation of commercial beekeeping, etc.
30. *About Melbourne, Florida* CITY OF MELBOURNE, FLORIDA, http://www.melbourneflorida.org/info/ (last visited Apr. 9, 2015).
31. ECONOMIC DEVELOPMENT COMMISSION OF FLORIDA'S SPACE COAST, *Community Data Melbourne*, April 2012, *available at* http://www.melbourneflorida.org/ecdev/edc-data.pdf.
32. MELBOURNE FLORIDA CODE § 10-52.
33. MELBOURNE FLORIDA CODE § 10-53.
34. Hillsboro Oregon, *Hillsboro Data* http://www.hillsboro- oregon.gov/index.aspx?page=66 (last visited Apr. 10, 2015).
35. 31 Driving Directions from Hillsboro, OR to Portland, OR, GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "Hillsboro, OR" and search "B" for "Portland, OR"; then follow "Get Directions" hyperlink).
36. HILLSBORO MUNICIPAL CODE § 6.20.080.
37. HILLSBORO MUNICIPAL CODE § 6.20.080(A)(4).
38. HILLSBORO MUNICIPAL CODE § 6.20.080.
39. Those concerns about the presence of *keeping* bees at properties adjacent to their own.
40. HILLSBORO PLANNING, *Neighborhood Beekeeping Notification Labels & Vicinity Map Request Form*, *available at* http://www.hillsboro- oregon.gov/modules/showdocument.aspx?documentid=1542 (last visited Apr. 9, 2015).
41. *See supra* Part I.
42. Census Bureau, *Savannah, Georgia,* CENSUS BUREAU QUICK FACTS, http://quickfacts.census.gov/qfd/states/13/1369000.html (last visited April 9, 2015).
43. GA. CODE ANN. § 2-14-41.1 (West)
44. GA. CODE ANN. § 2-14-40 (West). *See also* HONEYBEES, GEORGIA DEPARTMENT OF AGRICULTURE, http://agr.georgia.gov/honey-bees.aspx (last visited Apr. 9, 2015) ("All other beekeepers (e.g. hobbyists, pollinators, honey producers) are *not required* to be licensed or inspected by the Plant Protection Section") (emphasis added).
45. GA. CODE ANN. § 2-14-40 (West).
46. Aleigh Acerni, *No Zoning Laws, No Problem? Think Again*. URBAN FARM ONLINE.COM, (Dec. 2, 2011), http://www.urbanfarmonline.com/urban-farm-news/2011/12/02/beekeeping- zoning-laws.aspx.
47. *Id.*
48. David Ibata, *Forsyth raises big buzz in attempt to ban backyard beekeeping,* http://www.ajc.com/news/news/local/forsyth-raises-big-buzz-in-attempt-to-ban-backyard/nQNFK/ (Nov. 1, 2011, 1:58PM), http://www.ajc.com/news/news/local/forsyth-raises-big-buzz-in-attempt-to-ban-_backyard/nQNFK/.
49. *Id.*
50. *Id.*
51. Census Bureau, *Baton Rouge, Louisiana,* CENSUS BUREAU AMERICAN FACT FINDER, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited April 9, 2015).
52. LSU AgCenter Research & Extension, *Model Beekeeping Ordinance for Louisiana Local and Municipal Governments*, Sept. 2009, *available at* http://www.lsuagcenter.com/NR/rdonlyres/CB2656D7-A2EA-4E6D-8DC3-_A88E889E763E/61883/pub2524modelbeekeepingAug09HIGHRES.pdf.
53. LOUISIANA MUNICIPAL CODE § 6:661.
54. A Langstroth hive is the most common type of beehive used in North America. Consisting of stacked hive boxes with movable honeycomb frames, they allow the beekeeper to manage and inspect the bees with limited impact on the colony. *See* EvaCrane, *The World's Beekeeping, Past and Present*, *in* THE HIVE AND THE HONEY BEE 12-14 (1975).
55. BATON ROUGE MUNICIPAL CODE § 6:663.
56. *Id.* § 6:664.
57. *See id.* The code refers to the bees' "flyway," but this is understood as the "bee line," or the specific airways that worker bees make use of as they routinely enter and exit the hive. *See supra* Part I.
58. BATON ROUGE MUNICIPAL CODE § 6:665.
59. *Id*
60. *Id.* § 6:669.
61. *Id.* § 6:671.
62. *See* SALT LAKE CITY CODE § 8.04.010. "HONEYBEE: The common honeybee, *Apis mellifera* species, at any stage of development, but not including the African honeybee, *Apis mellifera scutellata* species, or any hybrid thereof." The relevant provisions of the code permit the keeping of honeybees with a series of registration requirements, and by the exclusion of the African honeybee within that definition, make its presence illegal in Salt Lake City. European race varieties, however would be included. *Id.*
63. 59 *See* Patricia Salkin, Honey It's All the Buzz: Regulating Neighborhood Beehives, 39 B.C. ENVTL. AFF. L. REV. 55, 71 (2012) (quoting San Diego, Cal., Mun. Code § 44.0413(a)).
64. *See* KIM FLOTTUM, THE BACKYARD BEEKEEPER: AN ABSOLUTE BEGINNER'S GUIDE TO KEEPING BEES IN YOUR YARD AND GARDEN 32 (2010).
65. This also ensures that bees will be treated differently from "undomesticated animals" or "agriculture" which are generally prohibited in city codes, and do not adequately encompass the nature of honey bees and the practice of bee keeping. This is akin to the Weaver case described *supra* Part II. ML

Drones Cont'd from page 33

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21. http://www.kramerlevin.com/files/upload/PirkerDecision.pdf (Brendan Shulman, a preeminent "drone lawyer" who represented Pirker, is a partner with the Kramer Levin firm) (last accessed July 25, 2015).
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24. *Id.*
25. *Id.*
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29. http://www.faa.gov/uas/civil_operations/ (last accessed July 23, 2015).
30. *Id.*
31. http://variety.com/2014/artisans/news/faa-expected-to-permit-use-of-drones-on-film-sets-1201313650/ (last accessed July 25, 2014).
32. http://www.forbes.com/sites/gregorymcneal/2014/07/12/faa-approves-limited-use-of-drones-for-san-diego-utility-company/ (last accessed July 25, 2014).
33. http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17934 (last accessed July 26, 2015).
34. http://richmondbizsense.com/2015/07/27/with-green-light-from-faa-drone-startup-takes-flight/ (last accessed July 27, 2015).
35. *Id.*
36. http://dronelawsblog.com/wp-content/uploads/2015/07/Helios-Imaging-Inc-12107.pdf (last accessed July 25, 2015).
37. http://www.faa.gov/uas/model_aircraft/ (last accessed July 20, 2015).
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50. https://olis.leg.state.or.us/liz/2015r1/measures/overview/hb2534 (last accessed July 24, 2015).
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71. Cal. Penal Code § 647(j).
72. www.Shouselaw.com
73. *Id.*
74. For example, says the website, if one were simply trying to win a bet that true Scotsmen do in fact "go commando" under their tartans, such academic photography might conceivably not violate the California invasion of privacy laws. *Id.* www.shouselaw.com/peeping-tom-laws.html#2.1.2 (last accessed August 10, 2015).
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76. *Id.*
77. http://www.dailydot.com/politics/us-state-drone-laws-mess/ (last accessed July 24, 2015).
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If you are interested in presenting a paper at one of these future conferences or seminars, please mail information to IMLA or contact IMLA at info@imla.org.

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