



## Drones Flying Into Your Future

Writing an article about a drone faces a built-in challenge with the meaning of the word being linked to monotonous communication. However, that challenge is overcome by the recent burst of interest in the use of drones.

Recently, the lead story on the national news was about a drone coming within 20 feet of an airport and causing a massive airport shutdown in New Jersey. The news was accompanied by a visualization of a drone causing a cavernous hole in the side of a fictitious aircraft. Similar events forced the expensive closures of Las Vegas and London's Gatwick airports in 2018. Entertainment is full of exciting stories of military or police use of drones. Drone flights were prohibited within 30 miles of the Superbowl in Atlanta. These events illustrate the burgeoning problems with the growth of such unmanned aircrafts now streaking across our skies for many different reasons. Millions of drones are now owned by private persons. Drones with cameras can now be purchased for less than \$100.

With the increase in drone use, the federal government stepped in to regulate drones in airspace. New legislation tried to adjust property owners' airspace rights to accommodate drones while preventing them from trespassing on private property below.

To accommodate the benefits aerial technology offers society, property owners' rights are limited to what they can reasonably use. Currently, airspace at least 500 feet above ground level is generally considered navigable airspace and is regulated by the Federal Aviation Administration (FAA). This airspace does not belong to the property owner who owns the land below.

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Drones have innumerable practical applications for governmental entities, including property surveillance;

monitoring of traffic and weather conditions; crowd control; search and rescue operations; disaster response; and law enforcement. These are contingent on the ability of drones to fly freely and legally through airspace. Drones generally fly below the FAA's navigable airspace, in the vertical curtilage that is commonly viewed as belonging to a property owner.

### Legislation And Rule-Making

In 2016, pursuant to congressional authorization, the FAA released its first operational rules, "Chapter 107," for routine use of small unmanned aircraft systems. The rules offer safety regulations for drones weighing less than 55 pounds and conducting non-hobbyist operations. These rules generally require drone operators to keep their drones within their visual line of sight. They also prohibit flights over people on the ground who are not directly participating in the drone operation. These rules also limit drone operations over property that does not



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belong to the drone operator, but they do not explicitly address the rights of neighboring property owners who wish to prevent drones from operating over their property.

Additionally, the FAA rules do not specifically deal with privacy issues in the use of drones and the FAA does not regulate how drones can gather data on people or property. Most legislation regarding drones does not explicitly address the trespass or privacy concerns of real property owners with regard to flying UAS over their land. Presumably state laws still apply. In the

absence of federal or state regulations granting drones the right to fly over private property without the owner's permission, drones do not have the right to do so. Property owners may enforce their rights through trespass and invasion-of-privacy claims.

Common law trespass is an invasion of the exclusive possession and physical condition of land. Therefore, a drone operator flying a drone over neighboring property below the FAA's navigable airspace may be technically trespassing on that property.

Drones equipped with cameras that record the private activities of property owners may result in tort liability for invasion of privacy. To establish a claim for invasion of privacy based on intrusion upon seclusion, a plaintiff is required to show that the drone operator committed an unauthorized intrusion or prying into the property owner's seclusion. The intrusion must be highly offensive or objectionable to a reasonable person. The matter intruded upon must be private and the intrusion must cause the plaintiff anguish and suffering.

For aggrieved property owners, filing a lawsuit and seeking damages for trespass or invasion of privacy is not an expedient resolution to the problems posed by increasing drone usage. Litigation is slow and costly. Without an overarching regulatory scheme, property owners may resort to taking matters into their own hands.

### Case Law

Due to recent rapid growth of drones, there is not an existing wealth of cases interpreting drone usage. Few cases have reached the appellate decision level, but a few cases do help explain.

### Private Property

In 2015, a man brought down an unmanned aircraft with a shotgun as it flew over his home. The owner of the drone subsequently filed a federal claim seeking money damages for the damage caused to his drone and asking for a declaratory judgment to resolve the tension between the rights of the drone operator and the rights of property owners. The lawsuit asked the judge to issue a judgment declaring that drones are "aircraft" subject to federal law, and thus cannot be trespassing or invading property owners' privacy when they are operating in navigable airspace. Unfortunately, the court granted a motion to dismiss based on lack of jurisdiction. Is it open season on drones? Not likely.

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## Privacy

Generally, the government is not required to obtain a warrant to perform public surveillance. Under the Fourth Amendment, a person has a reasonable expectation of privacy in his home but does not generally have a reasonable expectation of privacy when in public. If, however, society becomes accustomed to unrestrained drone usage over private property, then it will be much more difficult for the average person to object to government drones doing the same thing.

## Federal Preemption

One of the seminal cases on drone usage is *Singer v. City of Newton*, 284 F. Supp. 3d 125 (D. Mass. 2017), appeal dismissed on other grounds, 2017 WL 8942575 (1st Cir. 2017). In this case, the court held that certain sections of a city ordinance that regulated unmanned aircraft or drones are subject to invalidation on the grounds of conflict preemption. The city ordinance prohibited drone usage below an altitude of 400 feet over any private property or over any public property without the express permission of the property owner, conflicting with FAA-permitted flight regulations in 14 C.F.R. § 107.51(b). The court explained that the City's choice to restrict any drone use below this altitude absent prior permission works to eliminate any drone use in the confines of the City, thwarting not only the FAA's objectives but also those of Congress. The city ordinance also prohibited the flight of pilotless aircraft beyond the visual

line of sight of the operator; this was held to limit the methods of piloting such aircraft beyond that which the FAA had already designated for such aircraft. The FAA requires either that (1) a remote pilot both command and manipulate the flight controls, or (2) a visual observer be able to see the drone throughout its flight. The court also held that the ordinance was invalid in regulating drones, since its registration requirements for pilotless aircraft conflicted with the FAA explicit indication of intent to be the exclusive regulatory authority for registration of pilotless aircraft. The court rejected the City's argument that there is "some space" in FAA regulations of certain drones to exclude model drones that thereby allows the City to require registration of model drones, saying that requiring all drones to be registered was in clear derogation of the FAA's intended authority.

The *Singer* case has recently been cited with apparent approval in *Pan American, v. Municipality Of San Juan*, 2018 WL 6503215 (D. Puerto Rico.2018), in a challenge to a city ordinance prohibiting flying over a festival.

## Summary

So, what is left for the municipality to control? A model ordinance entitled "Ordinance for the Promotion of Drone Innovation and Accountability" has been promulgated by the National League of Cities and is available on its website ([nlc.org](http://nlc.org)). The website also has a primer on drones. There are many models on the web from various

law firms and public interest groups. Be sure to look at ones that have considered the *Singer* case and current laws. This is a moving target (literally and figuratively).

Of course, common city ordinances prohibiting criminal trespass and invasion of privacy are still viable.

The FAA is currently seeking to revise Chapter 107 to loosen some of the drone restrictions and to improve safety, especially with regard to drone accidents with pedestrians. Cities are free to provide their opinions to the FAA.

Cities should be careful not to tread on ground where the FAA has specifically regulated. Courts will likely protect their federal preemption. Cities must keep up on changes in the law as drones continue to proliferate and the law expands in this area. 🍃

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