

To Fly or Not to Fly? That is the Question Posed by the City of Newton!



Summary By: David R. Chenelle, Esq.

With the emergence of the use of the pilotless aircraft, commonly known as drones, there has been an increasing number of news stories concerning the use or abuse of drones. We are no longer talking about the flying toy helicopter that a child would get as a present, but commercial quality drones capable of flying ranges in the thousands of feet. So from the claims that my neighbor is spying on me to the more Machiavellian purposes claimed, drone use has now become one of the hot topics that condominium associations have to deal with.

In the City of Newton, an ordinance was passed in December of 2016 in an attempt to regulate the use of pilotless aircraft within the city limits. That ordinance indicated the intent was to “promote the public safety and welfare of the City and its residents ... to work in harmony with all relevant rules and regulations of the Federal Aviation Administration”. (“Ordinance”) It further defined pilotless aircraft as “an unmanned, powered aerial vehicle, weighing less than 55 pounds, that is operated without direct human contact from within or on the aircraft” (“FAA”). The ordinance provided, in part, the following:

1. Local registration requirements applicable to owners of all pilotless aircraft;
2. A ban on the use of a pilotless aircraft below an altitude of 400 feet over private property without the express permission of the owner of the private property;
3. A ban on the use of a pilotless aircraft “beyond the visual line of sight of the Operator”;
and
4. A ban on the use of a pilotless aircraft over Newton city property without prior permission.

Once passed, along comes Michael Singer, a resident of Newton to challenge the ordinance. Singer thereafter filed for Declaratory and Injunctive Relief in the U.S. District Court for the District of Massachusetts (“Court”) challenging the portions of the ordinance listed above. The trail of the case was abbreviated as both sides agreed to file reciprocating Motions for Summary Judgement.

As previously stated, the position of the City of Newton was for the safety and welfare of its citizens. Singer, however, had a much more robust response stating that the Ordinance went too far in that it is preempted by federal law as it attempts to regulate a nearly exclusively federal area of law; namely airspace.

Backing up a bit, in the fall of 2012 the FAA Modernization and Reform Act was passed directing the FAA to incorporate into its regulations the control and use of drones. This directive was codified at 49 U.S.C. §40101 resulting in the promulgation of 14 C.F.R. part 107, which as its

stated purpose “applies to the registration, airman certification, and operation of civil small unmanned aircraft systems.” In review of the FAA guidelines, the Court found that the Ordinance conflicted with or undermined the directive of the FAA in regards to the required registration and flying restrictions imposed within the Ordinance. In fact the Court went so far as to state that the restrictions contained within the Ordinance “essentially constitutes a wholesale ban on drone use in Newton.”

The Court then went into a very long dissertation on the Supremacy Clause of the U.S. Constitution. Following references to multiple U.S. Supreme Court cases involving air space and its control, the Court concluded that “where a state’s exercise of police power infringes upon the federal government’s regulation of aviation, state law is preempted.” The Court further concluded that where Congress has given the FAA the responsibility of regulating the use of drones, the challenged portions of the Ordinance were in fact preempted. The Court’s closing statement seemed to leave the door open to future attempts by municipalities when it stated “of course, nothing prevents Newton from re-drafting the Ordinance to avoid conflict preemption.”