



## Legal Brief

### DRONES IN YOUR DISTRICT: TECHNOLOGY, EXISTING LAW, AND PRIVACY CONCERNS

By Kristopher Kokotaylo, Meyers Nave

As the commercial and consumer use of unmanned aerial systems (“UAS” or “drones”) continues to skyrocket, there are critical issues that local governments need to consider before utilizing this rapidly advancing technology. Drones can provide an efficient and low cost method for local governments to perform various tasks, such as surveying work and conducting structural analysis, as well as assisting in difficult or dangerous situations, such as firefighting and search-and-rescue missions. However, obtaining and using a drone requires more than simply purchasing the drone and assigning an employee to operate it. In addition to complying with federal regulations, public agencies should consider developing drone-use policies and procedures, and they face the unenviable task of addressing the highly sensitive concerns that local residents may have about privacy and safety.

#### Local Government Options for Drone Use

Congress tasked the Federal Aviation Administration (“FAA”) with prescribing air traffic regulations regarding the flight of aircraft, including drones. The FAA Modernization and Reform Act of 2012 provides three classifications for drone use: (1) public,

(2) civil, and (3) model. And, on June 21, 2016, the FAA finalized the first operational rules for routine government and business use of small drones. Thus, as is outlined below, local governments have three options for operating a drone.

#### Model Aircraft

Drones operated solely for hobbyist purposes are not required to obtain approval from the FAA prior to operation, but must comply with statutory parameters for model aircraft operations consistent with Section 336 of Public Law 112-95. Local governments cannot operate a drone for governmental purposes under the model aircraft rules.

#### Public Aircraft

The FAA issues Certificates of Authorization (“COA”) to public drone operators on a case-by-case basis, placing individualized conditions on drone use. Examples of conditions include maximum flight altitudes, minimum operator qualifications, and limitations on non-daylight flights. The FAA performs a technical and operational review of COA applications and typically responds within 60 days.

#### Civil Aircraft and Small Unmanned Aircraft Rule

Until now, civil drone operators were required to obtain a Section 333 Exemption (in addition to a COA) or a “special airworthiness certificate.” However, on June 21, 2016, the FAA issued regulations (“Small UAS Rule”), effective at the end of August 2016, that authorize the non-hobbyist operation of small UAS without obtaining individual approval



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OCTOBER 12 @ 3:45 – 4:45 P.M.

Drones in Your District:  
Technology, Existing Law, and  
Privacy Concerns



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from the FAA through a COA or Section 333 Exemption. Local governments and commercial operators can now operate a small UAS if they meet certain minimum requirements and standards. Some of the requirements and standards include the following:

1. At least one person involved in the operation must have a remote pilot certificate.
2. UAS cannot exceed 55 pounds, including payload.
3. UAS must be operated:
  - a. within line of sight of the remote pilot or visual observer.
  - b. during daylight hours.
  - c. no higher than 400 feet above ground level.
  - d. without flying above persons not directly participating in the operation.
4. Pilots and visual observers are prohibited from operating more than one UAS at a time.

The FAA can waive some requirements for operators who show the proposed operation can be safely conducted under a waiver. The FAA is developing an online portal to apply for waivers.

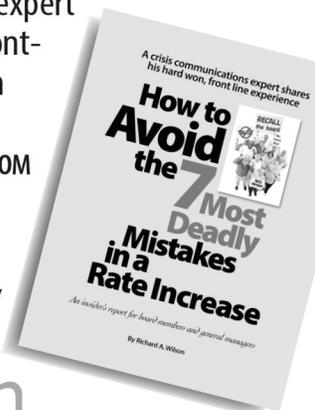
In summary, local governments have three options to operate a drone: (1) obtain a Certificate of Authorization, (2) obtain a Section 333 Exemption, or (3) operate pursuant to the new Small UAS Rule. Local governments may prefer the Small UAS Rule, which allows drone operation under specific standards with a qualified operator and eliminates the need to obtain separate FAA approval.

While the Section 333 Exemption is still technically an available option, the Small UAS Rule can allow operation in significantly less time than was previously required.

*Continued on page 45*

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## Legal brief [continued]

### Privacy and Policy Concerns

Although there are important purposes for governments to use drones, such use may raise privacy concerns from the public. For example, drone use for law enforcement purposes could generate questions about governmental surveillance or the use of images and other data collected and/or recorded by drones. Unfortunately, local governments are on their own in this complex and controversial privacy arena. The Small UAS Rule does not address privacy and the FAA does not regulate how drones gather data on people or property. The Small UAS Rule press release specifically states that the “FAA strongly encourages all UAS pilots to check local and state laws before gathering information through remote sensing technology or photography.” As potential guidance for local governments, the press release only provides a link to the “Voluntary Best Practices for UAS Privacy, Transparency, and Accountability” report from the National Telecommunications and Information Administration.

In addressing privacy issues, local governments need to consider that the United States Constitution and California Constitution protect citizens from “unreasonable” searches and seizures. Generally, law enforcement cannot perform a search without a valid search warrant or a recognized exception to the search warrant requirement, such as exigent circumstances. However, the U.S. Supreme Court has held that the use of legally permissible airspace to conduct surveillance of outdoor property and the use of sense-enhancing technology that is in general public use do not constitute an unreasonable search. Thus, local

governments could likely utilize drones to conduct monitoring for illicit activity. Additionally, local governments could utilize drones to perform non-law enforcement activities including activities that would otherwise require reconnaissance teams or a helicopter.

The critical question is whether local governments want to utilize drones without public input and without defined policies, procedures, and guidelines, which could risk upsetting residents who may already be apprehensive about governmental overreach and surveillance. Although local governments may generally be able to utilize drones uninhibited, they should consider proactively self-regulating drone use and developing a publicly vetted policy. Important areas that governments should address in a policy include: (1) how drones will be used, (2) safeguards to ensure drones are not utilized for illicit purposes, (3) retention policies for data gathered by drones, (4) procedures to investigate complaints, and (5) audit

procedures. A policy that incorporates these measures can help ease potential public mistrust of government and help local residents understand the purposes for which drones will be used, restrictions on that use, and ultimate benefits of that use. As drone usage expands throughout our personal and professional lives, local governments must be prepared to be held to the highest expectations of transparency and accountability when utilizing drones for the public good. ■



*Kristopher Kokotaylo serves the unique legal and regulatory needs of Meyers Nave's special district clients throughout California.*

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## By the Numbers

**\$36,603.98 - scholarship funds awarded  
by the Special District Leadership  
Foundation between January 1 and  
July 1 of 2016.**

\$36,603.98