

The Sky May Be the Limit: Local Drone Regulation and Federal Preemption

Just over one year ago, the Federal Aviation Administration (FAA) promulgated regulations governing the commercial use of drones, also known as unmanned aerial vehicles (UAVs) or unmanned aircraft systems (UAS), weighing less than 55 pounds. These small UAS (sUAS) regulations cleared the way for American businesses to benefit from the many commercial uses for drones. But one question unresolved by the sUAS regulations was the extent to which federal law preempts state and local laws governing drone use. Recently, in a case of first impression, a federal district court held federal law preempts certain provisions of a city ordinance attempting to regulate drone operations. The decision is important because it further defines federal preemption and the authority that states and municipalities have to regulate drones.

The case, *Singer v. City of Newton*, involves an ordinance enacted by the City of Newtown, Massachusetts. *Singer*, No. 7-10071-WGY (D. Mass. filed Sept. 21, 2017). Michael Singer, the plaintiff, is a Newton resident and FAA-certified sUAS pilot who owns and operates multiple sUASs for commercial purposes in the city. The ordinance, which Newtown approved on December 12, 2016, applies to “pilotless aircraft,” which it defines as “an unmanned, powered aerial vehicle, weighing less than 55 pounds, that is operated without direct human contact from within or on the aircraft.” Violations of the ordinance are punishable by a fine of \$50 following a one-time warning. *Id.* at 5. *Singer* argued federal law preempted four provisions of the ordinance: (1) a requirement that owners register all pilotless aircraft with the City of Newton; (2) a ban on operation of pilotless aircraft below an altitude of 400 feet over private property without the express permission of the property owner; (3) a ban on operation of pilotless aircraft at any altitude over public property without prior permission of the City of Newtown; and (4) a ban on operations of pilotless aircraft beyond the visual line of sight of the operator.

The court began its analysis by noting Congress may override state regulation by expressly preempting an area of law, which the court found Congress has not done with aviation. Absent express preemption, the court opined Congress could still preempt state regulation if federal regulation is so pervasive and dominant that it occupies the entire

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field of law, known as “field preemption,” or if state law obstructs the objectives of federal regulation, known as “conflict preemption.” According to the court, the FAA’s sUAS rule explicitly contemplated state or local regulation of pilotless aircraft in certain areas, such as protection of privacy. The court rejected plaintiff’s assertions that the federal government has preempted the entire field of aviation. But the court also rejected the City of Newton’s argument that the FAA had carved out an area for state and local regulation. Instead, the court found whether a state or local sUAS regulation is enforceable depends upon the principles of conflict preemption.

Applying conflict preemption principles, the court held federal law preempted the four provisions of the ordinance that plaintiff challenged. Federal law preempted the ordinance’s requirement that owners register all pilotless aircraft with the City of Newton because the FAA also implements a mandatory registration of certain drones. The City argued that it could require drone registration because the United States Court of Appeals for the District of Columbia held earlier this year in *Taylor v. Huerta* that the FAA could not require registration of model aircraft. But the *Singer* court found the FAA expressly stated federal registration was the exclusive means for registering UAS in navigable airspace, thereby preempting Newton’s ordinance.

Federal law also preempted the ordinance’s ban on sUAS operations below 400 feet over private property and ban on sUAS operations at any altitude over public property. The court found the ban on operations over public property at any altitude was preempted because the ban reached into navigable airspace, which was within the FAA’s exclusive regulatory purview. Moreover, the court held that the ordinance’s provisions worked in tandem to create “an essential ban on drone use within the limits of Newton,” thwarting the FAA’s objectives in the sUAS rule and congressional intent that the FAA integrate drones into the national airspace.

In addition, federal law preempted the ordinance’s ban on operations of pilotless aircraft beyond the visual line of sight of the operator. Aviation safety, the court held, is an area of exclusive federal regulation. And the court observed the FAA’s sUAS regulations govern visual line of sight operations for pilotless aircraft, rendering the Newton ordinance an impermissible intervention into the FAA’s regulation of aircraft safety.

Finally, the court let stand the remaining provisions of the ordinance because plaintiff did not challenge those provisions. Among the unchallenged provisions were a ban on operations of pilotless aircraft in “a manner that interferes with any manned aircraft” or to “conduct surveillance or invade any place where a person has a reasonable expectation of privacy.” The court concluded its opinion by stating that nothing prevented the City from redrafting its ordinance to avoid conflict preemption.

The *Singer* court’s decision is on solid legal grounds. The court correctly found there is no express preemption of the FAA regulation of sUAS. Commenters on the sUAS rule urged the FAA to include an express preemption provision in the regulations but the FAA declined, instead referring to a December 2015 memorandum from FAA’s Office of Chief Counsel discussing preemption. According to the FAA memorandum, state and local governments have a role, exercising police power, to regulate certain UAS operations.

But the FAA memorandum notes federal courts carefully scrutinize state and local regulation of aircraft overflight and warns against a "patchwork quilt" of "differing restrictions could severely limit the flexibility of FAA in controlling the airspace and flight patterns, and ensuring safety and an efficient traffic flow." Legal scholars may debate whether the appropriate preemption test for the Newton ordinance was field preemption or conflict preemption. But under either test, federal courts are likely to follow *Singer* and invalidate state or local drone registration or overflight regulations.

Singer is unlikely to halt state and municipal attempts to regulate UAS operations. Over twenty states approved drone laws in 2015, as have major cities such as Chicago, Los Angeles, Miami, and Santa Clara. And some in Congress are attempting to draw a legislative line between where the FAA control of the national airspace ends and local control begins.

Unless Congress changes the law, it appears federal aviation preemption will remain broad. As *Singer* illustrates, federal law would likely preempt state or local laws addressing operational UAS restrictions on flight altitude or flight paths, outright flight bans, regulation of navigable airspace, and mandated UAS equipment, certification, registration, or training beyond federal requirements. However, laws traditionally related to local police power, such as land use, zoning, privacy, trespass, and law enforcement operations, are generally not subject to federal preemption. State and local governments appear to be on solid ground if they attempt to regulate UAS operations based upon considerations of land use, zoning, privacy, trespass, and law enforcement. Acceptable constraints might include requiring police to obtain a warrant before using a UAS for surveillance or prohibiting certain UAS uses, such as for voyeurism, hunting or fishing, or carrying weapons. Note the plaintiff in *Singer* did not challenge a provision in the Newton ordinance that banned use of pilotless aircraft to conduct surveillance or to invade any place where a person has a reasonable expectation of privacy.

Singer may be the first federal preemption decision addressing drone operations but it is unlikely to be the last. As states and municipalities continue to impose restrictions on pilotless aircraft, more UAS owners and operators will argue that federal law preempts at least some of those regulations. States and municipalities will continue to struggle with federal preemption but one thing is certain: for local drone regulation, the sky may be the limit.