



A NEW YORK STATE OF DRONES

• PRACTICAL TIPS FOR TOWNS
AS REGS LOOM ON THE HORIZON

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Every day, we draw closer to a world in which drones play a greater role in our everyday lives. From package and pizza delivery to real estate, news reporting, and law enforcement, the emergence of smaller, cheaper, and more capable craft known as unmanned aerial vehicles (UAVs) or unmanned aircraft systems (UASs) has spawned a seemingly endless panoply of potential applications.

But the buzz about drones has also sparked legislative debates over the pros and cons of their usage. One of the biggest concerns hovering over lawmakers is striking the right balance among privacy, safety and beneficial UAV usage.

The Federal Aviation Administration (FAA) recently released its proposed rules governing commercial drones. The most notable proposed regulations are:¹

- A small drone must be less than 55 pounds.
- A drone must be within visual line of sight of the operator at all times.
- A drone must be operated only during the day.
- A drone must be kept below 500 feet and under 100 miles per hour.
- A drone operator must pass a test on aeronautical knowledge.

As this proposal targets commercial drones, the FAA's guidelines for recreational drones are unaffected. Some of these recreational drone guidelines are as follows:²

- A drone should be operated below 400 feet.
- A drone should be within the operator's eyesight.
- A drone should not be flown within a 5-mile radius of an airport.
- A drone should not be operated recklessly.

The lagged federal response to the proliferation of drones forces individual states to establish local laws governing drone usage. Currently, 16 states have passed new laws regulating drones, and 30 states — including New York — have drone bills pending.

Focusing on New York State, this article will analyze three drone bills in the pipeline and offer practical tips to help local government agencies and municipalities use and regulate drones.

The UAV Debate in New York State: Analyzing the UAV Bills

The national and international debate over the use of UAVs continues to rage, and New York State is no exception. Currently, New York has four bills crafted to regulate the use of UAVs within the state:

- Bill No. S00411 (0411), the "Empire State

Citizens' Protection From Unwarranted Surveillance Act," sponsored by Sen. Carl Marcellino³

- Bill No. A03597 (3597), sponsored by Assemblyman Kenneth Zebrowski⁴

- Bill No. A06713 (6713), sponsored by Assemblymen and Assemblywomen Steve Englebright, Vivian Cook, Luis Sepúlveda and Sandy Gale⁵

- Bill No. S01249 (1249), sponsored by Sen. Phil Boyle⁶

This article will focus only on the first three bills, as bill 1249 has a limited focus on prohibiting the hunting or taking of wildlife by using a UAV.

Reintroduced in 2015, Bill 0411 primarily covers governmental use of UAVs by amending the civil rights law in relation to regulating the use of UAVs.⁷ While the bill permits non-governmental use for "lawful purposes, including recreational or hobby purposes,"⁸ it completely bans the use of a UAV by any person or entity "to conduct surveillance of or to monitor any individual" inside "locations where a person would have an expectation of privacy."⁹

Generally prohibiting governmental use of UAVs,

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the bill makes some exceptions, including the use under “exigent circumstances ... if a law enforcement agency possesses reasonable suspicion that swift action is necessary to prevent imminent danger to life.”¹⁰ It defines “exigent circumstances” as “conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any person subject to surveillance to the fact that such surveillance had occurred.”¹¹ Other allowed uses are those pursuant to a search warrant in an active enforcement of Article 220 of the Penal Law, controlled substance offenses, to guard a national border or to combat a high risk of a terrorist attack.¹² Nevertheless, any information obtained or derived in violation of the provisions of the bill is inadmissible as evidence in any New York court or in an administrative hearing.¹³ The bill also provides a civil remedies provision, allowing anyone to bring a civil suit against a law enforcement agency.¹⁴

Introduced on January 27, the day after a drone crashed on the White House lawn, Bill 3597 essentially codifies the FAA’s guidelines for drone operation and makes violation of its provisions a Class A misdemeanor.¹⁵ The bill prohibits a personal use of an unmanned aircraft (1) above 400 feet, (2) weighing more than 10 pounds, (3) without a visual line of sight of such aircraft, (4) within a restricted airspace, or (5) in a reckless manner that is a risk of harm to the public.¹⁶ Further, it bans drone operation in “restricted airspace,” including schools, utility equipment, law enforcement facilities, military property, communication towers, bridges, railroad stations, and within 5 miles of an airport.¹⁷

While Bill 0411 covers governmental use, this bill attempts to restrict personal or recreational drone usage. But because Bill 3597 focuses primarily on public safety, it neglects other crucial issues like privacy.

Enter Bill 6713, a reincarnation of last year’s Bill S04839. This bill focuses solely on controlling the governmental use of a UAV so that it “complies with the level of privacy that New Yorkers have come to expect in their lives.”¹⁸ Requiring that the acquisition and any use of UAVs be in compliance with the FAA’s requirements and guidelines, the bill bans using a UAV, or revealing or obtaining information from using a UAV, with four exceptions. First, disclosing or obtaining such information is permissible so long as the subject of the information or the owner of the subject property gives a written consent.¹⁹ Second, it is also permissible to use a UAV when it is “reasonable

to believe that there is an imminent threat to the life or safety of a person” provided that a supervisory official submits to a court a sworn statement explaining the grounds for the emergency use.²⁰ Third, the bill allows the use pursuant to an eavesdropping warrant and/or a video surveillance warrant.²¹ Finally, governmental use for research purposes is acceptable provided that no information gained from the use is admissible as evidence in judicial proceedings, administrative hearings or for any intelligence purpose.²²

The most distinguishable features of Bill 6713 are its data retention, discipline for misuse and reporting provisions. The data retention provision requires any non-target information to be deleted “as soon as possible,” or at least within 24 hours after collecting the information.²³ The disciplinary clause provides that when a court or appropriate government body finds an intentional violation, it would determine whether to issue a disciplinary order through a proceeding.²⁴ If no disciplinary action is necessary, the grounds for such a decision must be notified to the state inspector general with jurisdiction over the concerned government entity.²⁵ The bill establishes when, to whom, where, and what to report. Any government using a UAV must report its usage on or before June 1 each year to the Legislature and post the report on its public Web site.²⁶ The report must contain the following:²⁷

- The number of times a UAV was used, categorized by the types of incidents and the types of reasons for the usage
- The number of times a UAV assisted in a criminal investigation with a description of how it helped in each investigation
- The number of times a UAV was used in non-criminal matters with a description of how it helped each matter
- The frequency and type of non-target data collected
- The total cost of the government entity’s UAV program

To sum up, bills 0411 and 6713 concern UAV usage by government while Bill 3597 regulates personal drone use. Although these bills attempt to protect New Yorkers’ privacy from surveillance and recording by UAVs as well

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From Page 10: Municipalities should Consider several areas Regarding Drone Usage

as their safety, there are a number of vulnerabilities. Even though bills 0411 and 6713 address data collection by government UAVs, they fail to define key terms necessary to prevent misuses and abuses. Bill 0411 provides a drone should not be used for “surveillance” purposes, but it does not define the term “surveillance,” leaving any images or recordings collected inadvertently or for other purposes unaddressed. Similarly, Bill 6713 does not define what a target entails or the scope encompassing the target, despite permitting a governmental drone to collect data on a target.

As for Bill 3597, it so completely overlooks an opportunity to address privacy issues that it seems the bill deliberately limits its focus to public safety. While the bill predominantly controls where an individual may operate a drone, it is silent on what the drone may or may not do. The failure to address data collection/retention will likely be a future flashpoint as the use of UAVs ramps up, particularly by law enforcement.

Another glaring limitation of the current proposed bills is their failure to address commercial use. Commercial drones are, therefore, expected to be the next target area for the Legislature to tackle.

What Should Towns Do?

Drone Usage by Law Enforcement Agencies or Municipalities

The FAA's Certificate of Approval (COA) is required. As declared in *Huerta v. Pirker*, the National Transportation Safety Board found the FAA has authority to regulate drones at any altitude. Consequently, any public entity using drones must acquire a COA from the FAA.²⁸ Most recently, the Michigan State Police applied for a COA to obtain FAA authorization to deploy a drone to use in vehicle collision investigation and other emergency situations.²⁹ Any non-public entity that wishes to operate a drone now must apply for an exemption under Section 333 of the FAA Modernization and Reform Act of 2012. In fact, the FAA just announced an interim policy that would streamline the Section 333 approval process.³⁰

Communication

Community involvement, up-front communication, and transparency about the decision to purchase and utilize drones are keys to success. The San Jose Police Department learned this the hard way when it had to apologize publicly for its secretive purchase of a drone.³¹ After heavy criticism from civil liberties groups,

the department promised it would not use or even test the drone.

Civil Rights Issues

To minimize any civil rights or privacy concerns related to local drone regulations, states or municipalities may want to consult advocacy groups such as a local chapter of the American Civil Liberties Union (ACLU). For example, in applying for a COA, the Michigan State Police had the ACLU's Michigan chapter review its policies for operating the drone — a good-faith expression of cooperation that went a long way.

Drone Task Force

Although its functions may be limited because no federal regulations are currently in place, a drone task force at the state level can be beneficial to share resources, to recommend regulations or guidelines on the use of drones, to spearhead all drone-related matters or to streamline implementation of state and federal drone regulations once they are enacted. One such example is the Alabama Drone Task Force, established by Gov. Robert Bentley, which includes members like the state's law enforcement secretary, agriculture commissioner, conservation commissioner, transportation director and lieutenant governor.³² This advisory council recently recommended the Alabama Department of Transportation to be the lead state agency on drones.³³

Education

An increasing number of alarming situations — such as the frequency of drone sightings near airports, in one case coming within 5 to 10 feet of a Delta Airlines flight³⁴ — highlights the need for better education of the public. Instead of waiting for a tragic accident to happen, state and local governments should develop an education program that teaches the public about the basic FAA rules of flying a drone for recreational use.³⁵ A Web site can be an important component of such a program; in addition to serving as a central drone information hub, it can promptly update the public about the local no-fly zones that are constantly being changed by the FAA.³⁶

Conclusion

According to the ACLU's recent recommendation, a UAV law should have safeguards that address the

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following areas: usage limits, decision-making entity, data retention, abuse and weaponization.³⁷ Thus far, New York's bills 0411 and 3597 collectively provide some safeguards against these concerns. However, the newly introduced 3597 may tarnish the other bill's efforts to protect privacy at the expense of ensuring public safety. The issue going forward seems to be the sufficiency of these safeguards.

As the potential for widespread drone usage grows exponentially, municipalities should work proactively to understand the regulatory environment that potentially faces them and to set appropriate guidelines and procedures. This approach can help towns avoid a number of headaches down the road, once New York hopefully finds its way to establishing a more effective and comprehensive regulatory framework. □

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(Endnotes)

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