



COMMONWEALTH of VIRGINIA

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The Honorable Scott A. Surovell
Member, House of Delegates
Post Office Box 289
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Dear Delegate Surovell:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the Commonwealth or its localities may regulate the use of drones, or whether such actions are preempted by federal law.

Background

Drones, otherwise known as unmanned aircraft systems, have in recent years become popular tools for scientific researchers, entrepreneurs, military personnel, and civilian hobbyists alike. Technology is rapidly expanding the numerous ways drones can be used. These developments have raised concerns about the possible misuse of drones, as well as questions regarding the extent of state and local authority to regulate their use.

Applicable Law and Discussion

I. The Supremacy Clause and Federal Preemption

The Supremacy Clause of the Constitution of the United States declares that the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land,” notwithstanding the laws of any state to the contrary.¹ For purposes of the Supremacy Clause, “local ordinances [are] analyzed in the same way as . . . statewide laws.”² Thus, to the extent that state or local laws or ordinances conflict with federal law, they are preempted by federal law.³

¹ U.S. CONST. art. VI, cl. 2.

² *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

³ *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (stating that in every case where state law conflicts with federal law, the federal law is supreme, and “the law of the state, though enacted in the exercise of powers not controverted, must yield to it”).

Courts have identified three types of federal preemption. “Express preemption” occurs when Congress has clearly stated or conveyed the intention that federal law shall preempt state law.⁴ “Conflict preemption” occurs when a state law is in direct conflict with federal law, such that “compliance with both federal and state [laws] is a physical impossibility,”⁵ or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁶ Finally, “field preemption” occurs when there is a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”⁷ When a subject is field preempted, any state law falling within the scope of the field is preempted and is invalid.

The types of federal preemption that are relevant to your inquiry are express preemption and field preemption. I will discuss both in turn.

II. Express Preemption

The only federal law that expressly preempts state and local laws regarding aviation is found in the Airline Deregulation Act of 1978 (the “Deregulation Act”).⁸ Under the Deregulation Act, no state may “enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of an air carrier that may provide air transportation.”⁹ The Deregulation Act defines an “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”¹⁰ It defines “air transportation,” in turn,¹¹ to include the interstate “transportation of passengers *or property* by aircraft as a common carrier for compensation.”¹² A drone qualifies as an “aircraft” under the Act’s broad definition of the term.¹³ Accordingly, to the extent a drone is used commercially to transport property for compensation across state lines, the Deregulation Act preempts any state regulation related to its price, routes, or services.

III. Field Preemption

The federal government has asserted exclusive sovereignty over the airspace of the United States.¹⁴ In 1958, Congress passed the Federal Aviation Act (the “Aviation Act”),¹⁵ which created the

⁴ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002); *see also Dugan v. Childers*, 261 Va. 3, 8-11 (2001) (holding that a Virginia statute was expressly preempted by federal law).

⁵ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also Mareta v. Hillman*, 283 Va. 34, 40 (2012), *aff’d*, 133 S. Ct. 1943 (2013).

⁶ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Gustafson v. City of Lake Angelus*, 76 F.3d 778, 782-83 (6th Cir. 1996).

⁷ *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1998); *Gustafson*, 76 F.3d at 782.

⁸ Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

⁹ 49 U.S.C.S. § 41713(b)(1) (LexisNexis through P.L. 114-11).

¹⁰ 49 U.S.C.S. § 40102(a)(2) (LexisNexis through P.L. 114-11).

¹¹ 49 U.S.C.S. § 40102(a)(5).

¹² 49 U.S.C.S. § 40102(a)(25) (emphasis added).

¹³ *See* 49 U.S.C. § 40102(a)(6) (defining the term “aircraft” as “any contrivance invented, used, or designed to navigate, or fly in, the air”).

¹⁴ 49 U.S.C.S. § 40103(a)(1) (LexisNexis through P.L. 114-11) (“The United States Government has exclusive sovereignty of airspace of the United States.”).

¹⁵ Pub. L. No. 85-726, 72 Stat. 731 (repealed and recodified in scattered sections of 49 U.S.C.).

Federal Aviation Administration (“FAA”) and vested in it the power to “frame rules for the safe and efficient use of the nation’s airspace.”¹⁶ Among other things, the Aviation Act provides the FAA with broad authority to regulate air safety, the operation of aircraft, and the use of navigable airspace (i.e., airspace management).¹⁷ As the primary federal body responsible for the oversight of aviation, the FAA has issued extensive federal regulations on these topics pursuant to its authority under the Aviation Act.¹⁸

Courts have consistently found that the Aviation Act “preempts the entire field of aviation safety.”¹⁹ Congressional intent “to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of control over air safety.”²⁰ Courts have likewise found that the Aviation Act preempts the entire fields of aircraft operation²¹ and airspace management.²² Therefore, state and local governments may not enact laws purporting to regulate these areas. Examples of preempted regulations include, but are not limited to, regulations that govern aircraft altitude,²³ flight paths,²⁴ or noise.²⁵

The Aviation Act applies to all “aircraft,” which it broadly defines as “any contrivance invented, used, or designed to navigate, or fly in, the air.”²⁶ For the past nine years, the FAA has consistently treated drones as “aircraft” in guidance documents, policy statements, and internal memoranda.²⁷ And the

¹⁶ *Air Line Pilots Ass’n Int’l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

¹⁷ 49 U.S.C.S. §§ 44701; 40101(d)(4); 40103(b)(1) (LexisNexis through P.L. 114-11).

¹⁸ See generally Title 14 of the *Code of Federal Regulations*.

¹⁹ *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics Sys. Inc.*, 409 F.3d 784, 795 (6th Cir. 2005); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999); *In re Air Crash Near Clarence Ctr., N. Y.*, 798 F. Supp. 2d 481, 486 (W.D.N.Y. 2011); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 740 (E.D.N.C. 2008); *Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077, 1083-84 (Colo. 1994).

²⁰ *Montalvo*, 508 F.3d at 473. Based on this rationale, courts have invalidated not only direct safety regulations, but also state laws that merely *implicate* aviation safety concerns. See, e.g., *Ventress v. Japan Airlines*, 747 F.3d 716, 722 (9th Cir. 2014) (employment regulations preempted); *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (on-board alcohol regulations preempted); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6-7 (1st Cir. 1989) (state pilot qualifications preempted).

²¹ *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F. Supp. 742, 750 (N.D. Ohio 1995) (field of aircraft operation and navigation preempted).

²² *Big Stone Broad., Inc. v. Lindbloom*, 161 F. Supp. 2d 1009, 1016 (D.S.D. 2001) (field of airspace management preempted).

²³ *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812, 815 (2d Cir. 1956) (local regulation of the altitude of aircraft take-offs and landings preempted); cf. *Gustafson*, 76 F.3d at 786 (a local ordinance pertaining to landing a seaplane on a lake was not preempted, because the “FAA does not believe Congress expressly or impliedly meant to preempt regulation of local land or water use”).

²⁴ *Skysign Int’l v. City & Cnty. of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002).

²⁵ *Am. Airlines, Inc. v. Hempstead*, 398 F.2d 369, 376 (2d Cir. 1968) (local noise ordinance preempted).

²⁶ 49 U.S.C.S. § 40102(a)(6) (LexisNexis through P.L. 114-11).

²⁷ *Unmanned Aircraft Operations in the National Airspace System*, 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007), available at <http://www.gpo.gov/fdsys/pkg/FR-2007-02-13/html/E7-2402.htm> (last visited May 18, 2015); FED. AVIATION ADMINISTRATION, INTERIM OPERATIONAL APPROVAL GUIDANCE 08-01, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM at 4 (March 13, 2008), available at http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coa/faq/media/uas_guidance08-01.pdf (last visited May 18, 2015); FED. AVIATION ADMINISTRATION, AFS-400 UAS

National Transportation Safety Board recently affirmed the FAA's interpretation that drones fall under the definition of "aircraft" in the Aviation Act and are, therefore, subject to FAA regulation.²⁸

Furthermore, in 2012 Congress passed the FAA Modernization and Reform Act ("FMRA"), which deals directly with the federal regulation of drones.²⁹ The FMRA directs the FAA to issue a set of federal regulations to "safely accelerate the integration of [civilian drones] into the national airspace."³⁰ Under that directive, the FAA must create standards for the "operation and certification" of drones,³¹ as well as the registration and licensing of drone pilots and operators.³² In 2013, the FAA issued a "roadmap," which anticipates that forthcoming drone regulations will establish airworthiness certification standards for drones, standards for the acceptable operation of drones, and standards for training drone pilots and other members of the aviation community who will work with drones (such as mechanics, air traffic controllers, visual observers, and launch/recovery specialists).³³ Recently this year, the FAA issued a notice of proposed rulemaking³⁴ setting forth proposed regulations for small civilian drones.³⁵ These proposed regulations address many of the specifics pertaining to the operation of small drones, operational limitations and requirements, a prohibition on night-time operations, establishment of a maximum airspeed and altitude, and operator certification requirements and responsibilities.

It is therefore clear from both the FMRA and the Aviation Act that Congress intends to occupy the fields of drone safety, operation, and airspace management—including specific standards governing drone certification and the training and licensure of drone pilots. For this reason, I conclude that state and local governments are preempted from enacting regulation targeted to these areas, with certain exceptions.

POLICY MEMO 05-01, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM – INTERIM OPERATIONAL APPROVAL GUIDANCE, at 2 & 3 (Sept. 16, 2005) (internal memorandum).

²⁸ Huerta v. Pirker, N.T.S.B. Order EA-5730 (2014), available at http://c.ymcdn.com/sites/www.mapps.org/resource/resmgr/Docs/NTSB_Order_EA_5730.pdf (last visited May 18, 2015). In the *Pirker* case, the appellee flew a small drone through the streets of Charlottesville, Virginia, in order to record images for use in a promotional video. Based on the manner in which the drone had been operated, Mr. Pirker was fined \$10,000 by the FAA for flying an aircraft in a careless or reckless manner, which is prohibited by 14 C.F.R. § 91.13(a). Although an administrative law judge had determined that the drone at issue did not meet the definition of "aircraft" within the meaning of the Federal Aviation Act, the National Transportation Board disagreed, reversing the decision of the law judge and reinstating the fine against Mr. Pirker. *See id.*

²⁹ Pub. L. No. 112-95, 126 Stat. 72 (enacted Feb. 14, 2012) (to be codified in scattered sections of 49 U.S.C.).

³⁰ *Id.* at § 332(a)(1).

³¹ *Id.* at § 332(a)(2)(A)(i).

³² *Id.* at § 332(a)(2)(A)(iii).

³³ *See* FED. AVIATION ADMINISTRATION, INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS (UAS) IN THE NATIONAL AIRSPACE SYSTEM (NAS) ROADMAP (1st ed. 2013). To complement the FAA Roadmap, the federal Joint Planning and Development Office simultaneously issued a "Comprehensive Plan" regarding the integration of civilian drones into the national airspace. *See* JOINT PLANNING AND DEVELOPMENT OFFICE, UNMANNED AIRCRAFT SYSTEMS (UAS) COMPREHENSIVE PLAN: A REPORT OF THE NATION'S UAS PATH FORWARD (Sept. 2013).

³⁴ Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 CFR pts. 21, 43, 45, 47, 61, 91, 101, 107, and 183).

³⁵ Small drones are defined as those that weigh less than 55 pounds. Pub. L. No. 112-95, 126 Stat. 72, § 331(6).

One exemption from the field preemption created by the Aviation Act and FMRA is for regulations that pertain to certain “model aircraft.” That term encompasses some drones.³⁶ The FMRA prohibits the FAA from promulgating any regulations governing model aircraft that: (1) are used solely for recreational purposes; (2) are operated in accordance with a community-based set of safety guidelines, (3) weigh less than 55 pounds, (4) are operated in a manner so as not to interfere with manned aircraft, and (5) if flown within five miles of an airport, are operated by an individual who has given the aircraft operator and air traffic control tower prior notice of the operation.³⁷ The FAA retains the authority, however, to enact and enforce regulations to ensure that these model aircraft do not “endanger the safety of the national airspace system.”³⁸ Given the explicit “carve out” for model aircraft, it is my opinion that state and local regulations governing these types of small craft are not preempted, as long as those regulations do not conflict with either the language or purpose of existing federal law and regulations.³⁹

Another exemption from the field preemption created by the Aviation Act and FMRA is for laws related to privacy and property regulation.⁴⁰ In addition, criminal statutes—even when the subject of the prohibited conduct is regulated under federal law—have generally been held not to be preempted under federal law.⁴¹ And although the standard of care for a tort action relating to a preempted subject is generally governed by federal law, the ability to bring the state cause of action survives.⁴² Finally,

³⁶ Pub. L. No. 112-95, 126 Stat. 72, § 336(a). The term “model aircraft” encompasses any “unmanned aircraft” that is: (1) capable of sustained flight in the atmosphere; (2) flown within the visual sight of the person operating the aircraft; and (3) flown for hobby or recreational—rather than commercial—purposes. *Id.* at § 336(c).

³⁷ *Id.* at § 336(a).

³⁸ *Id.* at § 336(b).

³⁹ *See* *Goodspeed Airport L.L.C. v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 209 & 211 (2d Cir. 2011).

⁴⁰ The FAA has not enacted comprehensive regulations pertaining to the privacy considerations that might be associated with drone operations, noting, instead, that states and localities are free to enact regulations addressing these issues. *See, e.g.*, *Unmanned Aircraft System Test Site Program*, 78 Fed. Reg. 68360, 68362 (Nov. 14, 2013) (“[I]f [drone] operations at a Test Site raise privacy concerns that are not adequately addressed by the Test Site’s privacy policies, elected officials can weigh the benefits and costs of additional privacy laws or regulations.”); *see also* 80 Fed. Reg. 9544, 9552 (Feb. 23, 2015) (“[S]tate law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person’s use of a [drone].”). President Obama has, however, issued a Presidential Memorandum imposing privacy-related requirements on federal agencies that use drones, and a recent request for public comment from the National Telecommunications and Information Administration indicates that additional privacy regulations regarding civilian drones may be forthcoming. *See* Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015), 80 Fed. Reg. 9355 (Feb. 20, 2015); Privacy, Transparency, and Accountability Regarding Commercial and Private Use of Unmanned Aircraft Systems, 80 Fed. Reg. 11978 (Mar. 5, 2015) (requesting, in accordance with the presidential memorandum, public comment on a variety of privacy issues related to drone operations).

⁴¹ *See, e.g.*, *Crenshaw v. Commonwealth*, 219 Va. 38, 40-41 (1978) (holding that a conviction for unlawfully operating a car with a radar detector was not preempted by the Federal Communications Act); *Hall v. Commonwealth*, 129 Va. 738, 748 (1951) (upholding a speeding citation given to a federal employee delivering the mail); *Huver v. Commonwealth*, No. 0276-08-4, 2009 Va. App. LEXIS 97, at *10 (Mar. 10, 2009) (holding that the National Firearms Registration Act did not preempt a Virginia statute prohibiting the possession of unregistered weapons); *People v. Valenti*, 153 Cal. App. 3d Supp. 35, 40 (App. Dep’t Super. Ct. 1984) (holding that a California state criminal statute prohibiting the reckless operation of an airplane was not preempted by federal law).

⁴² *See, e.g.*, *Krantz v. Air Line Pilots Ass’n*, 245 Va. 202, 209 (1993) (holding that a state tort claim for intentional interference with a prospective employment contract was not preempted by the Railway Labor Act).

although the “United States Government has exclusive sovereignty of airspace of the United States,”⁴³ a private landowner has a vested property interest in the “superadjacent airspace” just above the surface of the land.⁴⁴

I offer no opinion as to whether any *particular* state or local regulation is preempted by federal law, and I note further that the potential scope of federal preemption may change as Congress and the FAA continue to develop regulations pertaining to drones.⁴⁵

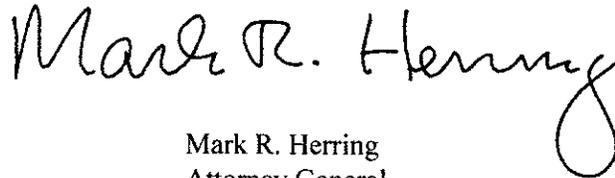
Conclusion

Accordingly, it is my opinion that the federal Deregulation Act expressly preempts state or local regulation of the routes, rates, and services of commercial drones used to transport property across state lines. Furthermore, the Aviation Act and FMRA preempt state and local regulation of drone safety, operational standards, and airspace designations, including particular issues relating to drone certification, training, and licensure. There are certain exceptions to federal preemption, as discussed above.

States remain free to enact laws relating to drones if the laws fall outside the scope of the Aviation Act and FMRA and do not conflict with other federal laws or regulations. In particular, states may regulate small drones that are exempted from federal regulation under the FMRA, and they may also enact laws for drones that address issues of privacy and property and also criminal offenses, so long as the laws do not conflict with the language or purpose of any existing federal aviation law.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

⁴³ 49 U.S.C. § 40103(a)(1).

⁴⁴ United States v. Causby, 328 U.S. 256, 265 (1946).

⁴⁵ See *supra* note 40.