

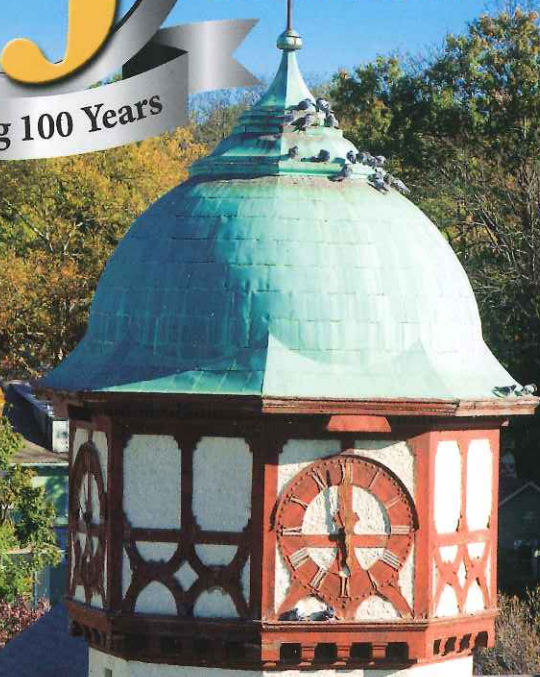


# municipalities

Official Publication of the New Jersey State League of Municipalities

April 2017

Celebrating 100 Years



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Focus: Historic Preservation

# Drone Technology

Moving forward while regulatory frame remains uncertain

By Brandon Dittman, of counsel, Helmer, Conley and Kasselman, P.A.

*The following article, supplied by League Affiliate, Jersey Access Group (JAG), continues a conference hot topic that promises to have wings to carry it well into the future.*



At the League's Conference in November, one of the hot sessions was "Drones: Challenges and Opportunities for Local Governments," a joint session with the League and JAG featuring moderator Brian C. Wahler, Mayor, Picataway and League Past President with speakers Christina Eng, COO, UASolutions, and Ken Fellman, Partner at Kissinger & Fellman, P.C. (shown here with session attendees and the subject of much discussion, a drone). An expanded look at the topic is offered below.

Unmanned aircraft systems (UAS) or "drone" technology is becoming more ubiquitous with each passing day. At this year's Super Bowl, Lady Gaga performed with drone "back-up dancers," Aaron Gordon of the Orlando Magic used a drone to help perform his NBA All-Star Game dunk in February, and late last year Amazon and Chipotle began the first government-sanctioned drone delivery trials. While the advance of drone technology has been relentless, the promulgation of federal regulations to govern their use has been a slow trickle at best.

## Local Government as Users of UAS Technology

On August 29, 2016, the Federal Aviation Administration (FAA) promulgated the first operational rules for commercial use of small UAS, widely known as the "Part 107" rules for the section

of the Code of Federal Regulations under which they fall (Operation and Certification of Small Unmanned Aircraft Systems (RIN 2120-AJ60) Federal Aviation Administration ). The Part 107 rules govern most non-hobby drone applications, including cable

channels for public, educational, and government (PEG) programming and non-police and fire municipal operations. Part 107 requires operators to become certified as a remote pilot in command (the UAS equivalent to a pilot's license) and to register all UAS aircraft with the FAA. A Part 107 authorization allows UAS operation with a number of limitations including restrictions on maximum altitude, airspeed, "beyond line of sight" operations, "swarming," autonomous operations, and operations over people.

While the Part 107 rules provide a number of clarifications on the processes and procedures for municipal UAS operations, significant questions remain. We have yet to see regulations governing operations over people. One of the key benefits of UAS technology is to be able to hover over crowds for photography or survey proposes more cheaply and quickly than traditional means. However, as a widely shared video of a drone



nearly crashing into world champion skier Marcel Hirscher at an international ski federation world cup event has proven, UAS operations over people can be extremely dangerous without proper precautions. Under Part 107, organizations may request a waiver under Part 107 to fly over people on a per occurrence basis.

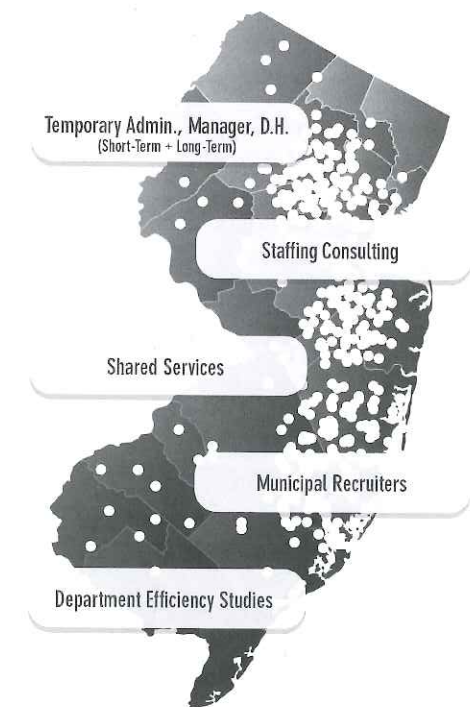
The waiver process requires a highly detailed submission to the FAA and must demonstrate compliance with FAA Performance Based Standards for Part 107 (Waiver forms are posted at [faa.gov/uas/request\\_waiver/media/performance\\_based\\_standards.pdf](http://faa.gov/uas/request_waiver/media/performance_based_standards.pdf)). This cumbersome system of per

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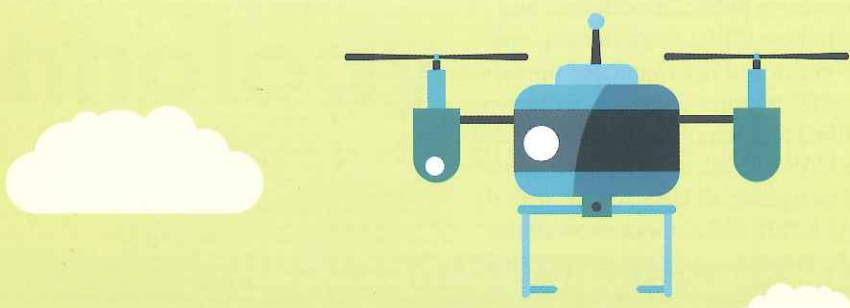
occurrence waivers is not ideal, particularly when trying to respond to or cover unplanned events such as protests or disasters. Because of the burden of this process, at press time, only 318 Part 107 waivers have been granted, mostly for night operations.

**“While the number and diversity of drone-based applications is ever growing, regularity uncertainty regarding their use persists.”**

The FAA was set to release a notice of proposed rulemaking (NPRM) in early 2017, specifically on the subject of operations over people. However, the transition to the Trump administration has thrown the future of the operations over people and all other drone regulations into question. This concern was highlighted in a recent letter from the Commercial Drone Alliance (which includes members such as Google and CNN) to the Office of Information and Regulatory Affairs stressing that the Administration’s recent Executive Order (EO) on Reducing Regulation and Controlling Regulatory Costs (the so called “two for one” regulatory EO) would only serve to increase the regulatory burden on drone operators if it were used to stop burden-easing regulations such as the operations over people NPRM from being promulgated. Given the current regulatory uncertainty, municipal UAS operators are encouraged to strictly comply with Part 107 or their Public Certificate of Authorization (if applicable).

**Local Governments as Regulators of UAS Technology**

The ability of local governments to regulate drones is even less clear than the ability to operate them. During the




## Municipal Decisions Around the USA

The absence of clear federal rules has not stopped localities from stepping into the void, and these local attempts to regulate will likely lead to a more definitive picture of what is permitted under federal law.

**ORLANDO, FL:** On January 23, 2017, the Orlando City Council passed Ordinance No. 2016-87, a comprehensive drone regulatory scheme. The ordinance restricts drone use within 500 feet of city-owned parks, schools, and venues. Drones are also restricted within 500 feet of gatherings with more than 1,000 people. The ordinance creates a series of permitting obligations for drone use and provides for civil and criminal penalties for unsafe operations as defined by the city. Given that the federal government has already “occupied the field” on subjects such as the location of drone operations, permitting schemes, and operations over people, and the Orlando ordinance creates city-specific standards that go beyond federal law in their reach, if the Orlando ordinance is challenged, it will likely be found to be preempted, at least in part.

**SAN DIEGO, CA:** In contrast, the City of San Diego is considering an ordinance drafted in coordination with the FAA specifically to avoid federal preemption. In essence, the San Diego ordinance creates local enforcement mechanism for compliance with FAA standards on safe operations including operations near airports and emergency responders. The drone advocacy group, Academy of Model Aeronautics, has hailed the ordinance as sensible, rare praise from an organization which generally opposes local regulation.



development of the Part 107 rules, many urged the FAA to preempt all state and local regulation of drone activity. Instead, the FAA’s final rule stated that the agency was “not persuaded that including a preemption provision in the final rule is warranted at this time,” concluding that “certain legal aspects concerning small UAS use may be best addressed at the state or local level.” However, the FAA has provided little guidance on what kinds of local regulations of drone activity are permissible. This is coupled with the fact that a recent statute, H.R.636 - FAA Extension, Safety, and Security Act of 2016, contains provisions which create a petition process by which entities may petition the Department of Transportation (DOT) to designate certain locations as off limits to drones. These provisions appear to preempt the ability to place location-based bans on drones.

The contrast of the Orlando and San Diego ordinances provides a helpful example for local governments considering regulating drones. First, local regulators should always consult with the FAA before passing new regulations on drone activity. Second, regulations that are unlikely to be preempted are those that focus on traditional state and local police power (such as land use, planning and zoning, health, safety, advertising, general welfare) and those that provide a local enforcement mechanism to enforce FAA standards.

While the number and diversity of drone-based applications is ever growing, regularity uncertainty regarding their use persists. The FAA has created a Drone Advisory Committee (DAC) to assist it, in part to define the roles and responsibilities of federal, state, and local governments in regulating and enforcing drone laws, and it met for the first time last September. Unfortunately, of the DAC’s 35 members there are only two representing local government interests – San Francisco Mayor Ed Lee and former Riley County, Kansas Commissioner Robert Boyd. Given this regulatory uncertainty at least in the short term, local governments must stay

abreast of the federal regulatory changes which will eventually come, and tread carefully, both as operators and regulators of drones.

**Save the Date**

FAA Certification for Commercial Operations requires that drone operators successfully pass the 14 CFR Part 107 Aeronautical Test. The Jersey Access

Group has teamed up with certified flight instructors to provide a two-day training course for municipal employees, May 30 and 31, 2017 at the Hyatt Regency Morristown. ↗

@To learn more contact [jaginfo@jagonline.org](mailto:jaginfo@jagonline.org). Registration is limited.

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